STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANGELA GAIL COLE, Minor.

DEPARTMENT OF HUMAN SERVICES, f/k/a FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CODY DARRYLL BIGJOHN, JR.,

Respondent-Appellant.

UNPUBLISHED
November 17, 2005

No. 262918
Isabella Circuit Court
Family Division
LC No. 00-004025-NA

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Respondent Cody BigJohn appeals as of right from the trial court order terminating his parental rights to the minor child, Angela Cole (d/o/b 2/6/04), under MCL 712A.19b(3)(g) (failure to provide proper care or custody). Because eligibility for Tribe membership is for the Tribe to determine, and because the trial court applied the incorrect standard in its termination of parental rights analysis, we reverse in part and remand; however, we do not disturb the trial court's finding regarding the qualification of the expert witness in question.

Respondent first argues that the trial court erred when it concluded that Angela was not an "Indian child" under the Indian Child Welfare Act (ICWA), 25 USC 1901, *et seq*. rather than deferring to the Tribe's findings that she was eligible for membership. Interpretation of the ICWA is a question of law, reviewed de novo. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005); *In re IEM*, 233 Mich App 438, 443; 592 NW2d 751 (1999). Termination of parental rights for qualified Indian children is subject to different procedures and the beyond a reasonable doubt standard. The federal standard requires evidence "beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody . . . is likely to result in serious emotional or physical damage to the child." 25 USC 1912(f); MCR 3.980(D). See *Fried, supra* at 539; *In re Elliott*, 218 Mich App 196, 209-210; 554 NW2d 32 (1996).

An "Indian child" is defined in 25 USC 1903(4) 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." (Emphasis added.) "[I]t is for the tribe to determine whether a child is an 'Indian child.'" *Fried, supra* at 540, citing *In re NEGP*, 245 Mich App 126, 133-134; 626 NW2d 921 (2001).

The trial court relied on a March 21, 2005 letter from Pauline Bolton, an enrollment officer for the Little Traverse Bay Band of Odawa Indians (LTBB),[1] in finding that Angela was not eligible for membership. But the letter explicitly stated:

> Angela Gail Cole is eligible for membership under the tribal constitution adopted by the tribe in an election conducted by the U.S. Department of the Interior on February 1st of 2005, and approved by the Secretary of the Interior by operation of law on March 18th, 2005. Enrollment can be complete any time after the swearing in of the new elected official which is scheduled to take place on September 11th, 2005. After September 11th the enrollment staff will assign Angela a number and complete the file for enrollment commission review and later a report will be submitted to tribal counsel for approval. It is at that tribal counsel meeting that Angela Cole -- Angela Gail Cole will officially become a member and she will be notified with an acceptance letter and membership card.

The court went on to state after speaking with James Bransky, general counsel for the Tribe, that the Tribe was operating under an old constitution, and that "under the old constitution Angela Cole would not be eligible for membership." The court further stated that Bransky informed him that Angela would be eligible for membership under the new constitution and that would take effect when "the new tribal counsel is elected and sworn in on September 11th, 2005."

The reason Angela was not eligible under the former standards is not clear from the record. Although, plainly, the Tribe wrote in its letter that Angela "is eligible for membership" under the Tribe's recently adopted constitution, and Angela was going to be admitted when the new tribal government took office in September 2005. And as respondent points out, the statute does not say that the child must be eligible or enrolled on the day of the hearing, only that she must be "eligible." The trial court erred when it found that the facts did not support the Tribe's determination regarding the child's status, because in effect, the trial court "second-guessed" the Tribe's conclusion. The law is clear that eligibility is for the Tribe to determine. *Fried, supra* at 540. Further, the ICWA is to be construed in light of its purposes, which include protecting the best interests of Indian children and promoting the stability and security of Indian tribes and families. 28 USC 1902; *In re Kreft*, 148 Mich App 682, 688; 348 NW2d 843 (1986).

Next, respondent argues that while the facts arguably supported termination of his parental rights by clear and convincing evidence, they do not support such action under the proper beyond a reasonable doubt standard of 25 USC 1912(f). Respondent's parental rights were terminated under MCL 712A.19b(3)(g).[2] While clear and convincing evidence is required

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[1] The record reflects that respondent father is one-fourth LTBB/Odawa and one-half Lac du Flambeau Ojibway.

[2] MCL 712A.19b(3)(g) provides:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(continued…)

to terminate parental rights under MCL 712A.19b(3)(g), *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999), the ICWA requires evidence "beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child" to terminate parental rights. 25 USC 1912(f). A similar provision appears in MCR 3.980(D).

After reviewing the record and applying MCL 712A.19b(3)(g), we are convinced the court's findings were not clearly erroneous. Record evidence established that clear and convincing evidence supported termination of respondent's parental rights under subsection (g), because respondent failed to provide proper care and custody and it was unlikely that he could do so within a reasonable time considering the child's age. However, in reviewing the record, we also conclude that the trial court applied the incorrect standard in its analysis. Under the circumstances of this case, the trial court was also bound to follow the standard enunciated in 25 USC 1912(f). MCR 3.980(D); *In re Elliott, supra* 209-210. For that reason, we must remand this issue to the trial court so it can properly review the record and make specific findings regarding whether the evidence satisfied the applicable beyond a reasonable doubt standard set out in 25 USC 1912(f). *Id*.

Finally, respondent argues that the expert witness called by petitioner, Allie Greenleaf Maldonado, assistant general counsel and a member of LTBB, was not qualified for purposes of the ICWA to testify as an expert. Questions of law under the ICWA are reviewed de novo. *Fried, supra* at 538. The ICWA provides in pertinent part in 25 USC 1912(f):

> No termination of parental rights may be ordered in such proceeding 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.

A similar provision appears in MCR 3.980(D).

The expert witness provision of 25 USC 1912(f) was construed in *In re Kreft, supra* at 689-690, to include expertise beyond ordinary social worker qualifications, and to require only one expert witness. The *Kreft* Court quoted the following from guidelines of the US Department of the Interior, Bureau of Indian Affairs:

(…continued)

* * *

> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

> Persons with the following characteristics are likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
>
> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child rearing practices.
>
> (ii) A lay expert witness having substantial experience with the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty. [*In re Kreft, supra* at 689-690, quoting 44 Fed Reg 67593, § D.4(b).]

Maldonado testified that, as a member of the LTBB, she was raised with traditional Native American religious practices and had learned traditional practices from her great uncle and the elders of the tribe. The trial court qualified Maldonado "as an expert in the area of her tribe's tribal traditions and family practices, child rearing practices." While Maldonado was an attorney and had not testified as an expert in these areas before, she was a member of the LTBB, had studied tribal traditions and practices, and had knowledge far beyond that of an ordinary layperson. See MRE 702. Further review of the record reveals that Maldonado did not opine on whether placing Angela in respondent's custody was likely to result in serious emotional or physical damage to the child. We conclude the trial court did not err when it qualified Maldonado as an expert under the ICWA. *In re Kreft, supra* at 689-690.

The order terminating respondent's parental rights is affirmed in part, reversed in part, and the case is remanded for application of the ICWA. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly