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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA09-504

Opinion Delivered September 30, 2009

DAWN MASTERSON-HEARD and JAMES HEARD APPELLANTS	APPEAL FROM THE MARION COUNTY CIRCUIT COURT [NO. JV07-45-2]
V.	
ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	HONORABLE GARY ISBELL, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

Appellants Dawn Masterson-Heard and James Heard appeal from an order terminating their parental rights in K.H. (born July 3, 2006). They do not challenge the sufficiency of the evidence to support the termination order. Instead, they argue that the Arkansas Department of Human Services ("DHS") did not meet the notice requirements of the Indian Child Welfare Act ("ICWA"), which provides enhanced substantive and procedural safeguards in termination cases involving Indian children. Appellants also argue that the circuit court failed to make an express finding of the ICWA's applicability. We affirm.

On June 1, 2007, James Heard appeared at a DHS office with K.H. seeking legal advice. James told DHS workers that he had no place to live and that he was afraid of K.H.'s mother, Dawn Masterson-Heard. James also said that Dawn had hit K.H. and thrown her

against a wall, and that Dawn spoke of suicide. According to a DHS affidavit, James exhibited an "impaired" thought process, and his conversation was rambling and disjointed. DHS placed a seventy-two-hour hold on K.H., and the circuit court granted emergency custody to DHS on June 5, 2007. K.H. remained in DHS custody for approximately twenty months while DHS provided services to appellants. In February 2009, the circuit court terminated appellants' parental rights after finding that James had engaged in violent and aggressive behavior in the home while K.H. was present; that Dawn could not maintain steady employment and was fired for stealing from her last job; and that the couple did not obtain appropriate housing or follow recommendations regarding counseling and medications.

At the outset of the case in 2007, James claimed that he was eligible for membership in several Indian tribes. During the termination hearing in January 2009, he invoked the ICWA and produced a membership card from the Western Cherokee Nation of Arkansas and Missouri. The circuit court heard evidence on the termination issue but postponed its ruling for ten days to allow briefs on the question of whether the Western Cherokee Nation of Arkansas and Missouri was federally recognized for purposes of the ICWA. The court received no additional evidence or briefs on the matter and entered the termination order approximately thirty days later. Appellants now argue that the court failed to comply with the ICWA.

The ICWA, 25 U.S.C. §§ 1901-1963 (1995), was enacted by Congress in 1978. The Act establishes minimum federal standards for the removal of Indian children from their

families and the placement of Indian children into foster or adoptive homes. Congress found that an alarmingly high percentage of Indian families were torn apart through the removal of Indian children by the non-tribal public and private agencies, and that an alarmingly high percentage of such children were placed in non-Indian foster and adoptive homes. 25 U.S.C. § 1901(4). Congress further determined that the states often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities. 25 U.S.C. § 1901(5). Consequently, the Act provides that, in any state proceeding for the termination of parental rights to an Indian child, the state court shall transfer the case to the Indian child's tribe or, if the tribe declines the transfer, permit the tribe to intervene in state court. *See* 25 U.S.C. § 1911. The Act also provides that a court cannot terminate parental rights to an Indian child unless there is evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. *See* 25 U.S.C. § 1912(f).

In order to serve these interests, the ICWA requires the party seeking termination of parental rights to an Indian child to notify the child's tribe of the proceeding. The pertinent part of the Act reads as follows:

> 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 Indian child's tribe*, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention. If the identity or location of ... 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 tribe. *No … termination of parental rights proceeding shall be held until at least ten days after receipt of notice* by the ... tribe or the Secretary.

25 U.S.C. § 1912(a) (emphasis added).

Appellants argue that the circuit court violated section 1912(a) because the court knew or had reason to know that K.H. was an Indian child and terminated appellants' parental rights without notice to the child's tribe. We conclude that the ICWA did not govern these proceedings.

The ICWA applies only in cases involving an "Indian child." An Indian child is an unmarried person under age eighteen who is either 1) a member of an Indian tribe, or 2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. 25 U.S.C. § 1903(4). To qualify as an Indian child under this definition, the child or its parent must be a member of an "Indian tribe." The Act defines an Indian tribe as

> any Indian tribe, band, nation, or other organized group or community of Indians *recognized as eligible for the services provided to Indians by the [Secretary of the Interior]* because of their status as Indians ....

25 U.S.C. § 1903(8) (emphasis added).

At the termination hearing, James, as K.H.'s parent, claimed membership in the Western Cherokee Nation of Arkansas and Missouri. However, that tribe is not an "Indian tribe" for purposes of the ICWA.[1] The Western Cherokee Nation of Arkansas and Missouri

[1]Earlier in the case, James claimed membership eligibility in other tribes, including the Choctaw. However, at the termination hearing, he asserted membership only in the Western Cherokee Nation of Arkansas and Missouri, and presented his membership credentials accordingly. James's counsel mentioned the Choctaw tribe prior to the hearing, but the court

does not appear on the federal government's list of tribes eligible to receive federal services. *See* 73 Fed. Reg. 18553-57 (Apr. 4, 2008); 72 Fed. Reg. 13648-52 (Mar. 22, 2007). If a child's or a parent's tribe does not appear on the list of tribes eligible to receive federal services, the ICWA is not applicable. *In re Adoption of A.M.C.*, 368 Ark. 369, 246 S.W.3d 426 (2007).

Because the ICWA clearly does not apply in light of Mr. Heard's tribal affiliation, he can show no prejudice from the court's failure to give notice to the tribe. An appellant must show prejudice to obtain reversal. *See Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). Furthermore, a remand by this court for the purpose of serving ICWA notice would have no practical effect, given that the tribe is not eligible for notice under the ICWA. We do not render advisory opinions or answer academic questions. *Yu v. Metro. Fire Extinguisher Co.*, 94 Ark. App. 317, 230 S.W.3d 299 (2006). Accordingly, we affirm the termination order.

Appellants also argue that the circuit court should have ruled on the applicability of the ICWA. The court impliedly did so by asking for briefs on the ICWA's applicability and, when no additional evidence or briefs were received, entering the termination order.

Affirmed.

GLOVER AND HENRY, JJ., agree.

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stated that it had received a report from the Choctaw Nation and that K.H. had no history with that tribe.