

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LINDA DAVIS,

Plaintiff-Appellant,

and

RICHARD JONES and CAROLYN JONES,

Intervening Plaintiffs-Appellees,

v

TIMOTHY BEVERIDGE,

Defendant.

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UNPUBLISHED

January 24, 2003

No. 242299

Iosco Circuit Court

LC No. 99-002099-DM

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff, the mother of Jewel Beveridge,<sup>1</sup> contends that the circuit court's failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, deprived the court of jurisdiction to award custody of Jewel to Carolyn and Richard Jones, Jewel's paternal grandmother and step-grandfather. Plaintiff also contends that the trial committed several errors that resulted in the erroneous decision to award custody of Jewel to the Joneses. We affirm.

Basic Facts and Procedural History

Plaintiff filed a complaint for divorce from defendant in September 1999. Plaintiff and defendant are the biological parents of Jewel Beveridge. In November 1999 plaintiff and defendant consented to the appointment of the Joneses as Jewel's limited guardians.<sup>2</sup> A

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<sup>1</sup> Jewel's date of birth is August 6, 1998.

<sup>2</sup> There is no evidence in the record that plaintiff revoked her consent to the limited guardianship. Although there is no formal requirement for a revocation of consent to foster care placement, the Bureau of Indian Affairs guidelines require the parent or Indian custodian to file a formal revocation of consent with the court where the consent form was filed. BIA Guidelines, E.3, at 67594. Further, there is no evidence to support a finding that plaintiff sought to revoke consent

(continued...)

judgment of divorce dated May 10, 2000, awarded temporary custody of Jewel to the Joneses “pending further order of the Court.”

On April 12, 2001, the Joneses filed a “Motion to Modify Judgment and Request for Friend of the Court Investigation and Report.” The motion cited the following pertinent allegations in support of the Joneses’ request for custody:

1. The petitioners received third party custody of the minor child through the divorce judgment filed in the case on 10 May 2000.
2. The plaintiff mother was awarded reasonable visitation with minor child.
3. The defendant father was awarded supervised visitation with the minor child.
4. The parents had submitted to a limited guardianship with the Iosco County Probate Court.
5. As of the drafting of this motion, the parents have not complied with the parenting plan.
6. The minor child has resided with the third party grandparents since 1999, which represents most of the child’s life.
7. The parent’s [sic] of the minor child had limited visitation since the commencement of the limited guardianship in [sic] 29 November of 1999.
8. The third party custodians are concerned for the safety of the minor child, if custody were returned to the parents.
9. A Friend of the Court Report and Recommendation for the minor would be appropriate.

In an order dated May 10, 2001, the trial court ordered that custody of the child remain with the Joneses pending psychological evaluations on all parties seeking custody and a Friend of the Court investigation, report, and recommendation regarding custody. On May 11, 2001, plaintiff filed a “Motion to Modify Judgment of Divorce Re: Child Custody” in which she sought sole legal and physical custody of the child.

At a pretrial hearing on February 15, 2002, the following colloquy occurred:

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(...continued)

to the limited guardianship by demanding return of the child before the Joneses were awarded custody in the judgment of divorce. Rather, the record reveals that plaintiff simply filed a motion for custody in the divorce action in response to the Joneses’ motion for custody.

[Plaintiff's Counsel]: There is a legal issue we want to raise. . . . It has to do with the Federal Indian Welfare Rights Act, which limits the Court's choices in placement of the child of Indian heritage, which we believe may not be being complied with right now.

[Defense Counsel]: This is the first this issue has been brought up. It appears that Ms. Beveridge has—or Ms. Davis has, at all times, submitted to the jurisdiction of this Court.

[Plaintiff's Counsel]: Don't disagree with either of those statements, Judge.

\* \* \*

THE COURT: If you want to raise that issues, brief it, and schedule it for hearing.

There is no indication in the record that plaintiff complied with the court's verbal order to brief the issue or that the issue was again addressed in the trial court.

At the custody trial,<sup>3</sup> defendant Timothy Beveridge, Jewel's father, testified that plaintiff hit him in the head with a potted plant in the presence of plaintiff's daughter, Rebecca Davis, and other children. He also testified that plaintiff hit him "a couple times." Defendant further testified regarding an incident in which plaintiff stabbed him in the arm with a knife in the presence of the children following an argument between himself and plaintiff. Defendant opined, however, that plaintiff had close ties with Jewel and that plaintiff was "capable of raising her right now."

