STATE OF MICHIGAN

COURT OF APPEALS

In re J.M. STENGER-HOFFMAN, Minor.

UNPUBLISHED
October 22, 2019

No. 348730
Lenawee Circuit Court
Family Division
LC No. 17-000956-NA

Before: FORT HOOD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to her minor child, JSH, under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist after 182 days), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to parent). We conditionally reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

In August 2017, petitioner filed a petition for temporary custody of JSH, alleging that numerous instances of domestic violence had occurred between respondent and JSH's father. The petition alleged that JSH's father physically abused respondent, and that he abused drugs, including amphetamines and methamphetamines. The petition also alleged that that respondent had severe substance abuse issues, and abused heroin, amphetamines, methamphetamine, cocaine, Tramadol, and alcohol while JSH was in her care. Based on the petition, the trial court took temporary jurisdiction of JSH under MCL 712A.2(b)(1) (substantial risk of harm because of abuse or neglect) and (b)(2) (unfit home or environment). JSH was first placed in a licensed foster home, and later relocated to a foster home with paternal relatives.

During the temporary custody proceedings, respondent and JSH's father were provided with parent-agency agreements (PAAs) and access to resources for mental health and substance abuse treatment. JSH's father declined to participate in the lower court proceedings and made no effort to communicate with foster care workers or adhere to his PAA. Respondent made some effort to adhere to her PAA by attending outpatient substance abuse treatment and parenting time. However, respondent could not rectify her substance abuse issues and ultimately failed to fully complete her PAA. Respondent stopped communicating with foster care workers, and her

lack of communication paired with her failure to comply with the terms of her PAA prompted the trial court to order petitioner to file a supplemental petition for permanent custody of JSH.

Petitioner complied with the trial court's directive and filed the petition, and a statutory bases and best-interest hearing was held. At the hearing, the trial court found that statutory bases for termination of both parents' parental rights existed under MCL 712A.19b(3)(c)(*i*), (g), and (j). The trial court further found that the termination of both parents' parental rights was in JSH's best interests, and subsequently entered an order to that effect. This appeal followed.

II. ICWA AND MIFPA

Respondent argues that petitioner and the trial court failed to adhere to the notice requirements set forth in the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. Because the lower court record is unclear, we conclude that conditional reversal is required to determine whether the notice provisions of ICWA and MIFPA were triggered, and whether any notice given to an interested American Indian tribe was adequate.

Generally, "[i]ssues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). Additionally, this Court "review[s] de novo issues involving the interpretation and application of MIFPA." *In re Detmer/Beaudry*, 321 Mich App 49, 59; 910 NW2d 318 (2017). However, respondent failed to preserve her issue for appeal by raising the argument that petitioner and the trial court failed to follow the notice requirements of ICWA and MIFPA in the court below. Accordingly, the issue is unpreserved, and this Court's review is for plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id*. Reversal is only warranted "when the plain, forfeited error resulted in the conviction of an actually innocent defendant *or* when an error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings . . . ." *Id*.

ICWA and MIFPA were enacted in an effort to "protect[] the best interests of [American] Indian children and promot[e] the stability and security of [American] Indian tribes and families." *In re England*, 314 Mich App 245, 251; 887 NW2d 10 (2016) (quotation marks and citation omitted). ICWA and MIFPA contain notice provisions, which require that any American Indian tribe a minor child may belong to must be notified "when there are sufficient indications that [a] child may be an [American] Indian child . . . ." *In re Morris*, 491 Mich at 100. Regarding the issue of notice, ICWA states, in relevant part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to

> the parent or Indian custodian and the tribe. [*Id*. at 102, quoting 25 USC 1912(a).]

MIFPA contains a similar notice provision, which states:

> In a child custody proceeding, if the court knows or has reason to know that an Indian child is involved, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary in the same manner described in this subsection. The secretary has 15 days after receipt of notice to provide the requisite notice to the parent or Indian custodian and the tribe. [*In re Jones*, 316 Mich App 110, 114; 894 NW2d 54 (2016), quoting MCL 712B.9(1) (citations omitted).]

Our Supreme Court has set forth a nonexhaustive list of factors indicating when notice to American Indian tribes may be required, which includes the following:

> situations in which (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified, (3) the child's birth certificate or other official record indicates that the child or a parent of the child is of Indian descent, (4) the child, the child's parents, or the child's Indian custodian resides or is domiciled in a predominantly Indian community and (5) the child or the child's family has received services or benefits from a tribe or the federal government that are available to Indians. [*In re Morris*, 491 Mich at 108 n 18.]

