STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0225

In re the Matter of the Welfare of the Child of: S. B., Parent.

Filed December 9, 2019
Affirmed
Florey, Judge

Hennepin County District Court
File No. 27-JV-15-483

Mark D. Fiddler, Rachel Osband, Fiddler Osband, L.L.C., Minneapolis, Minnesota (for appellants J.C. and D.C.)

Michael P. Boulette, Barnes & Thornburg, L.L.P., Minneapolis, Minnesota; and

Ronald M. Walters, ICWA Law Center, Minneapolis, Minnesota (for respondent grandmother R.B.)

Rebecca McConkey-Greene, McConkey-Greene Law Office, Duluth, Minnesota (for White Earth Band of Chippewa, Indian Child Welfare)

Michael O. Freeman, Hennepin County Attorney, Mary Lynch, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Eric Rehm, Law Office of Eric S. Rehm, Burnsville, Minnesota (for guardian ad litem)

Considered and decided by Florey, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant former foster parents argue that the district court erred by applying the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1907-1963 (2012) and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §§ 260.751-.835 (2018) to their motion for adoptive placement because the child is not eligible for membership in a federally recognized Indian tribe. Appellants also argue that ICWA is facially unconstitutional on three grounds: (1) it violates equal protection; (2) it exceeds Congress's Article I authority; and (3) it violates the anticommandeering doctrine. We affirm.

FACTS

P.S. was born to C.S. and S.B. in July 2011. In July 2016, the district court terminated C.S.'s and S.B.'s parental rights. Based upon an April 23, 2015 letter from the White Earth Reservation Tribal Council which stated that P.S. was not eligible for membership with respondent the White Earth Band of Chippewa (White Earth) and therefore the tribe would not intervene, the district court determined that ICWA did not apply to the termination proceeding.

Starting with the initiation of the removal proceedings in August 2014, P.S. was placed in seven different homes. Beginning in July 2016, P.S. was placed with appellants. On January 4, 2017, White Earth submitted a letter indicating that P.S. was eligible for membership, notwithstanding its earlier determination, and moved to intervene as a party in the child-custody proceedings. Prior to White Earth's intervention, respondent Hennepin County Human Services and Public Health Department (the county) informally

supported adoptive placement with appellants, but following White Earth's intervention, the county began supporting respondent R.B., P.S.'s maternal grandmother, as P.S.'s adoptive placement.

R.B. was P.S.'s primary caregiver for the first four years of P.S.'s life. R.B. met with the county in August 2014 and indicated she was willing to be a permanent-placement option, but was told that the county would not recommend her due to her criminal record. The district court found that R.B. "has been unwavering in her desire to adopt [P.S.]." In March 2017, the county approved R.B. for child-foster-care licensure and adoption. The county removed P.S. from appellants' home and placed her with R.B. in January 2018.

Appellants moved the district court for an order granting them adoptive placement of P.S. in December 2017. R.B. did not move for adoptive placement at that time because the county and White Earth supported her as P.S.'s adoptive placement. The district court deferred ruling on appellants' motion because the county had not yet executed an adoption-placement agreement (APA) with R.B., and the county possessed the exclusive authority to make the adoptive placement. The county and R.B. executed the APA in May 2018. In July 2018, the district court found that appellants made a prima facie showing that the county was unreasonable in failing to place P.S. with them for adoption, and set the matter for an evidentiary hearing.

In addition to challenging the reasonableness of the county's adoptive placement, appellants also brought several challenges to the applicability of ICWA and MIFPA. Following the district court's initial deferral on ruling on their motion for adoptive placement, appellants petitioned this court for writs of prohibition and mandamus directing

the district court to return P.S. to preadoptive placement in their home, and to prevent the application of ICWA and MIFPA. This court denied the petitions.

Appellants next moved the district court to vacate the portion of its February 5, 2018 order—which deferred ruling on appellants' motion for adoptive placement—that reiterated its previous finding that ICWA and MIFPA apply to P.S.'s custody proceedings. Appellants asserted that this finding should be vacated due to White Earth's misrepresentation that P.S. qualifies as an "Indian child" within the meaning of the statutes. The district court found there was insufficient evidence of misrepresentation, that it was bound by White Earth's membership determination, and denied the motion to vacate. Finally, appellants moved the district court to permanently enjoin its enforcement of ICWA and MIFPA, which the district court denied.

Following an evidentiary hearing, the district court denied appellants' motion for adoptive placement. This appeal followed.