Vicki Beveridge, defendant's stepmother, testified that she observed Jewel with the Joneses and that they had a "very warm and loving home" and that Jewel was "very, very bonded to them." Vicki also said that she was aware of Jewel's asthma. She indicated that the asthma attacks she saw Jewel suffer usually occurred within twenty-four hours of Jewel returning from being at defendant or plaintiff's home. Vicki described the Joneses' household as very comfortable and clean, "but lived in" with it being "evident that a child lives there" with "toys and thing around." She said that Jewel had her own room that was very nice and clean and that Jewel had a lot of toys. Vicki also testified that, on August 6, 2000, Jewel's second birthday, plaintiff was at the Joneses' home and plaintiff said, "Yeah, I use marijuana, so what, a lot of people do. A lot of people use it to help them to calm down. It is beneficial."

Carolyn Jones testified that Jewel had lived in her home since July 1999. She said that she and her husband take care of Jewel and that Jewel has her own room. Carolyn also testified that she registered Jewel in Head Start, which Jewel was attending four mornings of the week. She also enrolled Jewel in a swimming class. Carolyn said that there was no drug or alcohol use in her house and that she and her husband did not smoke. She also said that neither of them had any domestic violence in their home. Carolyn indicated that, from August 2001 to the time of

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<sup>3</sup> Trial was held on April 22, April 26, and May 6, 2002.

her testimony, of eighty days when plaintiff was supposed to have visitation time with Jewel, plaintiff only exercised thirty-nine days of visitation. She calculated that, during the entire guardianship, plaintiff exercised thirty-five percent of her allotted visitation. When asked about reasons that plaintiff gave her for not picking up Jewel, Carolyn replied:

I would have to say—there were many. I mean, there was [sic] times where she didn't show up and I'd ask her what happened. She was having a romantic interlude that weekend. She was getting a massage. She was going to aerobics. The most recent ones are that there was too—during Thanksgiving of last year—there was too much chaos in her house.

Carolyn also testified to the following observations of plaintiff at various times:

She would have a very slurred voice, a very drawn out voice. There were occasions where she was not driving when she picked up Jewel. Her significant other or boyfriend would pick Jewel up along with [plaintiff] and [plaintiff] had very dilated eyes, very slurred speech. Admitted to me that she had done marijuana and was doing marijuana.

Carolyn described an incident that occurred probably three or four weeks before her testimony in which she smelled smoke on Jewel's clothing and backpack when she returned from plaintiff's home. Carolyn said that she was fifty-seven years old and that her husband was sixty-four. When asked by her counsel about their age, she said that she did not think "we're too old to handle this job" and that she felt they were in very good health. She also said that they got a lot of support from defendant's stepmother and father. Carolyn thought that they received \$13,000 (presumably per year) from the tribe for Jewel's care, but said that all that money was put in Jewel's trust fund and that they had "not spent a dime" of that money. They had not used any of it for Jewel's care.

Ted Stiger, Ph.D., testified that he evaluated plaintiff on May 29, 2001, Carolyn on August 27, 2001, and Richard Jones on September 4, 2001. He said that the results of plaintiff's evaluation "indicated a great deal of narcissism, self indulgence" and that she had "[i]ssues of being very prone to becoming dependant on others, in particular males." He indicated that plaintiff had "a great deal of accumulated anger and resentment" as well as suspiciousness and mistrust. Her test results were indicative of continued risk "in regard to acting out," meaning having "substance abuse difficulties, getting involved in enmeshed destructive relationships and things like that." With regard to Carolyn Jones, Dr. Stiger concluded that there were "indications of low self-esteem and indications of depressive affect" as well as "a proclivity to become overly dependent on males." However, Dr. Stiger said that Carolyn has a greater degree of emotional stability than plaintiff. Dr. Stiger testified that Richard showed "some indications of being overly passive with some low self-esteem indicators" and that there were "some indications of depressive effect," but no indications of any extreme or severe psychopathology in either of the Joneses. Dr. Stiger indicated that the Joneses did not present risk factors regarding potential abuse or neglect while plaintiff did.

