

IN THE APPELLATE COURT OF THE CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION, PABLO, MONTANA

PEGGY S. KEELE KING,	*	
Petitioner/Appellant,	*	Cause No. <u>AP-01-92</u>
	*	
vs.	*	
	*	
MICHAEL THOMAS KING,	*	<u>O R D E R</u>
Respondent,	*	
	*	
In Re the Matter of	*	
MICHAEL LEO KING and	*	
ADRI MICHELLE ANTOINE,	*	
Minor Children.	*	

This Court has been presented with a "Notice of Appeal and Application for Stay of Underlying Appeal" by Janita and John Hammond, who are the maternal aunt and her husband of the minor children, Michael Leo King and Adri Michelle Antoine, named in the above entitled action. The trial court denied the moving parties intervention in its order dated May 8, 1992. The Hammonds, by and through their counsel, Douglas Anderson, appealed that order to this Court on May 15, 1992. Thereafter, applicants for intervention filed a brief in support of their appeal on June 30, 1992. For the reasons stated below, we affirm the trial court's decision of May 8, 1992 denying the Hammond's intervention in this custody action.

The Hammonds rely primarily on two decisions of the Montana Supreme Court, In re the Matter of M.E.M., 725 P.2d 212 (Mont. 1986), and In the Matter of T.S., 801 P.2d 77 (Mont. 1990), which construed the federal Indian Child Welfare Act (ICWA), 25 U.S.C § 1901 et seq. These decisions are inapplicable to the instant appeal.

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MICHAEL THOMAS KING,	*	<u>ORDER</u>
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In In re the Matter of M.E.M., the district court denied intervention to an Indian aunt of an Indian child in adoption proceedings brought by non-Indian foster parents in state court. There, the parental rights of both parents had been terminated. The Montana Supreme Court reversed the district court ruling and allowed intervention, holding that the aunt had an interest in the adoption proceedings based on the ICWA which "expresses Congress' intention that Indian children be placed with Indian families where that is possible." Id. at 213.

The appeal of the above-captioned case does not involve adoption proceedings of non-Indian foster parents. Rather, it is a custody proceeding involving the natural parents of the minor child Adri. The parental rights of neither parent have been terminated, nor are they at issue on appeal. Nor is this matter in state court. In short, In re the Matter of M.E.M. does not support the Hammonds' petition for intervention.¹

In the Matter of T.S. involved an action by an Eskimo tribe to transfer jurisdiction of an Indian child custody proceeding from state court to tribal court under the ICWA. The Montana Supreme Court noted that in determining the jurisdictional issue under §1911(b)² of the ICWA, it will apply the "best interests of the

¹ Similarly, the Foster Parent Handbook does not support the Hammonds in this case because this is a custody action between the natural parents of Adri, and from all indications, the Hammonds are not in a legal or administrative sense "selected or licensed foster parents."

² As quoted by the Montana Supreme Court, §1911(b) provides in relevant part:

child" test. The court cautioned that the jurisdictional

"best interests of the child" test should not be confused with the "best interest of the child" test applied under §40-4-21, MCA, in custody determinations between parents in a dissolution. It also should not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent-child legal relationships under Title 41, Chapter 3, MCA. Id. at 80.

Unlike In the Matter of T.S., this case does not involve jurisdictional issues, nor is it a child neglect or parental termination action. Applicants for intervention have misapplied the jurisdictional "best interests of the child" test. Because this is not a proceeding to transfer jurisdiction, that test is not applicable here.³ In short, In the Matter of T.S. does not support the Hammonds' petition to intervene.

Finally, the Hammonds assert that under the "current Order of the Tribal Court," Adri has been placed in a non-Indian setting, and that such is contrary to the best interests of the child and the Tribe. The Hammonds reason that when Indian children are separated from their tribe, ultimately both will suffer. This argument is misplaced. In the first instance, the trial court's

In any State court proceeding for the foster care placement of or termination of parental rights to an Indian child not domiciled or residing within the reservation of the child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.... (Emphasis in the original). Id. at 79.

As stated above, the appeal of the above-captioned case is limited to the issue of legal custody of Adri. It is not an adoption or parental termination proceeding, nor is there a jurisdictional issue.

³ Of course, the "best interest of the child test" under §40-4-212, MCA must and will be applied to determine the final outcome of the appeal of the custody of Adri.

order granting custody of Adri to her father, respondent in this action, was stayed by the Chief Judge of the Tribal Court on March 6, 1992, pending the outcome of the appeal. On July 22, 1992, this court affirmed the stay and ordered that it be enforced in all respects. Further, Adri's mother Peggy, an enrolled tribal member residing on the Reservation, presently has legal and physical custody of Adri pursuant to the trial court's December 3, 1991 dismissal of a CPS case as to Adri. The effect of the stay is to retain the status quo of this custody arrangement pending the outcome of the appeal of the custody issue.

The Hammonds also presumably rely on Rule 24(a) of the Federal Rules of Civil Procedure in support of their attempt to intervene in the child custody proceedings. While the basis for intervention as of right under Rule 24(a) is that the applicant's interest may be impaired unless intervention is granted, no absolute right to intervene is accorded unless the application is timely.⁴ 3B

⁴ Rule 24(a)(2) provides for intervention by right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect or impair that interest, unless the applicant's interest is adequately represented by the existing parties." Given enforcement of the stay and pending the outcome of the appeal of the custody issue, the Court is not convinced that the Hammonds are "so situated" that the disposition of the action may as a practical matter impair their interest. Petitioner Peggy Keele King, Janita Hammond's sister, has custody of Adri and shall continue to do so, pending the outcome of the appeal. The record indicates Peggy and Janita reside near each other, and that there is a close relationship between them and Adri, and that the Hammonds spend significant time with Adri. The stay allows this arrangement to continue. Further, petitioner has requested that the Hammonds be granted "substantial visitation" of Adri in order to nurture the bond established between Adri and the Hammonds. For these reasons, the Court is

Moore's Federal Practice, ¶24.13, "At What Stage Will Intervention Be Allowed; Timeliness," (1992). Timeliness is a flexible concept which should be determined in light of all of the circumstances of a particular case. Id. If there has been substantial proceedings in the action, such as motions, depositions and discovery, and the taking of testimony, tardy intervention is usually denied. Id.

The determination of whether an application for intervention is timely or not is within the discretion of the trial court. The trial court's determination of timeliness will be reversed only for an abuse of discretion. Id. We find no such abuse here and therefore affirm the trial court's denial of intervention.

The record indicates that these proceedings have been ongoing since at least early 1990, and were initiated when Adri had already been informally placed with the Hammonds by petitioner. On October 17, 1991, Tribal Family Services moved to dismiss a CPS case involving Adri in order to return Adri to her mother Peggy. On December 3, 1991, the trial court ordered dismissal of the CPS case as to Adri, and full custody of Adri was returned to Peggy.

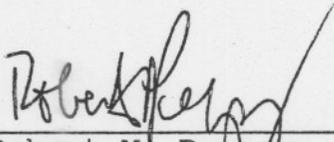
Trial on the issue of the custody of Adri was held on January 15 and 16, 1992. Janita Hammond appeared as one of eighteen testifying witnesses. On February 19, 1992, the trial court entered its decision on the merits. Thereafter, on March 3, 1992 petitioner Peggy S. Keele King filed a notice of appeal regarding the custody of Adri. The appeal has been perfected.

also unconvinced that petitioner as an existing party cannot adequately represent the Hammonds' interest.

The Hammonds' petition for intervention was not filed until April 8, 1992--some two years after the litigation began, and after trial was completed, a decision had been rendered, and the appeal perfected. In short, too much time has elapsed between the time the Hammonds knew or should have known of their interest and the time they moved to intervene. Further, substantial proceedings took place prior to their application.

Given the procedural posture of this case and the discretionary powers of the trial court, this Court affirms the trial court's denial of the Hammond's motion to intervene.

SO ORDERED this 22nd day of July, 1992.



Robert M. Peregoy
Chief Appellate Court Judge