STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ENM, Minor.

MARIA ANN DEBACKER,

Petitioner-Appellee,

and

ENM,

Appellee,

v

NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS,

Intervenor-Appellant.

UNPUBLISHED
November 13, 2012

No. 310128
Delta Circuit Court
Family Division
LC No. 11-001855-AO

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Intervenor-appellant, Nottawaseppi Huron Band of Potawatomi Indians (NHBPI), appeals the trial court's order denying its motion to intervene and its order finalizing the adoption of the minor child, ENM, by appellee, Maria DeBacker. Specifically, NHBPI challenges the trial court's ruling that the Indian Child Welfare Act, of 1978 (ICWA), 25 USC 1901 *et seq*., does not apply to these proceedings because ENM is not an "Indian child" within the meaning of the act. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

The child, ENM, was born on January 7, 2011. The family court terminated the parental rights of ENM's father on June 15, 2011, and terminated the parental rights of ENM's mother, Angel Micheau, on July 7, 2011. Ms. Micheau appealed the termination order and this Court affirmed the order in an unpublished decision, *In re Micheau*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2012 (Docket No. 305467). This Court described the repeated abuse ENM endured at the hands of Mr. and Ms. Micheau, which resulted in severe

burns, injuries to her upper lip, and fractures to her forearm, clavicle, and ribs. *Id*. Appellee, Ms. DeBacker, began to care for ENM almost immediately after she was removed from the Micheau home.[1]

During the initial termination proceedings, the family court learned that ENM might be an Indian child, and it ordered the Department of Human Services (DHS) to provide notice to various Indian tribes and to otherwise follow the criteria under the ICWA. The court also called an Indian expert to testify regarding the removal and placement of ENM. No family members agreed to act as a permanent placement for the child, and other Indian tribes indicated they had no affiliation with ENM. NHBPI was aware of the termination proceedings by June 14, 2011, but evidence failed to show ENM was an Indian child for purposes of the ICWA, under which a tribe may assert an interest in a termination proceeding if the proceeding involves an Indian child. 25 USC § 1903(1). An "Indian child" is defined by 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." See also, MCR 3.002(5). ENM was not a member of an Indian tribe and neither biological parent was a member of a tribe, though counsel for NHBPI asserted that she might be able to show that ENM is an Indian child within a few days. NHBPI did not make any such showing, and also acknowledged that enrollment in the NHBPI tribe was closed. Thereafter, as noted above, the trial court terminated the Micheaus' parental rights under state law.

On November 2, 2011, Ms. DeBacker filed a petition to adopt ENM. Ms. DeBacker is not related to the Micheaus and is not Indian, but she cared for ENM since ENM was removed from the Micheau home at three months old. By all accounts, ENM was continuing to heal from the injuries inflicted by the Micheaus and was, indeed, thriving in Ms. DeBacker's care. After the trial court held a hearing on the petition and reviewed reports from Child and Family Services, it formally consented to Ms. DeBacker's adoption of ENM on February 8, 2012. However, before the hearing to finalize the adoption, NHBPI filed a notice of intent to intervene on February 27, 2012. NHBPI submitted an enrollment statement showing that, after Ms. Micheau's parental rights were terminated to ENM, Ms. Micheau enrolled as a member of the Saginaw Chippewa Indian Tribe on August 2, 2011.[2] According to NHBPI, it learned about Ms. Micheau's enrollment on February 23, 2012. NHBPI argued that, by virtue of Ms. Micheau's enrollment in the Saginaw tribe, ENM qualifies as an Indian child for purposes of the ICWA. While counsel for NHBPI again acknowledged that enrollment in the NHBPI tribe remained closed, she asserted that ENM is *eligible* for enrollment in the NHBPI tribe, and the court must, therefore, follow the adoptive placement preferences in the ICWA, which gives priority to extended family members and other Indian families. 25 USC 1915(a). According to NHBPI, Ms. Micheau's half-sister, also a member of the Saginaw Chippewa Indian Tribe, expressed a

[1] A jury later convicted Ms. Micheau of first-degree child abuse and we take judicial notice that she was sentenced to a term of imprisonment.

[2] The Saginaw Chippewa Indian Tribe has denied that ENM is eligible for membership in its tribe.

willingness to adopt ENM. NHBPI did not serve Ms. DeBacker with its notice of intent to intervene.

The trial court held a hearing on NHBPI's motion on April 4, 2012, at which ENM's guardian ad litem and NHBPI's counsel appeared. The court also took testimony from Sandy Blair, the "enrollment specialist" for NHBPI, on the specific issue of whether ENM is eligible for membership in the NHBPI tribe. Ms. Blair testified that the only criteria NHBPI uses to determine eligibility for membership is whether the person has an ancestor on the 1904 Taggart Indian Census Roll. Specifically, Ms. Blair stated, "[t]here is no minimum blood quantity to be a member here, you just have to be able to trace your family to that Roll." An unnamed person submitted a "family tree" to Ms. Blair, which was the evidence she used to trace ENM to the Taggart Roll. The family tree is a form, DHS-120, on which a person sets forth a child's biological family history. Ms. Blair testified that the form showed one descendent in particular, ENM's maternal great-grandfather, whom she could trace to the Taggart Roll, but she also believed she could trace three of ENM's ancestors to the Roll.

Ms. Blair acknowledged that an actual application for membership in the NHBPI tribe is far more rigorous than a determination of Indian child status under the ICWA. An applicant for membership must show an ancestral link to someone on the Taggart Roll with documentation, including all birth certificates, death certificates and, if applicable, marriage licenses of the applicant and ancestors to document lineage to someone on the roll. She conceded that no such documentation is required for purposes of ICWA inquiries and that, here, a family tree was sufficient to establish that ENM is eligible for membership in the NHBPI tribe. She further acknowledged, however, that should she apply, ENM would not necessarily be accepted for membership without further documentation and investigation.

Ms. Blair also testified that the NHBPI tribe decided to close enrollment during a federal audit and that enrollment has been closed "for the last few years." She further testified that enrollment would remain closed because the tribe was holding elections and working on a new enrollment ordinance because the tribe passed a new constitution, but that this would not impact eligibility for membership in the tribe. Ms. Blair explained that the tribe holds onto applications and they will be processed when enrollment reopens, which she hoped, but could not guarantee, would happen sometime soon.

At the hearing, the guardian ad litem objected to NHBPI's intervention and argued that the court had already ruled that the ICWA did not apply. She further noted that Ms. Micheau joined an entirely different tribe than the NHBPI tribe and that the record lacks sufficient evidence of how ENM can be traced to the NHBPI tribe. According to the guardian ad litem, NHBPI should not be permitted to intervene at such a late date when extensive efforts were made to locate an interested tribe, no family expressed an interest in adopting ENM, and ENM was in foster care with Ms. DeBacker for more than a year.

In considering the arguments, the trial court observed that NHBPI had no standing to intervene during the termination portion of the proceedings because ENM was not shown to be an Indian child at that time and it is a separate question whether NHBPI may intervene after the court consented to the adoption by Ms. DeBacker. The court acknowledged Ms. Micheau's enrollment in the Saginaw Chippewa Indian Tribe, but expressed concern about whether ENM

"is" eligible for membership in NHBPI when enrollment has been closed for years and there is no clear indication of when it might reopen. The court also questioned how the tribe could have two standards—one for eligibility determinations under the ICWA, which requires no supporting documentation, and one for actual membership, which requires a significant amount of verifying documentation that must be examined by the tribe before membership is actually granted.

On April 11, 2012, the trial court issued a written opinion and order. In it, the court thoroughly set forth the history of the proceedings. The court asserted that, while it is for the tribe to decide who is eligible for membership, NHBPI claims different standards for tribal purposes and for purposes of the ICWA, and it is for the court to determine whether the ICWA applies. Citing as persuasive a case from the United States Court of Appeals for the Tenth Circuit, *Nielson v Ketchum*, 640 F3d 1117 (CA 10, 2011), the court ruled that NHBPI "has no authority to make a determination for ICWA purposes while retaining the right to make a separate determination for actual membership into the tribe." The court also ruled that, because enrollment in the NHBPI tribe is closed, no one, including ENM, is eligible for membership at the present time and that "[t]he clear meaning of 'is' does not include being eligible at some time in the future . . . ." Accordingly, the trial court ruled that ENM is not an "Indian child," the ICWA does not apply, and NHBPI may not intervene in the adoption proceeding.

II. DISCUSSION

As our Supreme Court recently stated in *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012):

> Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). A court's factual findings underlying the application of legal issues are reviewed for clear error. *People v LoCicero (After Remand)*, 453 Mich 496, 500; 556 NW2d 498 (1996).

"Our primary goal when interpreting statutes is to discern the intent of the Legislature." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). "If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted." *Id.* at 260.

The "ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children." *In re Morris*, 491 Mich at 99. As one example, pursuant to 25 USC 1911(c), "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." See also, MCR 3.905(D). As discussed, the family court ruled that, during the termination stage of the proceedings, the ICWA did not apply because, after fully complying with the notice requirements under the ICWA, ENM was not shown to be an Indian child. This ruling is not in dispute. However, contrary to NHBPI's position, the plain language of 25 USC 1911(c) does not state that a tribe may intervene as of right during post-termination adoption proceedings. Rather, the statute plainly provides that tribal intervention as of right is in foster care placement and termination proceedings.

Nonetheless, as stated above, we recognize that the ICWA applies to the adoptive placement of an Indian child, as set forth in 25 USC 1915(a), which states that, "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." Thus, if the ICWA applies, it appears intervention would be appropriate because NHBPI "claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . . ." MCR 2.209(A)(3).

This case presents an unusual set of facts because, not only did the biological mother of the child join an Indian tribe only after her parental rights were terminated, an unrelated tribe filed its notice to intervene after failing to establish application of the ICWA during the termination proceedings and after the adoption was already approved by the court. We are also well aware that Ms. DeBacker has now cared for ENM for more than a year and a half, and that ENM was just three months old when she was placed in Ms. DeBacker's home. Nonetheless, we take seriously the purpose behind and requirements of the ICWA and, as did the trial court, address the question here with serious consideration of those principles.

It is well settled that "only the Indian tribe can determine its membership." *In re Morris*, 491 Mich at 100. However, it is for the court to interpret the ICWA as a matter of law and to take testimony about the application of ICWA. Where, as here, the trial court correctly determined that the ICWA did not apply during the termination proceedings and validly consented to the adoption, where membership in the tribe was closed, with no date on which it would reopen, where the child did not meet actual membership criteria, and where the tribal representative applied a significantly lesser standard for eligibility, fully acknowledging that her opinion about the child's eligibility was only for ICWA purposes, we hold that the court correctly ruled that ICWA does not apply to invalidate the adoption of ENM by Ms. DeBacker in favor of the placement preferences in the act.

As discussed, ENM was not an Indian child when the court formally consented to Ms. DeBacker's adoption of ENM and, in fact, no one was eligible for membership in the tribe because enrollment was closed. The ICWA requires that the child "*is* eligible for membership in an Indian tribe . . . ." 25 USC § 1903(4) (emphasis added), and we agree with the trial court that "[t]he clear meaning of 'is' does not include being eligible at some time in the future . . . ."

Further, the statute does not in any manner contemplate that a tribe may ignore its own membership criteria to declare a child an Indian child only for purposes of the ICWA. Again, Ms. Blair conceded that eligibility for actual membership is not based merely on a family tree submitted by an unidentified person—which is all she used to testify about ENM's eligibility—but on significantly more documentation and investigation. In addition to the fact that no one could enroll for the prior "few years" and there was no certainty about enrollment in the future, again, Ms. Blair testified that actual eligibility depends on documentation and investigation not submitted or conducted here. And, though Ms. Blair repeatedly testified that membership eligibility is based solely on the ability to trace an ancestor to the 1904 Taggart Roll, this is not consistent with the tribe's constitution that was in place at the time the court considered the issue. Indeed, the constitution cited by NHBPI provides that a potential member must also have