Richard Jones testified that Jewel had resided in his and his wife Carolyn's home since July 1999 and that both he and Carolyn provided care for Jewel. Like Carolyn, Richard testified that Jewel had her own room, that there was no drug or alcohol use in the home, and that he and

Carolyn did not smoke. In short, Richard testified that he once asked plaintiff if she had smoked marijuana on an earlier occasion when he observed her eyes being dilated and her speech as slurred and that she said yes. Richard described a time when he picked Jewel up at plaintiff's house in which there had to be someone smoking there because cigarette smoke "just rolled out" when the door to the house was opened. Richard testified about an incident in which he asked plaintiff how she could go to court, put her hand on the Bible and swear to God to tell the truth, and then not tell the truth. He said that plaintiff said, "It[']s not my God."

Gloria Rouleau-Gerber, a mental health counselor, testified that she provided counseling to plaintiff and met Jewel, but that she had not met the Joneses. Rouleau-Gerber said that she observed plaintiff with her children and that plaintiff has "very strong mothering skills" and "very strong bonding attachment skills" with regard to her children. Rouleau-Gerber testified that, when plaintiff first came to her, she was "an adult child of an abusive history" who had a lot of defensiveness and anger and showed an inability to stand up for her own rights, but that plaintiff had "grown very strong and very capable of problem solving." Rouleau-Gerber indicated that she saw no abuse or neglect in the family of plaintiff and her four children and that she had no reservations about plaintiff becoming the sole custodian of Jewel.

Rebecca Davis, plaintiff's twenty-year-old daughter, testified that plaintiff raised her. Rebecca graduated from high school, was taking college classes, and was employed in a "key carrier" management position with Rite-Aid. Rebecca indicated that she saw plaintiff with her younger siblings and her own child "[a]ll the time" and that plaintiff cared for Rebecca's two-year old son "usually every day, while I go to school at night, and then at night when I work when the day care is closed." Rebecca said that plaintiff taught her son a lot of things and that "he cries to go to her house when we go home." She also described plaintiff's relationship with Jewel as being the same as with the other children except Jewel is not around as much. On cross-examination, Rebecca essentially indicated that she saw plaintiff hit defendant with a pot, but that she did so in self-defense.

Plaintiff testified that she and Jewel are very close and indicated that, during the last two visitations when it was time to return Jewel to the Joneses, Jewel said that she did not want to go. In short, plaintiff indicated that she would use a "time out" as a means of discipline and that, when she was on friendly terms with the Joneses and was at their home, she "really didn't see much discipline." However, plaintiff said that one time Richard told her that he had taken his belt off and threatened Jewel that he would spank her. Although plaintiff did not believe he would really strike Jewel with a belt, she believed that "using that sort of disciplinary action is harmful." Plaintiff has five children, and each child has a different father. Plaintiff indicated that, while she used to smoke inside her house in her bedroom, she started smoking outside her house to avoid exposing her children to the smoke and that she does not allow anyone else to smoke in her house. Plaintiff acknowledged having smoked marijuana. Plaintiff indicated that defendant's arm was sliced by a knife when he tried to hit her while she had the knife in her hand. Plaintiff also indicated that she had violent and/or fearful altercations with "Mr. Forester," a man who she had dated and allowed to move into her home. Plaintiff essentially acknowledged being convicted of four counts of fraud related to receiving money from her Indian tribe for caring for Jewel when Jewel was not living with her. On cross-examination, plaintiff testified that she did not deny having used marijuana since the limited guardianship was in place. She also testified that she was taken to a hospital by ambulance about five months prior

to her testimony for a heroin overdose. She said that was the only time she ever used heroin. She obtained the heroin from “some people at the park” who were “downstate folks” she did not know. Plaintiff testified about an altercation with Forester in which both of them ended up with black eyes. She indicated that the incident in which she threw a plant at defendant involved him previously throwing water on her face, having her “pinned in the bathroom,” and screaming at her.

## I

Plaintiff first argues that the trial court lacked jurisdiction to decide this child custody dispute because it involved the Joneses seeking “foster care placement”<sup>4</sup> of Jewel and, therefore, that 25 USC 1912(a) required notice to Jewel’s Indian tribe, the Saginaw Chippewa Indian Tribe.<sup>5</sup> 25 USC 1912(a), which is part of the ICWA, provides in pertinent part:

In an involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking 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 their right of intervention.

25 USC 1903(1)(i) defines a “foster care placement” for purposes of the ICWA to mean “any action *removing an Indian child from its parent* or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated” (emphasis added). This case does not involve removal of an Indian child from its parent. Here, the Joneses already had custody of the child at the time they filed their motion to modify the judgment of divorce, pursuant to both the limited guardianship and the judgment of divorce. Therefore, this case does not involve a foster care placement proceeding as that term is defined in the act. Because the lower court proceeding was not a “foster care placement” proceeding, it was not subject to the notice requirement of 25 USC 1912(a).<sup>6</sup>

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<sup>4</sup> The ICWA only applies to child custody proceedings in state courts. The ICWA defines a “child custody proceeding” as one of the following: foster care placement, termination of parental rights, preadoptive placements, and adoptive placements. 25 USC 1903(1). This case clearly does not involve the latter three types of proceedings.

<sup>5</sup> Plaintiff’s counsel first mentioned the issue of the ICWA at a February 15, 2002, pretrial hearing. The trial court directed plaintiff’s counsel to brief the issue and file a motion if he wanted to raise the issue. However, no such motion was filed.

<sup>6</sup> Plaintiff’s remaining arguments regarding the ICWA are premised on a finding that this case involves a foster care placement proceeding. In light of our conclusion that this case does not involve a foster care placement proceeding, the ICWA does not apply to this case. Thus, the remainder of plaintiff’s arguments that are based on the ICWA need not be addressed.

## II

Plaintiff argues that the award of custody of Jewel to the Joneses violated plaintiff's general constitutional right to custody of her child. Plaintiff's argument does not challenge the factual findings made by the trial court in its oral opinion expressing its decision to grant custody of Jewel to the Joneses, but rather essentially accepts those factual findings. Rather, plaintiff asserts that those findings were constitutionally insufficient to support awarding custody to the Joneses because the trial court did not find plaintiff to be an unfit parent.

In *Heltzel v Heltzel*, 248 Mich App 1, 27-28; 638 NW2d 123 (2001), this Court stated:

We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person. Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person.

This Court qualified this holding by noting that "it is not sufficient that the third person may have established by clear and convincing evidence that a marginal, though distinct, benefit would be gained if the children were maintained with him." *Heltzel, supra* at 28. Plaintiff cites the United States Supreme Court decision in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000), which specifically involved the constitutionality of a state statute that gave broad discretion to courts to order that third parties have visitation with children, in support of plaintiff's right to raise her child. However, in its more recent decision in *Heltzel*, this Court specifically discussed *Troxel*, and, thus, obviously considered its test for the burden that a third party must meet to prevail over a parent in a child custody dispute to be consistent with *Troxel*. *Heltzel, supra* at 21-23. Notably, while plaintiff cites *Heltzel*, she gives no consideration to the key portion of *Heltzel* that sets forth the amplified clear and convincing standard applicable in this context.

In its oral opinion explaining its decision to grant custody of Jewel to the Joneses, the trial court stated that, "[i]n order for custody to be granted to the limited guardians, the factors must clearly and collectively and convincingly establish that it is in the child's best interest." The trial court likewise stated, "[t]he burden of proof on [the Joneses] is clear and convincing." After a discussion related to the statutory best interest factors, the trial court expressed its "overwhelming opinion" that it was in Jewel's best interest for custody to be granted to the Joneses. The trial court's remarks reflect that it recognized and applied the proper burden of proof in requiring the Joneses to prove by clear and convincing evidence that granting custody of Jewel to them was in her best interests. The trial court did not expressly state that the Joneses showed more than a "marginal" benefit, but it is manifest from the trial court's analysis, including its statement that its "overwhelming opinion" favored the Joneses, that it found far more than a marginal benefit to Jewel from awarding custody to the Joneses. In this regard,

except for the four best interest factors that it weighed equally or found inapplicable, the trial court found every best interest factor to favor the Joneses. Notably, the trial court referred to evidence that drug and alcohol abuse by plaintiff was prevalent and included a hospitalization for a heroin overdose. The trial court stated that plaintiff subjected herself to great risk of harm with her substance abuse including “purchasing of heroine [sic] from a park from an unknown person to her.” Accordingly, we conclude that the trial court’s analysis and the factual findings in support of that analysis were appropriate to allow awarding custody of Jewel to the Joneses without violating the general constitutional right of a parent to custody of a child as against third parties.<sup>7</sup>

### III

Plaintiff maintains that the Joneses lacked standing to seek custody under MCL 722.26b(2) because plaintiff achieved substantial compliance with the limited guardianship plan shortly before trial commenced on April 22, 2002.<sup>8</sup> MCL 722.26b(2) provides:

A limited guardian of a child does not have standing *to bring* an action for custody of the child if the parent or parents of the child have substantially complied with a limited guardianship placement plan regarding the child entered into as required by [MCL 700.5205], or section 424a of former 1978 PA 642. [Emphasis added.]

