

245 Mich.App. 126

In the Matter of N.E.G.P., Minor.**Family Independence Agency,
Petitioner–Appellee,**

v.

**Jeffrey Lee Hosler, Respondent–
Appellant,**

and

Barbara Pullen, Respondent.**Docket No. 226663.**

Court of Appeals of Michigan.

Submitted March 7, 2001,
at Grand Rapids.

Decided March 16, 2001, at 9:05 a.m.

Released for Publication May 7, 2001.

Family Independence Agency brought parental rights termination proceeding against child's incarcerated father. The Circuit Court, Emmet County, Family Division, Frederick R. Mulhauser, J., terminated father's parental rights. Father appealed. The Court of Appeals, O'Connell, J., held that: (1) trial court was required to conclusively determine whether child was "Indian child" under Indian Child Welfare Act (IWCA), and (2) father was not entitled to notice of termination proceedings until his paternity was established.

Remanded.

1. Indians ⇌6.6(1)

Trial court was required to conclusively determine, in parental rights termination proceeding, whether child was "Indian child" under Indian Child Welfare Act (IWCA), where prosecutor was notified that child could be from specific tribe, but neither counsel nor court contacted tribe to verify information. Indian Child Welfare Act of 1978, § 1 et seq., 25 U.S.C.A. § 1901 et seq.

2. Indians ⇌6.6(3)

Whether the trial court failed to satisfy the Indian Child Welfare Act (ICWA) involves a legal question of statutory interpretation that appellate courts review de novo. Indian Child Welfare Act of 1978, § 1 et seq., 25 U.S.C.A. § 1901 et seq.

3. Indians ⇌6.5

Indian Child Welfare Act (ICWA) does not apply to proceedings where the child involved is not an Indian child. Indian Child Welfare Act of 1978, § 1 et seq., 25 U.S.C.A. § 1901 et seq.

4. Indians ⇌6.5

Lack of enrollment in a Native American tribe is not conclusive of the issue whether a child qualifies as an Indian child within meaning of Indian Child Welfare Act. Indian Child Welfare Act of 1978, § 1 et seq., 25 U.S.C.A. § 1901 et seq.

5. Indians ⇌6.5

Question whether a person is a member of a tribe, for purposes of Indian Child Welfare Act (ICWA), is for the tribe itself to answer. Indian Child Welfare Act of 1978, § 1 et seq., 25 U.S.C.A. § 1901 et seq.

6. Infants ⇌198

Father was not entitled to notice of parental rights termination proceedings until his paternity was established. MCR 5.903(A)(4), 5.921(D).

7. Constitutional Law ⇌274(5)**Infants ⇌204**

Adjournment of parental rights termination hearing did not deny father his due process rights, where father was party who raised issue that caused adjournment. U.S.C.A. Const.Amend. 14.

8. Appeal and Error ⇐966(1)

Pretrial Procedure ⇐713

Court's ruling on a motion for a continuance is discretionary and appellate courts review it for an abuse of discretion.

Robert J. Engel, Prosecuting Attorney, and Jennifer Herschelman, Assistant Prosecuting Attorney, Petoskey, for petitioner.

Finney, Lewis, Juneau, Henderson & Scully (by George R. Lewis), Petoskey, for respondent.

Before SAAD, P.J., and FITZGERALD and O'CONNELL, JJ.

O'CONNELL, J.

Respondent appeals as of right from a family court order terminating his parental rights to his minor child pursuant to M.C.L. § 712A.19b(3)(g), (i), and (j); M.S.A. § 27.3178(598.19b)(3)(g), (i), and (j). We remand for further proceedings.

Petitioner initiated termination proceedings against the child's mother shortly after the child's birth in October 1998. At the time, the mother incorrectly identified a man other than the respondent as the child's father. The court terminated the mother's parental rights on January 15, 1999, on the basis that her parental rights to five other children were terminated in the past. During the proceedings, however, petitioner determined that respondent might be the child's father. On January 4, 1999, petitioner sent a letter to respondent, who was incarcerated, indicating his possible paternity of the child. Respondent replied by letter on January 9, 1999, and offered to take a blood test. The test results, returned on June 25, 1999, showed a 99.42 percent probability that respondent was the child's father. On July 16, 1999,

petitioner filed a supplemental petition for termination of respondent's parental rights, asserting that respondent was the biological father of the child.

During the second day of respondent's termination hearing, January 10, 2000, counsel for respondent brought to the court's attention the possibility that respondent had an affiliation with a Native American tribe. The trial court directed petitioner to send notice of the proceedings to the tribe to which respondent alleged affiliation, but continued with the proofs in the case. At the end of the hearing, the trial court again advised petitioner to talk with respondent about his possible tribal membership and to notify the tribe about the proceedings.