At the adjudicatory hearing, petitioner informed the trial court that JSH's father had American Indian heritage, and that there was potential that respondent also had American Indian heritage. Petitioner stated that an inquiry into the matter would be conducted; however, no further information was given on the record regarding the claims. No evidence was presented to show whether JSH's birth record listed him as having American Indian ancestry, nor was evidence presented to show whether respondent or JSH's father lived on an American Indian reservation, received benefits from a recognized American Indian tribe, or had American Indian relatives.

The notice requirements in ICWA and MIFPA are similar; both indicate that tribal notice is required where a trial court "knows or has reason to know that an Indian child is involved" in a termination proceeding. 25 USC 1912(a); MCL 712B.9(1). However, "[p]recisely what constitutes 'reason to know' or 'reason to believe' in any particular set of circumstances" is highly subjective. *In re Morris*, 491 Mich at 106. In *Morris*, our Supreme Court stated as follows:

> As in other contexts, reasonable grounds to believe must depend upon the totality of the circumstances and include consideration of not only the nature and

> specificity of available information but also the credibility of the source of that information and the basis of the source's knowledge. In light of the purpose of [ICWA], however, to permit tribal involvement in child-custody determinations whenever tribal members are involved, the threshold requirement for notice was clearly not intended to be high.

The claim that respondent and JSH's father may have American Indian ancestry was relayed to the trial court by petitioner. Respondent never raised the issue of JSH's potential American Indian heritage, and after petitioner informed the trial court that JSH might have American Indian heritage, respondent failed to provide information regarding ancestry or membership in an American Indian tribe, such as the name of a particular American Indian tribe that she or JSH's father belonged to, or information regarding relatives who also claimed American Indian heritage. Respondent's failure to present any information regarding JSH's American Indian heritage suggests that the claim relayed by petitioner did not constitute "reliable information" sufficient to trigger the notice requirements of ICWA and MIFPA. *In re Morris*, 491 Mich at 108. Accordingly, this Court is not convinced that the trial court plainly erred by failing to investigate the claim that respondent and JSH's father were of American Indian ancestry.

However, in general, this Court errs on the side of caution with regard to potential violations of the notice provisions set forth in ICWA and MIFPA. See *id*. ("If there must be error in determining whether tribal notice is required, let it be on the side of caution."). A review of the record and the lower court file ultimately returned no evidence that the claims of American Indian ancestry made by respondent and JSH's father were further discussed or investigated after petitioner informed the trial court of the claims. Further, JSH was not designated as an American Indian child in the petition for temporary custody, the supplemental petition for permanent custody, or any other important document filed in the trial court. Consequently, there is little to no information with which this Court may conclude that the notice provisions of ICWA and MIFPA were followed. Indeed, as noted above, there is so little information in the record that it is unclear to this Court whether the claim to American Indian heritage was sufficiently reliable to trigger the notice provisions of ICWA and MIFPA in the first place.

In light of the fact that no information on the issue exists in the record, this Court cannot adequately determine whether petitioner and the trial court were required to adhere to the notice provisions of ICWA and MIFPA, and if so, whether petitioner and the trial court provided adequate notice to potentially interested American Indian tribes. Accordingly, the proper remedy is to "conditionally reverse the order of termination . . . and remand for compliance with the notification requirements . . . ." *Id*. at 123. See also *In re Johnson*, 305 Mich App 328, 330, 332-334; 852 NW2d 224 (2014) (holding that conditional reversal was warranted for the potential failure to comply with the notice requirements of ICWA after the minor child's father claimed his maternal and paternal grandmothers were American Indian). If the trial court establishes that the notice provisions of ICWA and MIFPA do not apply, the order terminating respondent's parental rights should be reinstated. Alternatively, if ICWA and MIFPA are found to apply, and petitioner and the trial court failed to provide notice to the appropriate American Indian tribes, the "order[] terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA" and MIFPA. *In re Morris*, 491 Mich at 123.

We conditionally reverse and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

In re J M Stenger-Hoffman Minor

Docket No. 348730

LC No. 17-000956-NA

Karen M. Fort Hood
Presiding Judge

David H. Sawyer

Douglas B. Shapiro
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

The trial court shall make reasonable efforts to determine whether ICWA and MIFPA apply, and within 90 days of the issuance of this opinion, the trial court shall provide to this Court an order containing findings as to (1) whether ICWA and MIFPA were triggered in this case, and if so, (2) whether proper notice was given to any interested American Indian tribe. The proceedings on remand are limited to this issue.

/s/ Karen M. Fort Hood

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

October 22, 2019
Date

Chief Clerk