MCL 72.26b(2) is directed to the circumstances that exist when a motion for custody is filed by a limited guardian because it provides that a limited guardian does not have standing “to bring” an action for custody if the parent or parents have substantially complied with a limited guardianship placement plan. Plaintiff does not argue that she was in substantial compliance with the limited guardianship placement plan when the Joneses brought their action for custody by filing a motion for custody of Jewel on April 12, 2001. Thus, assuming that plaintiff substantially complied with the limited guardianship placement plan shortly before trial, plaintiff has not shown that MCL 722.26b(2) barred the Joneses from bringing their motion for custody because the substantial compliance occurred after the action for custody was brought. In this regard, nothing in the language of MCL 722.26b(2) indicates that, after a limited guardian with standing to bring an action for custody has done so, that standing to continue to pursue the action is lost if a parent subsequently achieves substantial compliance with a limited guardianship

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<sup>7</sup> Contrary to the possible implication of plaintiff’s argument, it is not constitutionally required for a third party to show a parent to be unfit in order to prevail in a child custody dispute. The *Heltzel* panel indicated that the amplified clear and convincing evidence standard discussed above should be applied on remand in that case, which involved a “fit natural mother seeking a change of her child’s custody from an established custodial environment with third persons.” *Heltzel, supra* at 23-24. Thus, it is inherent in the analysis in *Heltzel* that a third party may, in appropriate circumstances, be awarded custody over even a *fit* parent without violating the parent’s general constitutional right to custody of a child.

<sup>8</sup> We note that the Joneses also had custody of the child pursuant to the May 10, 2001, judgment of divorce.

placement plan. This Court should not effectively read such a provision into MCL 722.26b(2) because “a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

#### IV

While plaintiff’s argument might be clearer, it appears that plaintiff is asserting that it was improper for the trial judge acting in this case to consider evidence such as non-transcribed testimony and exhibits presented in the probate court guardianship proceedings involving Jewel.<sup>9</sup> We disagree.

MCL 722.26b(5) provides:

If a child’s guardian or limited guardian brings a child custody action, the circuit court shall request the supreme court in accordance with [MCL 600.225] to assign the probate court judge who appointed that guardian or limited guardian to serve as the circuit court judge and hear the child custody action.

The most plausible explanation for this statutory provision is that the Legislature wished to have the probate judge who presided over guardianship proceedings involving a child also preside over a claim for custody of that child brought by a guardian or limited guardian so that the trial judge could consider evidence presented and impressions formed by the probate judge in the guardianship proceedings. Presumably, the Legislature would not have enacted such a statutory provision if it intended for a child custody action brought by a guardian or limited guardian to be considered by a circuit judge without regard to evidence presented to and impressions formed by the presiding judge during earlier guardianship proceedings. Thus, we conclude that the trial judge could properly consider evidence presented and impressions that he formed at the prior guardianship proceedings.<sup>10</sup>

With regard to plaintiff’s due process argument, she seems to be indicating that she was not able to appropriately respond to evidence presented at the guardianship proceedings. Due process in civil cases requires that a party have the chance to know and respond to the evidence. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). However, from all indications, plaintiff was able to participate in the guardianship proceedings and know the evidence that was presented there. With regard to appellate review by this Court, there appears to be no reason that plaintiff could not have ordered and provided to this Court transcripts of the guardianship proceedings if she concluded that it would have been helpful to her appeal to do so. Thus, we conclude that plaintiff’s due process rights were not violated by the trial court’s consideration of evidence presented during the guardianship proceedings.

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<sup>9</sup> The trial judge in this case is a probate judge who presided at earlier probate court guardianship proceedings related to Jewel and who was assigned to act as a circuit judge in the present case.

<sup>10</sup> Notably, the parties do not address MCL 722.26b(5) in discussing this issue.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald