COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1697 **Cir. Ct. No. 2016TP7**

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

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

KEWAUNEE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

R. I.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kewaunee County: KEITH A. MEHN, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.[1]

¶1 STARK, P.J. R.I. appeals an order terminating his parental rights to M.J., his biological daughter who is an Indian child.[2] R.I. is not of Native American heritage. During the grounds phase of this termination of parental rights (TPR) action, the parties stipulated R.I. had abandoned M.J. However, R.I. argued that prior to determining if grounds existed to terminate his parental rights, the circuit court was required to hold an evidentiary hearing. R.I. asserted the hearing was necessary to determine the likelihood of serious emotional or physical damage from his continued custody of M.J. and if any active efforts were made to prevent breakup of an Indian family, pursuant to 25 U.S.C. § 1912(f) and (d) of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (ICWA), and WIS. STAT. § 48.028(4)(e)1. and 2. of the Wisconsin Indian Child Welfare Act, WIS. STAT. § 48.028 (WICWA). The circuit court granted partial summary judgment in favor of the Kewaunee County Department of Human Services (the County) after the court concluded the respective provisions of ICWA and WICWA did not apply to R.I.

[1] This appeal was converted from a one-judge appeal to a three-judge appeal under WIS. STAT. RULE 809.41(3) (2015-16). To accommodate the conversion of this appeal, we have exercised our authority to extend the time under WIS. STAT. RULE 809.107(6)(e) (2015-16), to issue a decision in a termination of parental rights case. *See* ***Rhonda R.D. v. Franklin R.D.***, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] It is undisputed that M.J. is an "Indian child" under both 25 U.S.C. § 1903(4)(b) and WIS. STAT. § 48.02(8g) because she is a person under eighteen who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

¶2 On appeal, R.I. contends the circuit court's grant of partial summary judgment was improper because genuine issues of material fact existed regarding damage to M.J. from R.I.'s continued custody and whether active efforts were made to prevent breakup of the Indian family as required by ICWA and WICWA. We conclude 25 U.S.C. § 1912(f) and (d) are inapplicable because R.I. never had custody of M.J. *See* ***Adoptive Couple v. Baby Girl***, 570 U.S. ___, 133 S. Ct. 2552, 2560-63 (2013). We also reject R.I.'s argument that WIS. STAT. § 48.028(4)(e)1. and 2. apply to him regardless of his lack of custody and conclude WICWA does not establish a higher level of protection for R.I.'s parental rights than ICWA. Accordingly, we affirm the TPR order.

BACKGROUND

¶3 M.J. was born in November 2010 to J.J., a member of the Lac du Flambeau Band of Lake Superior Chippewa. M.J. was removed from her mother's care in May 2013 pursuant to a continuing need for protective services order. The order provided that M.J. was subject to ICWA as an Indian child. M.J. was placed with her uncle—J.J.'s step-brother and a non-Indian—with whom M.J. and J.J. had been living since August 2012. M.J.'s uncle was ultimately granted legal custody of M.J. in 2015.

¶4 R.I. was incarcerated at the time of M.J.'s birth and was adjudicated M.J.'s father in November 2014.[3] The paternity order specified that legal and physical custody of M.J. had been held open due to M.J. residing in foster care.

[3] It is undisputed that, although R.I. has no Native American heritage, he is a "parent" under 25 U.S.C. § 1903(9) and WIS. STAT. § 48.02(13) for purposes of the applicability of ICWA and WICWA because he is M.J.'s biological parent and his paternity has been established.

While in prison, R.I. wrote M.J. several letters, sent her gifts, and participated in life skills training and parenting courses.

¶5 After his release from prison in March 2015, R.I. moved to Florida. R.I. contacted M.J.'s uncle and said he wanted to send a care package to M.J. M.J.'s uncle provided R.I. with his address, but he never received a package from R.I. R.I. scheduled—but then cancelled—visits with M.J. in June and July 2015. R.I. has never visited M.J. in person. R.I. failed to communicate with M.J. in any way between July 2015 and May 2016.

¶6 J.J. died in May 2016. The County petitioned for termination of R.I.'s parental rights to M.J. on December 20, 2016, alleging grounds for unfitness existed due to abandonment and failure to assume parental responsibility under WIS. STAT. § 48.415(1) and (6). The County additionally filed a "Statement of Active Efforts" pursuant to ICWA and WICWA.[4] R.I. contested the TPR petition.

¶7 The County eventually moved for partial summary judgment, alleging no genuine disputes of material fact existed on the elements of abandonment.[5] On R.I.'s stipulation, the circuit court entered an order for partial summary judgment on that ground.

[4] *See* 25 U.S.C. § 1912(d) & WIS. STAT. § 48.028(4)(e)2. (requiring showing of "active efforts" to prevent "breakup" of Indian family); § 48.028(4)(g)1. (setting forth nine activities a fact finder may consider as evidence of whether the "active efforts" standard has been met).

[5] To establish grounds for abandonment, a petitioner must show "the child has been placed, or continued in a placement, outside the parent's home by a court order … and the parent has failed to visit or communicate with the child for a period of 3 months or longer." WIS. STAT. § 48.415(1)(a)2.

¶8 The County also asserted the provisions of ICWA and WICWA that required additional findings of fact—i.e., regarding the likelihood of serious emotional or physical damage from R.I's continued custody, and whether any active efforts were made to prevent breakup of an Indian family—were inapplicable because R.I. never had legal or physical custody of M.J. R.I. argued the findings under ICWA and WICWA were required regardless of his lack of custody or placement, and he requested a bench trial on those issues.

¶9 The circuit court subsequently entered another order granting partial summary judgment. It concluded the applicable provisions under ICWA and WICWA were "nearly identical," and under the Supreme Court's decision in ***Adoptive Couple***, fact finding was unnecessary because R.I. never had physical or legal custody of M.J. After a dispositional hearing, the circuit court entered an order terminating R.I.'s parental rights to M.J. R.I. appeals the TPR order.

STANDARD OF REVIEW

¶10 Summary judgment is available during the grounds phase of a TPR action if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.[6] ***Steven V. v. Kelley H.***, 2004 WI 47, ¶6, 271 Wis. 2d 1, 678 N.W.2d 856; WIS. STAT. § 802.08. We independently review a decision to grant or deny summary judgment. ***Oneida Cty. DSS v. Nicole W.***, 2007 WI 30, ¶8, 299 Wis. 2d 637, 728 N.W.2d 652.

[6] TPR actions involve two phases: (1) a fact-finding hearing on grounds for parental unfitness; and (2) if grounds are established, then a dispositional hearing to determine the best interests of the child. *See* ***Steven V. v. Kelley H.***, 2004 WI 47, ¶¶24-27, 271 Wis. 2d 1, 678 N.W.2d 856. R.I.'s appellate argument implicates only the first phase.

¶11 Whether partial summary judgment was proper here involves statutory interpretation, which is a question of law that we also independently review. ***Id.***, ¶9. "Statutory interpretation begins with the language of the statute. If the meaning of the words of a statute is plain, we ordinarily stop our inquiry and apply the words chosen by the legislature." ***Id.***, ¶16 (citing ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110). We must interpret statutes "in the context in which they are used, as part of a whole and in relation to the language of surrounding or closely related statutes." ***Id.*** (citing ***Kalal***, 271 Wis. 2d 633, ¶46).

DISCUSSION

Statutory Background

¶12 Congress enacted ICWA after it found Indian children were being subjected to wholesale—and often unwarranted—removal from their homes at a high rate, resulting in their separation from their families and tribes through non-tribal adoptions or placements in foster care. ***Adoptive Couple***, 133 S. Ct. at 2557 (citations omitted). ICWA is thus intended

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902. To that end, ICWA "govern[s] state-court child custody proceedings involving Indian children." ***Adoptive Couple***, 133 S. Ct. at 2557. TPR actions are within the scope of a "child custody proceeding" under ICWA. *See* 25 U.S.C. § 1903(1)(ii).

¶13 The applicability of two ICWA provisions is at issue in this appeal. First, 25 U.S.C. § 1912(f) prohibits a court from terminating a parent's rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Second, under § 1912(d), the party seeking termination must show "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

¶14 In ***Adoptive Couple***, the Supreme Court held § 1912(f) does not apply where a parent never had physical or legal custody of the Indian child prior to any child custody proceedings. ***Adoptive Couple***, 133 S. Ct. at 2562. On this point, the Court interpreted the phrase "continued custody" in § 1912(f) as referring to "custody that a parent already has (or at least had at some point in the past)." ***Adoptive Couple***, 133 S. Ct. at 2560. In addition, the Court held § 1912(d) only applies "in cases where an Indian family's 'breakup' would be precipitated" by child custody proceedings. ***Adoptive Couple***, 133 S. Ct. at 2562. Consistent with its reading of § 1912(f), the Court reasoned that if a parent has abandoned and never had custody of an Indian child, there is no relationship under § 1912(d) to either continue or end and, as a result, "breakup" of a family "has long since occurred." ***Adoptive Couple***, 133 S. Ct. at 2562.

¶15 In addition to its own protections, ICWA instructs that applicable state laws on child custody proceedings apply when a state provides a higher standard of protection for a parent than that contained in ICWA. *See* 25 U.S.C. § 1921; *see also* ***I.P. v. State***, 166 Wis. 2d 464, 473, 480 N.W.2d 234 (1992) ("ICWA is not pervasive, all-encompassing legislation, but rather sets forth

minimum standards that must be followed."). WISCONSIN STAT. § 48.028(10) similarly provides that a court must follow ICWA except "in any case in which this chapter provides a higher standard of protection for the rights of an Indian child's parent …." In sum, a petitioner "must meet the substantive and procedural requirements of the ICWA, as well as proving the grounds for termination of parental rights as required by state law," before a parent's rights to an Indian child can be terminated. ***Luis R. v. Monroe Cty. DHS***, 2009 WI App 109, ¶18, 320 Wis. 2d 652, 770 N.W.2d 795.

¶16 WICWA contains provisions similar to 25 U.S.C. § 1912(f) and (d) in WIS. STAT. § 48.028(4)(e). The legislature enacted this provision on December 7, 2009, when it repealed and recreated the previous version of § 48.028.[7] *See* 2009 Wis. Act 94, § 10. In relevant part, § 48.028(4)(e) prevents involuntary termination of parental rights to an Indian child unless both of the following occur:

> 1. The court or jury finds beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses…, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> 2. The court or jury finds by clear and convincing evidence that active efforts … have been made to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian child's family and that those efforts have proved unsuccessful.

[7] The previous version only provided that "[ICWA] supersedes the provisions of [WIS. STAT. ch. 48] in any child custody proceeding governed by that act." *See* WIS. STAT. § 48.028 (2007-08).

Sec. 48.028(4)(e)1.-2. No published authority has interpreted this provision since its enactment.[8]

Analysis

¶17 R.I. does not dispute that he has never had custody of M.J. and that he abandoned M.J. under WIS. STAT. § 48.415(1). Accordingly, the fact-finding requirements under 25 U.S.C. § 1912(f) and (d) are inapplicable in this case. *See* ***Adoptive Couple***, 133 S. Ct. at 2560-62.

¶18 R.I. acknowledges that 25 U.S.C. § 1912(f) and WIS. STAT. § 48.028(4)(e)1., as well as § 1912(d) and § 48.028(4)(e)2., contain virtually identical language, specifically the respective terms "continued custody" and "breakup of the … family." Both sets of statutes plainly indicate their provisions only serve to protect a "pre-existing state" of custody and to prevent the "discontinuance of a relationship," *see* ***Adoptive Couple***, 133 S. Ct. at 2560, 2562 (citations omitted), neither of which R.I. has ever had with M.J. However, despite these textual similarities, R.I. asserts § 48.028(4)(e) provides a heightened standard of protection of his parental rights. He thus argues ***Adoptive Couple***'s interpretation of 25 U.S.C. § 1912(f) and (d) cannot apply in his case. Specifically, R.I. cites § 48.028(3)(a), which states:

[8] In ***Luis R. v. Monroe County DHS***, 2009 WI App 109, ¶2, 320 Wis. 2d 652, 770 N.W.2d 795, this court interpreted 25 U.S.C. § 1912(f) as applying to a parent who did not have physical custody of an Indian child "even though the child ha[d] been placed outside the parental home before the TPR proceeding [was] filed." R.I. argues ***Luis R.*** supports his argument regarding the applicability of WIS. STAT. § 48.028(4)(e) to a parent who never had custody of an Indian child. However, ***Luis R.*** is distinguishable from both this case and ***Adoptive Couple v. Baby Girl***, 570 U.S. ___, 133 S. Ct. 2552 (2013), because the parent there had physical and legal custody at some time prior to the filing of the TPR petition. *See* ***Luis R.***, 320 Wis. 2d 652, ¶¶4, 9, 14, 22.