The next day, January 11, 2000, petitioner submitted a request to the Secretary of the Interior for a search to identify the child's possible Native American ancestry. The paperwork contained information regarding the child, respondent, and the child's paternal grandparents and great-grandparents. The form indicated that the child's tribe was possibly the Anishina-bee tribe. The notice indicated the applicable tribe's right of intervention. A letter from the Secretary of the Interior responding to the request, dated February 7, 2000, indicated that there was no information available regarding the tribal membership or tribal affiliation of the child or her parents. The family court apparently accepted the letter as conclusive evidence regarding the matter.

[1, 2] Respondent first argues that the family court erred in failing to conclusively determine the child's status as an "Indian child" under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, before the close of proofs. We agree and remand. Whether the court failed to satisfy

the ICWA involves a legal question of statutory interpretation that we review de novo. *In re SD*, 236 Mich.App. 240, 243, 599 N.W.2d 772 (1999); *In re IEM*, 233 Mich.App. 438, 443, 592 N.W.2d 751 (1999).

The ICWA sets forth specific procedures and standards for child custody proceedings involving foster care placement of or termination of parental rights to an Indian child. *Id.* One of the ICWA's requirements is that an interested Indian tribe receive notice of termination proceedings involving Indian children:

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 [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding. [25 U.S.C. § 1912(a).]

1. 25 U.S.C. § 1912(f) provides that a termination of parental rights must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child

For purposes of the ICWA, an "Indian child" is any unmarried individual less than eighteen years of age who is either (1) an Indian tribe member or (2) both eligible for Indian tribe membership and an Indian tribe member's biological child. 25 U.S.C. § 1903(4).

We recognize the general principle that failure to comply with the requirements of the ICWA may render invalid a proceeding terminating a parent's rights, 25 U.S.C. § 1914; *In re Elliott*, 218 Mich. App. 196, 209, 554 N.W.2d 32 (1996); *In re HD*, 11 Kan.App.2d 531, 532, 729 P.2d 1234 (1986); *In re Junious M*, 144 Cal.App.3d 786, 791, 193 Cal.Rptr. 40 (1983), and we conclude that petitioner in this case did not comply with the requirements of the ICWA. The special notice requirements apply when a court "knows or has reason to know that an Indian child is involved..." 25 U.S.C. § 1912(a). Here, the trial court did not learn of the child's possible Indian heritage until the second day of respondent's termination hearing. The court directed petitioner to investigate the matter and continued with the proofs in the case, noting that it might have to ultimately judge the proofs using an increased standard if the child was later determined to be an Indian child under the ICWA. See 25 U.S.C. § 1912(f); MCR 5.980(D).¹ The record reflects that petitioner sent notice of the proceedings by registered mail, return receipt requested, to the Secretary of the Interior in accordance with 25 U.S.C. § 1912(a). Nevertheless, the statute also required petitioner to send notice to the child's tribe. Both the court and petitioner knew or had reason to know, by virtue of petitioner's inclusion of "Anishinabee" on the forms that it

by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." MCR 5.980(D) contains similar language.

mailed to the Secretary of the Interior, that the child was potentially a member of that tribe. The lower court record contains no proof that petitioner either sent the tribe the required notice, return receipt requested, or that the tribe responded to any notice. Petitioner never indicated that it could not determine the location of the tribe. Therefore, petitioner did not comply with the requirements of 25 U.S.C. § 1912(a).² Further, in continuing with the proofs, the trial court did not follow the statute's mandate that "[n]o . . . termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary." 25 U.S.C. § 1912(a).³

[3-5] The ICWA does not apply to proceedings where the child involved is not an "Indian child." *In re Colnar*, 52 Wash. App. 37, 41, 757 P.2d 534 (1988); *In re Appeal in Maricopa Co. Juvenile Action*, 136 Ariz. 528, 532, 667 P.2d 228 (Ariz.App., 1983). The lack of enrollment in a Native American tribe is not, however, conclusive of the issue whether a child qualifies as an

"Indian child." *In re IEM*, *supra* at 445, 592 N.W.2d 751; *In re Hunter*, 132 Or. App. 361, 364, 888 P.2d 124 (1995).⁴ Rather, the question whether a person is a member of a tribe is for the tribe itself to answer. *In re IEM*, *supra* at 447-448, 592 N.W.2d 751; *In re JW*, 498 N.W.2d 417, 422 (Iowa App., 1993); *In re Colnar*, *supra* at 39, 757 P.2d 534; *In re Junious M*, *supra* at 792, 193 Cal.Rptr. 40. On remand, petitioner must provide proper notice to the Anishinabee tribe and the court must determine whether the Anishinabee tribe meets the definition of "Indian tribe" contained in 25 U.S.C. § 1903(8). If the tribe concludes (1) that the child is not an Indian tribe member and (2) that she was both not eligible for Indian tribe membership and not an Indian tribe member's biological child, 25 U.S.C. § 1903(4), or if the tribe chooses not to intervene, or if the court determines that the tribe is not an "Indian tribe" as defined in 25 U.S.C. § 1903(8), then the order terminating respondent's parental rights is affirmed. If the tribe concludes (1) that the child is an Indian tribe member or (2) that she is both

2. The present case is distinguishable from *In re IEM*, *supra*. In that case the petitioner's sending of the required notice to the Secretary of the Interior alone was enough to satisfy 25 U.S.C. § 1912(a) because the child's possible Native American heritage was unspecified. *In re IEM*, *supra* at 448, 592 N.W.2d 751.

