Court of Appeals, State of Michigan

ORDER

In re King/Koon Minors

Docket No. 352610

LC No. 19-004809-NA

David H. Sawyer
Presiding Judge

Michael J. Kelly

Brock A. Swartzle
Judges

The motion for reconsideration is GRANTED, and this Court's opinion issued November 24, 2020 is hereby VACATED. A new opinion is attached to this order.

Presiding Judge

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

January 7, 2021
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

In re King/Koon, Minors.

UNPUBLISHED
January 7, 2021

No. 352610
Grand Traverse Circuit Court
Family Division
LC No. 19-004809-NA

ON RECONSIDERATION

Before: SAWYER, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

Respondent mother appeals from the final conference order of the circuit court following removal of the two minor children. We affirm and remand for further proceedings.

Initially, we note that respondent does not challenge the merits of the order. Rather, she only raises a procedural argument, namely that the trial court failed to comply with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. Accordingly, we will focus on these procedural arguments.

It is undisputed by the parties that respondent is a member of the Little River Band of Ottawa Indians and that the children are considered by the tribe to be "descendants," but not full members of the tribe nor are they eligible for membership in the tribe. Indeed, when the trial court asked respondent at the preliminary hearing whether the children were tribal members or eligible for tribal membership, she responded "No, your Honor." This concession largely renders respondent's arguments moot. Before a court can decide if the ICWA applies to a particular case, it must first determine whether the child is an "Indian Child." *In re Morris*, 491 Mich 81, 100; 815 NW2d 62 (2012). 25 USC 1903(4) 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."[1] By respondent's own admission, her children do not meet either of these criteria.

Respondent argues that the trial court nevertheless needed to comply with the tribal notice requirement of 25 USC 1912(a) because that notice to the tribe must be given if the trial court "knows or has reason to know" that the child is an Indian child. But respondent's arguments that the trial court had reason to know that the children were Indian children fall short given respondent's concession that the children do not meet the definition of being an "Indian child." Respondent bases this argument on the fact the trial court knew that she was a tribal member. Respondent's argument might have some merit if the only information available to the trial court was that respondent was a tribal member or that the parents were of Indian heritage. See *Morris*, 491 Mich at 108. But that is not the case. The trial court knew of respondent's own statement that the children were not tribal members nor eligible for tribal membership. Moreover, the petition in this case clearly states that while respondent is a member of the Little River Band of Ottawa Indians, the children are not members and not eligible for membership and that the tribe itself has stated that it would not be involved except to the extent that the children might be eligible for services as "descendants." Moreover, in June of 2019, the Little River Band notified the Department of Health and Human Services (DHHS) that neither child were members or eligible for membership. Eligibility for tribal membership is a question that is exclusively within the jurisdiction of the tribe itself, not the court. *Morris*, 491 Mich at 106; see also MCL 712B.3(k)(ii) (which states the eligibility for membership is "determined by that Indian tribe.").[2]

Respondent further argues that the inquiry by DHHS was insufficient because it did not inquire as to possible membership in other tribes. Specifically, respondent suggests potential membership in the Grand Traverse Band of Ottawa and Chippewa Indians because the children's grandmother was a member of the Grand Traverse Band. But, even if the initial inquiry was inadequate on this basis, it was thereafter cleared up as there is a response from the Grand Traverse Band in the lower court file in January of 2020 that indicates that the children are ineligible for enrollment in the Grand Traverse Band.

Respondent also suggests that further inquiry was necessary to determine if sufficient Indian heritage could have been established through the children's putative fathers. Respondent does not offer any evidence that either father is of Indian heritage and concedes that biological paternity has not been established. We note that both the ICWA and the MIFPA exclude from the definition of "parent" a putative father whose paternity has not been established. 25 USC 1903(9); MCL 712B.3(s); see also MCR 3.002(20). While we recognize that the Court in *Morris* held that the notice requirement is triggered by even a minimal showing of evidence suggesting that the

[1] The definition of "Indian child" under MIFPA is the same as under ICWA. MCL 712B.3(k). Accordingly, our analysis under the MIFPA would be essentially the same as under the ICWA.

[2] In her brief, respondent argues in part that the information supplied to the Little River Band was inadequate for the Little River Band to properly determine the children's eligibility for membership. It is not appropriate for the trial court nor this Court to question the adequacy of the inquiry and determination by the tribe. That is within the exclusive jurisdiction of the tribe itself.

child might be an Indian child, 491 Mich at 106, there is not even that minimal showing here with regards to the putative fathers. Not only has it not been established that they are the biological fathers of the children, a necessary requirement, but respondent also offers no reason to believe that those putative fathers have any Indian heritage.

In sum, the only available evidence establishes that the children were not members, nor eligible for membership, in either the Little River Band or the Grand Traverse Band as determined by those tribes. Moreover, respondent does not make even a minimal showing of potential eligibility for membership in any other tribe, offering mere speculation at best. Thus, the trial court did not know nor have reason to know that the children were eligible for membership in a tribe. Accordingly, the requirements of the ICWA and the MIFPA were not triggered in this case.

Affirmed. The matter is remanded for continued proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Brock A. Swartzle