> This section and [ICWA], apply to any Indian child custody proceeding *regardless of whether the Indian child is in the legal custody or physical custody* of an Indian parent, Indian custodian, extended family member, or other person at the commencement of the proceeding and whether the Indian child resides or is domiciled on or off of a reservation. A court assigned to exercise jurisdiction under this chapter may not determine whether this section and [ICWA], apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family.

(Emphasis added.) R.I. contends the emphasized portion of § 48.028(3)(a) plainly requires the court make the findings required in § 48.028(4)(e) regardless of the child's custody status. We disagree.

¶19 As the County notes, there is a federal regulation comparable to WIS. STAT. § 48.028(3)(a). 25 C.F.R. § 23.103(c) provides:

> If a proceeding … concerns a child who meets the statutory definition of "Indian child," then ICWA will apply to that proceeding. In determining whether ICWA applies to a proceeding, the State court may not consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, *whether the parent ever had custody of the child*, or the Indian child's blood quantum.

(Emphasis added.)

¶20 It is clear that 25 C.F.R. § 23.103(c) is intended to ensure that ICWA applies to proceedings involving parents of an "Indian child," regardless of a

parent's Native American affiliations or heritage.[9] Likewise, WIS. STAT. § 48.028(3)(a) plainly indicates that WICWA applies as a procedural matter to all "Indian child custody proceeding[s]," which include TPR proceedings under § 48.028(2)(d), regardless of whether the child is "part of an existing Indian family." Neither party disputes that R.I. is a "parent," *see* 25 U.S.C. § 1903(9), WIS. STAT. § 48.02(13), or that M.J. is an "Indian child," *see* § 1903(4)(b), § 48.02(8g). Thus, as a "parent," R.I. would be entitled to protections under ICWA and WICWA on that basis.

¶21 The general applicability of ICWA and WICWA to R.I. as a "parent" of an Indian child, however, is a separate issue from whether WIS. STAT. § 48.028(4)(e) requires additional fact finding where the parent has never had custody of an Indian child.[10] Once again, R.I., as a parent, has never had any custody of M.J. that could have been "continued" or ended, nor could there have been a "breakup" of any existing family for the same reason. *See* ***Adoptive Couple***, 133 S. Ct. at 2560, 2562. If we adopted R.I.'s interpretation of § 48.028(4)(e) and required fact finding to determine the existence of damage to M.J. from R.I.'s continued custody and if active efforts were made to prevent the breakup of an Indian family, we would read "continued" out of subdivision 1. and

[9] Replying to the County, R.I. argues summary judgment was also improper under ICWA because 25 C.F.R. § 23.103(c)—which was promulgated after ***Adoptive Couple***—creates heightened protections that apply regardless of custody. As we explain, § 23.103(c) ensures the ICWA applies to a parent of an Indian child, not whether that parent is entitled to greater substantive protections once ICWA applies. To whatever extent R.I. means instead to argue the regulation compels different interpretations of 25 U.S.C. § 1912(f) and (d), his argument is either foreclosed by ***Adoptive Couple*** or severely underdeveloped.

[10] Indeed, in ***Adoptive Couple***, the Supreme Court assumed without deciding that the biological father was a "parent" under 25 U.S.C. § 1903(9) before it considered whether 25 U.S.C. § 1912(f) and (d) were applicable. *See* ***Adoptive Couple***, 133 S. Ct. at 2560 & n.4.

ignore the use of "breakup" in subdivision 2. as well. We cannot do so. *See* ***Kalal***, 271 Wis. 2d 633, ¶46 (statutes must be interpreted to give effect to every word where possible and to avoid absurd results). In all, R.I. provides us with no reason to disregard the Supreme Court's construction of 25 U.S.C. § 1912(f) and (d) in interpreting the language of § 48.028(4)(e)1. and 2.

¶22 Because R.I. never had custody of M.J., additional fact finding under 25 U.S.C. § 1912(f) and (d) and WIS. STAT. § 48.028(4)(e)1. and 2. was not required in this TPR action. The circuit court therefore correctly granted partial summary judgment on grounds for abandonment.

By the Court.—Order affirmed.

Recommended for publication in the official reports.