3. MCR 5.965(B)(7) states that at the preliminary hearing, the court "shall inquire if the child or parent is a registered member of any American Indian tribe or band, or if the child is eligible for such membership." Respondent argues that the court's failure to make this inquiry invalidated the proceedings below. We note that the trial court did not hold a preliminary hearing because the child was already in foster care after the termination of the parental rights of the child's mother. In our view, the court's failure to question whether the child or one of her parents was a registered member of, or eligible for member-

ship in, an American Indian tribe or band, may have been an additional factor in determining whether the court knew or had reason to know that the child was an "Indian child." However, because we have already determined that the court and petitioner did not comply with the requirements of 25 U.S.C. § 1912(a), we need not discuss the issue further.

4. In *In re Shawboose*, 175 Mich.App. 637, 639, 438 N.W.2d 272 (1989), a panel of this Court stated that a parent's enrollment in an Indian tribe was a prerequisite to a child's qualification as an "Indian child" under 25 U.S.C. § 1903(4). The panel in *In re IEM*, *supra* at 445, n. 3, 592 N.W.2d 751, concluded that *Shawboose* could not be read to require enrollment as a prerequisite to the application of the ICWA. We follow *In re IEM*, which was issued after November 1, 1990. MCR 7.215(H)(1).

eligible for Indian tribe membership and an Indian tribe member's biological child, and if the tribe chooses to intervene, and if the court determines that the tribe is an "Indian tribe" as defined in 25 U.S.C. 1903(8), then the order terminating respondent's parental rights is reversed and the trial court must conduct new proceedings in accordance with the ICWA. *In re IEM*, supra at 450, 592 N.W.2d 751; *In re Junious M*, supra at 798, 193 Cal.Rptr. 40.

[6] Next, respondent argues that, as the child's putative father, he was not provided proper notice of the original termination proceedings in accordance with our court rules. Whether a court has personal jurisdiction over a party is a question of law that we review de novo on appeal. *In re Terry*, 240 Mich.App. 14, 20, 610 N.W.2d 563 (2000). We note that respondent did not raise this argument below and so it is not preserved for our review. In any event, his argument is without merit. Respondent could not have been considered the father of the child as defined in MCR 5.903(A)(4), or a putative father of the child under MCR 5.921(D), until the paternity test results were received in June 1999. Because respondent did not establish paternity until June 1999, he was not entitled to notice of the proceedings until that time. See *In re Gillespie*, 197 Mich. App. 440, 442-446, 496 N.W.2d 309 (1992).

[7, 8] Respondent also argues that the lower court's adjournment of the termination hearing on October 21, 1999, denied him due process. A court's ruling on a motion for a continuance is discretionary and we review it for an abuse of discretion. *In re Jackson*, 199 Mich.App. 22, 28, 501 N.W.2d 182 (1993). We reject this argument. Although respondent argues that the adjournment denied him due process, he was the person who raised the issue that caused the adjournment.

Finally, our review of the record leads us to conclude that the family court did not clearly err in finding that petitioner established the statutory grounds for termination with clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich. 331, 337, 445 N.W.2d 161 (1989). Further, the evidence did not show that termination of respondent's parental rights was clearly not in the child's best interests. M.C.L. § 712A.19b(5); M.S.A. § 27.3178(598.19b)(5); *In re Trejo*, 462 Mich. 341, 354, 612 N.W.2d 407 (2000). Thus, the family court did not err in finding that petitioner established the statutory grounds for terminating respondent's parental rights to the child.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.



Robert STOKES and Patricia Stokes,
Plaintiff-Appellant/Counter-
Defendant/Cross-Appellee,

v.

MILLEN ROOFING COMPANY,
Defendant-Appellee/Counter-
Plaintiff/Cross-Appellant,

and

Douglas Sumner, Comerica Bank,
Thomas Dowling and George Schuler,
Third-Party Defendants.

No. 216334.

Court of Appeals of Michigan.

April 2, 2001.

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ORDER

Stokes v. Millen Roofing Co., 245 Mich. App. 44, 627 N.W.2d 16. The March 9,