D E C I S I O N

Appellants challenge the district court's denial of their motion for adoptive placement. Appellate courts review a district court's decision on whether to grant an adoption petition for an abuse of discretion. *In re S.G.*, 828 N.W.2d 118, 125 (Minn. 2013). However, appellants do not challenge the specific findings of the district court upon which it based its denial of their motion, but instead assert that the district court erred by applying ICWA and MIFPA to their motion for adoptive placement. They argue that ICWA and MIFPA are inapplicable because White Earth does not satisfy the statutory definitions of a

federally recognized Indian tribe and also assert that ICWA is unconstitutional on three bases.

I. Applicability of ICWA and MIFPA

As a threshold matter, appellants assert that the district court erred by applying ICWA and MIFPA to their motion for adoptive placement because P.S. is not eligible for membership in a federally recognized tribe, and thus she does not meet the statutory definitions of an Indian child. The de novo standard of review typically applied to a district court's reading of a Minnesota statute also applies to review of a district court's reading of ICWA. *See In re Welfare of Children of S.R.K.*, 911 N.W.2d 821, 827 (Minn. 2018).

ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). ICWA defines an Indian tribe as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . ." *Id.* § 1903(8).

MIFPA defines an Indian child as "an unmarried person who is under age 18 and is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe." Minn. Stat. § 260.755, subd. 8. The MIFPA definition of an Indian tribe is the same as that set forth in ICWA. *Id.*, subd. 12.

Appellants argue that the district court erred by determining that White Earth satisfies the statutory definition of an Indian tribe. Appellants rely on *State v. Davis* for the asserted proposition that only the Minnesota Chippewa Tribe, of which White Earth is

a constituent band, satisfies the ICWA definition of an Indian tribe, but that is not what the supreme court stated in *Davis*. 773 N.W.2d 66, 68 (Minn. 2009). *Davis* centered upon a question of whether federal law preempted the state's ability to enforce its traffic laws against a member of the Leech Lake Band who was stopped for speeding while traveling on land held in trust by the United States for the Mille Lacs Band. *Id*. at 67-68. Both bands are members of the Minnesota Chippewa Tribe. *Id*. at 68.

Appellants isolate and rely on the following language from *Davis* to support their contention that eligibility for membership in the White Earth Band is insufficient to meet ICWA's definition of an Indian tribe: "The Minnesota Chippewa Tribe (MCT) is a federally recognized Indian tribe with six member bands, including the Leech Lake Band and the Mille Lacs Band." *Id*. Appellants argue that based on this language, only eligibility for membership in the Minnesota Chippewa Tribe is sufficient to qualify as an Indian tribe—and by extension, an Indian child—within the meaning of ICWA and MIFPA. This argument is not supported by either binding Minnesota appellate caselaw or statute.

As set forth above, under both ICWA and MIFPA, an Indian tribe is defined as "an Indian tribe, *band*, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians . . . ." 25 U.S.C. §1903(8); Minn. Stat. § 260.755, subd. 8 (emphasis added). In *In re the Welfare of S.N.R.*, this court stated that eligibility for membership in a constituent band of the Minnesota Chippewa Tribe satisfied ICWA's eligibility requirement. 617 N.W.2d 77, 81 n.2 (Minn. App. 2000) ("Because the Leech Lake Band has been recognized

as eligible for such services, the band is an Indian tribe for the purposes of the ICWA."), *review denied* (Minn. Nov. 15, 2000). The same is true here.

Like the Leech Lake Band, the White Earth Band is recognized as eligible for services provided by the United States Bureau of Indian Affairs. Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863, 34865. Therefore, the district court did not err by finding that eligibility for membership in White Earth is sufficient to meet the relevant statutory definitions of an Indian tribe.

Any inquiry into White Earth's internal eligibility determinations is not permitted as a matter of tribal sovereignty. *S.N.R.* 617 N.W.2d at 84 ("[A] tribal determination that a child is a member or eligible for membership in that tribe is conclusive evidence that a child is an 'Indian child' under [ICWA]."). Accordingly, a district court is not to inquire into "the tribe's application of its membership standards to a particular child . . . . Rather, the [district] court must determine whether the party who states that the child is a member or eligible for membership in a tribe is authorized to make such statements on the tribe's behalf." *Id*. Here, the district court found that White Earth is authorized to make membership determinations on behalf of the Minnesota Chippewa Tribe and that, based upon an affidavit of the Director of the White Earth Band, P.S. is a member of White Earth. Therefore, the district court did not err by determining that White Earth satisfies the definition of an Indian tribe set forth in ICWA and MIFPA, and thus the statutes applied to appellants' motion for adoptive placement.

II. Constitutional Questions

A. Notice of Constitutional Challenge

Before turning to the merits of appellants' constitutional arguments, we note our concern with their failure to file and serve notice of their constitutional challenges.

