STATE OF MICHIGAN

COURT OF APPEALS

In re BANKS, Minors.

UNPUBLISHED
October 14, 2021

Nos. 357014; 357015
Wayne Circuit Court
Family Division
LC No. 2017-001203-NA

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondent-mother and respondent-father appeal as of right the trial court's order terminating their parental rights to their minor children, EJB, KAB, and KMB. Because the trial court correctly determined that the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., do not apply in this case, we affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On March 12, 2020, following a seven-day hearing, the trial court terminated the parental rights of respondents to their minor children, EJB, KAB, and KMB.[2] This Court issued a per curiam opinion on February 18, 2021, conditionally reversing the trial court's termination decision, and remanding for the limited purpose of determining compliance with the notice requirements of the ICWA and MIFPA. *In re Banks*, unpublished per curiam opinion of the Court of Appeals,

[1] *In re Banks*, unpublished order of the Court of Appeals, entered May 4, 2021 (Docket Nos. 357014 and 357015).

[2] The parental rights of both respondents were terminated pursuant to MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions that led to adjudication), (c)(*ii*) (other conditions have not been rectified), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm).

issued February 18, 2021 (Docket Nos. 354060 and 354062), p 11.[3] Our Court reasoned that respondent-father disclosed to petitioner, the Department of Health and Human Services (DHHS), that he had Native American heritage, and nothing in the trial court record suggested that steps were taken to meet the notice requirements of 25 USC 1912(a)[4] or MCL 712B.9(1).[5] *Id*. at 10-11.

Subsequently, on April 15, 2021, the trial court referee conducted a hearing to comply with this Court's directives. The referee heard testimony from Kevin Rader, a Child Protective Services (CPS) investigator for DHHS. Rader testified that at the time of the preliminary hearing on July 21, 2017, respondent-father indicated to Rader that he may have Native American heritage. Respondent-mother asserted before the preliminary hearing that she had Native American heritage as well, but she denied having Native American heritage during the preliminary hearing.

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[3] Our Court addressed the lack of compliance with the notice provisions of the ICWA and MIFPA pursuant to MCR 7.216(A)(7).

[4] 25 USC 1912(a) states:

> 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 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.

[5] MCL 712B.9(1) provides:

> In a child custody proceeding, if the court knows or has reason to know that an Indian child is involved, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary in the same manner described in this subsection. The secretary has 15 days after receipt of notice to provide the requisite notice to the parent or Indian custodian and the tribe.

Rader explained that in 2017, after speaking with respondents, he sent notices to the Bureau for Indian Affairs (BIA) and the three branches of the Cherokee Tribe[6] to confirm whether EJB, KAB, and KMB had Native American heritage. The BIA referred Rader to the Cherokee tribes individually because "each tribe is responsible for determining membership or eligibility for membership." Rader also stated during his testimony that he received confirmation from each Cherokee Tribe in 2017 that EJB, KAB, and KMB were not members of any band of the Cherokee Tribe.

Additionally, Rader testified that after our Court remanded this matter to the trial court to ensure compliance with the ICWA and MIFPA, he discovered that the Cherokee Nation had omitted KMB from its September 25, 2017 correspondence. Therefore, Rader resent notice of KMB's potential eligibility for membership to the Cherokee Nation on or around March 4, 2021. The Cherokee Nation confirmed on March 15 that EJB, KAB, and KMB were not Indian children in relation to the Cherokee Nation.

The referee admitted as evidence the documentation presented by DHHS confirming that EJB, KAB, and KMB were not members of any band of the Cherokee Tribe. The evidence included the March 15, 2021 correspondence from the Cherokee Nation, three separate letters dated July 26, 2017, from the United Keetoowah Band of Cherokee Indians, three separate letters dated July 31, 2017, from the Eastern Band of Cherokee Indians, and the September 25, 2017 correspondence from the Cherokee Nation that omitted KMB. Also admitted were return receipts (i.e., green cards) from the Cherokee Nation in 2021, return receipts from each band of the Cherokee Tribe in 2017, correspondence dated July 27, 2017, from the BIA, and completed MDHHS-5998[7] and DHS-120[8] forms.

Based on this documentary evidence, and the testimony offered by Rader, the referee recommended that proper notice in accordance with the ICWA and MIFSA had been given to the appropriate tribes, and that EJB, KAB, and KMB were not Indian children. Accordingly, the referee recommended termination of respondents' parental rights. The trial court agreed, and affirmed the referee's findings on April 16, 2021.

[6] The three branches of the Cherokee Tribe include the Cherokee Nation, United Keetoowah Band of Cherokee Indians, and the Eastern Band of Cherokee Indians.

[7] The MDHHS-5598 form is used by DHHS to verify Indian ancestry.

