COURT OF APPEALS
DECISION
DATED AND FILED

August 12, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1402 **Cir. Ct. No. 02TP000236**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE TERMINATION OF PARENTAL RIGHTS TO GENEVIEVE K., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DIANNE K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTINS, Judge. *Affirmed*.

¶1 SCHUDSON, J.[1] Dianne K. appeals from the trial court order terminating her parental rights to Genevieve K. She argues that the trial court erred in not applying the provisions of the Indian Child Welfare Act.[2] This court affirms.

I. BACKGROUND

¶2 In September 1999, nineteen-day-old Genevieve was taken into protective custody by the Bureau of Milwaukee Child Welfare because, according to the Termination of Parental Rights petition, a neighbor found Dianne passed out drunk in the hallway outside her locked apartment and called the Milwaukee police. Dianne told police that she had left Genevieve inside the apartment while she was doing laundry in the basement. She said that she met a friend in the laundry room who had a bottle of whiskey and they drank it. Personnel from the Milwaukee Fire Department had to kick down Dianne's apartment door to gain access to Genevieve who was found lying face down in her crib and "appeared very hungry and was crying." Genevieve was subsequently found to be in need of court protection or services, pursuant to WIS. STAT. § 48.13(10), and was placed outside Dianne's home. She was initially placed with her maternal grandmother until it was discovered that the grandmother was allowing Dianne to also live with her. Genevieve was then placed with a foster family.

¶3 In April 2003, the State petitioned for termination of Dianne's parental rights to Genevieve, alleging that: (1) Dianne had failed to assume

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] *See* 25 U.S.C. §§ 1901-1963 (1978).

parental responsibility for Genevieve, under WIS. STAT. § 48.415(6); (2) Dianne abandoned Genevieve, under WIS. STAT. § 48.415(1)(a)2; and (3) Dianne continued to be in need of protection or services, under WIS. STAT. § 48.415(2).

¶4 At the initial court appearance, Dianne objected to the trial court's jurisdiction, asserting that the Indian Child Welfare Act ("ICWA") applied and, therefore, the case should be transferred to the Menominee Indian Tribe of Wisconsin. In response, Judge Karen Christenson indicated that, in the CHIPS proceedings, many briefs regarding the applicability of ICWA had been filed; therefore, she contacted Chief Judge Joseph Martin of the Menominee Indian Tribe to discuss the issue. Judge Christenson notified the parties that Chief Judge Martin "asserted his opinion that [Genevieve] is not an Indian child and repeated that the tribe is not going to become involved."

¶5 At a pretrial hearing, Judge Christopher Foley indicated that Genevieve's maternal grandmother had sent him a series of documents regarding the applicability of ICWA. He notified the parties that he sent a memo to the grandmother indicating that "[he] d[idn't] see anything in those documents that indicate[d] to [him] that Judge Christenson's determination that [ICWA] did not apply, was incorrect, and [he] d[idn't] intend to revisit the issue." Thus a jury trial was held.

¶6 The jury found that Dianne had abandoned Genevieve. It also found that she did not have good cause for failing to have contact with her from September 16, 2001 to March 31, 2002, that the Bureau had made reasonable efforts to provide court-ordered services, that Dianne failed to meet the conditions established for Genevieve's return to her home, and that there was a substantial likelihood that Dianne would not meet those conditions within twelve months.

¶7 The court held a two-day dispositional hearing. At the hearing, the State filed with the court two tribal letters from Genevieve's CHIPS proceedings. The letters advised the court that Genevieve was not eligible for tribal membership; thus, the tribe would not participate in any court proceedings. The trial court ultimately concluded that Genevieve's best interests required the termination of Dianne's parental rights.

II. DISCUSSION

¶8 Dianne's only argument is that the trial court erred in not applying ICWA. She contends that Resolution 79-49 of the Menominee Indian Tribe defines "'member' as 'a descendant of an enrollee of the Menominee Indian Tribe,'" that the tribe certified Genevieve as a second-degree descendant of an enrolled Menominee Indian and, therefore, Chief Judge Martin did not have the "power to negate or change [the] Resolution." Thus, she contends that Genevieve is eligible for enrollment in the tribe and the trial court should have applied ICWA. This court disagrees.

¶9 This court will not reverse a trial court's findings of fact unless they are shown to be clearly erroneous. WIS. STAT. § 805.17(2). The interpretation of ICWA presents a question of law that this court reviews de novo. *See* ***Brown County v. Marcella G.***, 2001 WI App 194, ¶6, 247 Wis. 2d 158, 634 N.W.2d 140. The federal policy expressed by ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families…." 25 U.S.C. §1902. Here, ICWA applies only if Genevieve is considered an "Indian child." "'Indian child' means 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).

¶10 The Indian tribe is the ultimate authority on the determination of whether an individual qualifies for membership. As 25 U.S.C. § 1911(b) provides:

> (b) **Transfer of proceedings; declination by tribal court**
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> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided, That such transfer shall be subject to declination by the tribal court of such tribe.*

(Emphasis added.) This court has held that, although "not binding on courts, [the guidelines interpreting ICWA, as established by the Bureau of Indian Affairs,] are helpful and should be considered when deciding issues under the ICWA." ***Brown County***, 2001 WI App 194, ¶8.

¶11 According to the Bureau, "Upon receipt of a petition to transfer [to a tribal court] the [trial] court must transfer unless either parent objects to such transfer, *the tribal court declines jurisdiction*, or the court determines that good cause to the contrary exists for denying the transfer." Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67590-91 (1979) (emphasis added). "The determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological parent is or is not a member of that tribe is conclusive." ***Id.*** at 67584-95.

¶12 Here, the tribe declined to become involved in Genevieve's case. The tribe's two letters to the court during Genevieve's CHIPS proceedings advised the court that, although a second-generation descendant, Genevieve was not eligible for enrollment in the tribe and, therefore, the tribe would not become involved in the case. Judge Christenson received verbal confirmation of this determination from the tribe's Chief Judge prior to the termination proceedings. Dianne does not provide any support for her argument that Chief Judge Martin misapplied Resolution 79-49. Therefore, she has failed to provide any basis for this court to conclude that the information from the tribe was wrong, or that the trial court's finding, based on that information, was clearly erroneous.

¶13 The tribal court has the authority to make its own membership determinations. *See* 25 U.S.C. § 1911(b); *see also* Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584-95. The trial court followed the established guidelines by giving deference to the tribal court's determination that Genevieve was not eligible for membership and, therefore, was not an "Indian child." Thus, the trial court did not err in determining that ICWA did not apply in this case.

By the Court.—Order affirmed.

This decision will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.