For a challenge to a federal statute, Minn. R. Civ. P. 5A(1)(A) requires a party challenging its constitutionality in Minnesota district court to file a notice of constitutional question when "neither the United States nor any of its agencies, officers, or employees is a party in an official capacity." Rule 5A(2) requires the party to serve the notice upon the U.S. Attorney General. No element of the federal government was a party to this proceeding, and appellants neither filed a notice with the district court nor served that notice and the associated documents as required by rule 5A.

For a challenge to a state statute, the party must file a notice of constitutional question in accordance with Minn. R. Civ. P. 5A(1)(B), and the notice must be served upon the Minnesota Attorney General in accordance with rule 5A(2). When the constitutionality of a state statute is challenged on appeal, Minn. R. Civ. App. P. 144 requires the party challenging the statute to file and serve notice of the challenge on the attorney general when "the state or an officer, agency or employee of the state is not a party."

Here, the Hennepin County Human Services and Public Health Department, represented by the Hennepin County Attorney, is a party to the action. However, the Supreme Court has stated that

> even if the county is an agent of the state for some purposes, we do not agree that it is for this purpose . . . . It is only in those actions or proceedings where the state or an officer, agency, or

> employee of the state is a party represented by the attorney general's office that an exception exists under this rule. In other words, service must be made upon the attorney general in all cases where he is not already in the case.

Elwell v. Hennepin County, 221 N.W.2d 538, 544 (Minn. 1974) (quotation omitted).[1] Upon this basis, we question whether the Hennepin County Human Services and Public Health Department's participation in this action, represented by the Hennepin County Attorney, would satisfy rule 144's notice requirement.

Because neither the applicability of rule 5A nor rule 144 was raised or briefed by the parties, we proceed to address the merits of appellants' facial constitutional challenges, but note that appellants may have forfeited review of their constitutional challenges, *Elwell* 221 N.W.2d at 545, or they may be limited to an as-applied challenge, *Clay v. Clay*, 397 N.W.2d 571, 576 (Minn. App. 1986), *review denied* (Minn. Feb. 17, 1987), due to appellants' failure to file and serve notice of their constitutional challenges.

B. Equal Protection

ICWA creates rebuttable adoptive-placement preferences for "Indian children" that are different than those for other children. *Compare* 25 U.S.C. § 1915(a) (ICWA preferences), *with* Minn. Stat. §§ 260C.605 (2018), .212, subd. 2 (2018) (non-ICWA preferences). Appellants assert that ICWA's creation of preferences applicable only to Indian children creates a racial classification that cannot withstand strict scrutiny under the

[1] The pertinent language of rule 144 in effect in 1974 when *Elwell* was decided also required notice upon the attorney general when "the state or an officer, agency, or employee of the state is not a party . . . ."

equal-protection component of the Fifth Amendment.[2] *See U.S. v. Windsor*, 570 U.S. 744, 774, 133 S. Ct. 2675, 2695 (2013) (noting the existence of an equal-protection component of the Fifth Amendment).

Rejecting a due-process challenge to a hiring practice of the Bureau of Indian Affairs (BIA) that favored Indian applicants, the Supreme Court rejected the idea that the preference was racially based: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474, 2484 (1974). Relying upon the "unique legal status" of tribal members, the Supreme Court stated that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id*. at 555, 94 S. Ct. at 2485. Thus, because classifications based on tribal membership are not racial, they are subject to rational-basis review rather than strict scrutiny. *Id.*, 417 U.S. at 554-55, 94 S. Ct. at 2484-85.

We reject appellants' assertion that this aspect of *Mancari* was superseded by *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552 (2013). The majority in *Adoptive Couple* mentions neither *Mancari* nor its holding that statutory classifications based on tribal membership are subject to rational-basis review. Absent an affirmative

[2] The heading of the equal-protection section of appellants' brief states that both ICWA and MIFPA violate equal protection. Appellants, however, make no argument and cite no authority for the idea that MIFPA violates the equal-protection facet of the Fourteenth Amendment. Appellate courts decline to address inadequately briefed questions. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). Therefore, we decline to address MIFPA here.

basis for concluding that the Supreme Court has decided that tribal membership is no longer a non-racial classification, we lack a basis for applying anything other than a rational-basis test to ICWA.

Appellants also assert that *Rice v. Cayetano*, 528 U.S. 495, 120 S. Ct. 1044 (2000) supersedes *Mancari* because ICWA, like the Hawaiian constitutional provision at issue in *Rice*, uses ancestry as a proxy for race. We disagree. *Rice* involved who could vote in a statewide election for an office that administered public lands held by the state. *Id*. at 521, 120 S. Ct. at 1059. *Rice*, however, distinguished the special treatment afforded Indian tribal members under federal law, declined to extend the quasi-sovereign status of Indian tribal members to classifications involving native Hawaiians, *Id*. at 520-22, 120 S. Ct. at 1058-59, and did not otherwise indicate that it was altering the treatment of tribal members for constitutional purposes. Thus, we conclude that the tribal quasi-sovereignty underpinning *Mancari* was not implicated in, and hence was not superseded by, *Rice*.

Appellants also cite *Adarand Constructors, Inc. v. Pena* for the idea that all racial classifications are subject to strict scrutiny. 515 U.S. 200, 227, 115 S. Ct. 2097, 2113 (1995). But because appellants have not shown that tribal membership is a racial classification, *Adarand* is inapplicable.

Because ICWA's placement preferences are subject to rational-basis review, we must uphold the statute "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555, 94 S. Ct. at 2485. ICWA identifies "protect[ing] the best interests of Indian children" and "promot[ing] the stability of and security of Indian tribes and families by the establishment

of minimum Federal standards" as matters of national policy relating to the adoptive placement of Indian children. 25 U.S.C. § 1902. ICWA's placement preferences favoring Indian homes for adoptive placement of Indian children are rationally tied to Congress's unique obligation to the Indians. Accordingly, we reject appellants' equal-protection challenge to ICWA.

C. Commerce with Foreign Nations

Appellants next argue that ICWA is unconstitutional because it exceeds Congress's legislative authority under Article I of the Constitution. Article I, Section 8 grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Appellants assert that Congress is only granted the authority to regulate Indian affairs as they pertain to "commerce," and legislation that does not regulate Indian commerce unconstitutionally intrudes upon the powers reserved to the states by the Tenth Amendment.

Appellants rely on Justice Thomas's concurrence in *Adoptive Couple* for the proposition that ICWA exceeds Congress's Article I authority. 570 U.S. at 666, 133 S. Ct. at 2571 (Thomas, J., concurring) ("Because adoption proceedings like this one involve neither 'commerce' nor 'Indian tribes,' there is simply no constitutional basis for Congress's assertion of authority over such proceedings."). As a concurring opinion, this portion of *Adoptive Couple* lacks precedential authority, and more importantly is inconsistent with current Supreme Court precedent that states that Congress's legislative authority under the Indian Commerce Clause is plenary. *U.S. v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 1633 (2004) ("[T]he Constitution grants Congress broad general powers

to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." (quotation omitted)); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S. Ct. 1698, 1716 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."). Because Congress's power to legislate in the field of Indian affairs is plenary, ICWA does not exceed Congress's legislative authority.

D. Anticommandeering Doctrine

Finally, appellants argue that ICWA unconstitutionally commandeers state sovereign authority over matters of domestic relations. Appellants principally rely on *Murphy v. Nat'l Collegiate Athletic Ass'n*, which struck down a federal law that prevented, among other things, state legislatures from authorizing sports gambling in their respective states, but *Murphy* is distinguishable. 138 S. Ct. 1461, 1478 (2018).

"The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." *Id.* at 1475. In *Murphy*, the Supreme Court held that the Professional and Amateur Sports Protection Act (PASPA) violated the anticommandeering doctrine because, in prohibiting state legislatures from authorizing sports gambling, the PASPA "unequivocally dictates what a state legislature may and may not do." *Id.* at 1478.

Appellants argue that 25 U.S.C. § 1915(a) unconstitutionally commandeers state authority over adoptions by providing a list of placement preferences for the adoption of Indian children inconsistent with Minnesota statutory requirements applicable to adoptions

not involving Indian children. *Compare* 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."), *with* Minn. Stat. § 260C.605, subd. 1(b) ("Reasonable efforts to make a placement in a home according to the placement considerations under section 260C.212, subdivision 2, with a relative or foster parent who will commit to being the permanent resource for the child . . . .").

Here, it is possible to avoid the constitutional question altogether, because Minnesota has specifically enacted the ICWA placement preferences into state law. Minn. Stat. § 260.771, subd. 7(a) ("The court must follow the order of placement preferences required by [ICWA], United States Code title 25, section 1915, when placing an Indian Child."). Assuming without accepting that ICWA violates the anticommandeering doctrine, here, appellants have no basis to assert that the federal government has unconstitutionally directed state action when, by legislative enactment, the state has freely adopted the federal requirement.

Because the district court did not err by determining that White Earth satisfies the statutory definitions of an Indian tribe under MIFPA and ICWA and because ICWA is not unconstitutional under any of the bases identified by appellants, the district court did not err by applying ICWA and MIFPA to appellants' motion for adoptive placement.

Affirmed.