[8] The DHS-120 form is utilized in addition to the MDHHS-5598 form if a court case has been initiated.

II. ANALYSIS[9]

On appeal, respondent-mother and respondent-father both contend that they were denied due process because the ICWA is unconstitutional and denied them the right to participate in proceedings.[10] We disagree.

This Court reviews "de novo whether child protective proceedings complied with a respondent's constitutional rights." *In re Dearmon*, 303 Mich App 684, 693; 847 NW2d 514 (2014). Respondents in this case did not raise any due process argument before the trial court. Because of this, respondents' due process arguments are unpreserved and reviewed for plain error affecting substantial rights. *In re Pederson*, 331 Mich App 445, 463; 951 NW2d 704 (2020). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2009).

First, respondents argue that they were not informed of their right to petition a court to invalidate foster care placement in proceedings to terminate their parental rights. However, respondents do not identify who should have provided them notification. Further, although respondents provide background of the ICWA, and quote excerpts from our Supreme Court's decision in *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012), respondents do not provide a thorough, organized argument in order for this Court to conduct a proper legal analysis of this issue. Respondents "cannot simply assert an error or announce a position and then leave it to this Court to discover and rationalize the basis for [their] claims, or unravel and elaborate for [them their] arguments, and then search for authority either to sustain or reject [their] position. *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012) (quotation marks and citation omitted).

Nevertheless, as our Supreme Court explained, 25 USC 1914 is ICWA's enforcement provision, and "provides a powerful collateral remedy for violations of ICWA's key provisions." *In re Morris*, 491 Mich at 100-101. 25 USC 1914 states:

> Any *Indian child* who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody *such child* was removed, and the *Indian child's* tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of [25 USC 1911, 25 USC 1912, and 25 USC 1913]. [Emphasis added.]

The Supreme Court further explained that 25 USC 1914 "gives standing to the Indian child, the parents and the Indian custodians of the Indian child, and the Indian child's tribe." *Id.* at 101 n 12. While several parties may bring an action under 25 USC 1914, "any such action is prefaced on the condition that the child meets the definition of an 'Indian child' found in 25 USC 1903(4)." *Id.* An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member

[9] Respondents raise the same issues from the same facts and the same decision terminating their parental rights to EJB, KAB, and KMB.

[10] Of note, neither respondent addressed the MIFPA in their respective brief.

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 USC 1903(4).

Here, the Cherokee Nation, United Keetoowah Band of Cherokee Indians, and the Eastern Band of Cherokee Indians each determined that EJB, KAB, and KMB are not members of their respective tribe or eligible for membership. These determinations were provided in written correspondence to Rader in 2017, and again on March 15, 2021, when the Cherokee Nation resolved its omission of KMB from its September 19, 2017 correspondence to Rader. Because of this, EJB, KAB, and KMB are not "Indian" children as defined in 25 USC 1903(4). Therefore, 25 USC 1914 does not apply to the facts of this case.

Next, respondents contend that they were not provided notice pursuant to 25 USC 1912(a). Respondents offer no legal analysis for this notice argument, nor do they cite the trial court record in support of it. Again, this Court will not expound respondents' position or perform its own research in order to justify respondents' position. *Mitchell*, 296 Mich App at 524.

Lastly, respondents argue that the ICWA is flawed,[11] and also question the thoroughness of the search conducted by the Cherokee Tribes to determine membership eligibility for EJB, KAB, and KMB. Respondents also assert that under ICWA, a parent is afforded the right to petition an Indian tribe. But respondents premise this assertion on the false notion that their minor children have Native American heritage. In addition, respondents do not cite any mandatory or persuasive authority in support of this alleged procedural right of parents claiming Native American heritage. Simply announcing a position is insufficient, and falls short of what is an acceptable presentation before this Court. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, the record does not support respondents' claim that the tribes did not engage in a meaningful review of possible tribal membership for EJB, KAB, and KMB. Respondents' representation that the tribes merely confirmed receipt of Rader's correspondence advising the tribes of the pending child protective proceedings is untrue. The Cherokee Nation, United Keetoowah Band of Cherokee Indians, and the Eastern Band of Cherokee Indians each acknowledged receipt of Rader's notice, stated that they had examined their tribal records, enrollment records, and tribal registries, and concluded that EJB, KAB, and KMB are not Indian children. Such facts are obvious upon a simple cursory review of the documents presented by DHHS at the April 15, 2021 hearing and admitted as evidence by the trial court referee.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola

[11] Respondents offer no substantive analysis of this argument, and instead appeal to public policy. As such, this is a question more appropriate for our federal and state legislatures. See *Terrien v Zwit*, 467 Mich 56, 70; 648 NW2d 602 (2002).