Nottawaseppi Huron Band of the Potawatomi blood. While no *quantity* of NHBPI blood is specified in the constitution, the fact remains that, when Ms. Blair testified, NHBPI required for membership, not simply an ancestor on the 1904 Taggart Roll, nor simply Potawatomi blood, nor Huron Potawatomi blood, nor blood from another related band, but Nottawaseppi Huron Band of the Potawatomi blood. This additional enrollment criteria suggests not only that the 1904 Taggart Roll may include people who are not Nottawaseppi Huron Band of the Potawatomi Indians, but specifies a particular blood requirement that was simply not addressed by Ms. Blair in her testimony about ENM's eligibility for membership in the tribe. Further, while ENM's great-grandfather may have been a member of the tribe as an ancestor traceable to the Roll, the basis for his membership in the tribe is unknown and it does not necessarily follow that ENM has NHBPI blood. As noted, Ms. Blair testified that enrollment remained closed because the tribe was in the process of revising its ordinances to reflect new constitutional requirements but, again, did not disclose the blood requirement and simply said she did not think the new constitution or ordinances would impact membership eligibility. However, it defies reason to suggest that this tribal constitution requirement would have no bearing on eligibility for membership in the tribe.

As did the trial court, we find the reasoning in *Nielson* persuasive. *Nielson*, 640 F3d 1117. In *Nielson*, the biological mother, Britney Nielson, relinquished her parental rights to her child, CDK, the day after she gave birth. *Id*. at 1118-1119. At the same time, she consented to the adoption of CDK by Sunny and Joshua Ketchum. *Id*. at 1119. At the hearing, Ms. Nielson's mother said she was enrolled in an Indian tribe, but that she did not enroll Britney or her other children in the tribe. *Id*. Months later, Ms. Nielson sought to invalidate the adoption and the Cherokee Nation intervened on her behalf. *Id*. at 1119-1120. They cited an internal rule of the Cherokee Nation that provided that "'every newborn child who is a Direct Descendant of an Original Enrollee shall be automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following the birth of the child.'" *Id*. at 1120, quoting Chapter 2, Section 11A of the Cherokee Nation Citizenship Act. Similar to Ms. Blair's explanation of tracing a child to the Taggart Roll for ICWA purposes, an "original enrollee" under the Cherokee Citizenship Act was anyone listed on the Dawes Commission Rolls, also established around the turn of the 20th century. *Id*. at 1120 n 2. And, similar to this case, the Cherokee tribe did not require an application or request for membership, nor any supporting documentation for a child to qualify under the rule. *Id*. at 1120.

According to Ms. Nielson, the Cherokee Citizenship Act made CDK an Indian child at birth and the court erroneously failed to apply the ICWA rules for voluntary adoptions. *Id*. The 10th Circuit disagreed and ruled that the ICWA did not apply because the Citizenship Act could not operate to make CDK an "Indian child" for purposes of the federal statute. *Id*. at 1124. While acknowledging a tribe's right to define its own membership for tribal purposes, it may not seek to define membership differently only for purposes of the ICWA. *Id*. The court concluded that "[t]he tribe cannot expand the reach of a federal statute by a tribal provision that extends automatic citizenship to the child of a nonmember of the tribe." *Id*. While *Nielson* involved the withdrawal of voluntary consent to adoption and the question of whether the child was a *member* of the tribe, rather than whether the child was *eligible* for membership, the court's conclusion is persuasive where, as here, a tribe seeks to "expand the reach" of the ICWA by applying a

different standard to meet the ICWA criteria to a child with no parental ties to the tribe when actual membership requirements differ.[3]

For the reasons set forth above, we agree with the family court's thorough and well-reasoned opinion holding that the ICWA does not apply, and affirm its denial of NHBPI's motion to intervene.[4]

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly

[3] We decline to address NHBPI's argument regarding an alleged duty owed by DHS to ENM on the basis of a settlement with the Saginaw Chippewa Indian Tribe, as it was not raised before or decided by the family court. *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010).

[4] While we hold that the court correctly concluded that the ICWA did not apply, we also agree with Ms. DeBacker that her due process rights were violated when she had no opportunity to be heard or challenge the intervention of NHBPI, which occurred after the court consented to her adoption of ENM. MCL 710.43. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (citations omitted). Ms. DeBacker was an interested party, but was not provided notice of the hearing, was not represented by counsel, and was not afforded a fair or meaningful opportunity to be heard.