STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JOSEPH ELWOOD ALEXANDER and LINDSEY MARIE ALEXANDER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JAMES ROBERT ALEXANDER,

Respondent-Appellant,

and

VALETA ALEXANDER,

Respondent.

UNPUBLISHED
December 20, 2007

No. 278530
Oakland Circuit Court
Family Division
LC No. 06-716050-NA

Before: Saad, P. J., and Owens and Kelly, JJ.

PER CURIAM.

Respondent[1] appeals as of right from an order terminating his parental rights to his minor children pursuant to MCL 712A.19b(3)(a)(ii) (desertion for more than 91 days by a parent who has not sought custody during that period), (c)(i) (182 days have passed since adjudication and conditions continue to exist), (g) (failure to provide proper care or custody and no reasonable expectation that parent will be able to provide within reasonable time), and (j) (reasonable likelihood that the children will be harmed if returned to the home of the parent). We conditionally affirm but remand for proper notice to any interested Indian tribe pursuant to the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*.

[1] Respondent, Valeta Alexander, did not file an appeal regarding the termination of her parental rights. Therefore, throughout this opinion, we will refer to respondent, James Robert Alexander as "respondent."

I. Basic Facts and Proceedings

This case arises from a petition alleging that (1) respondents continuously left the minor children at the home of their maternal grandmother without advising her of their whereabouts, (2) respondents were unemployed and lacked stable housing, (3) respondents engaged in domestic violence in the presence of the minor children, (4) the maternal grandmother suspected respondents of using drugs, (5) respondents used a false address to obtain assistance from petitioner, Department of Human Services, and (6) respondents failed to cooperate with appointments with petitioner. At the first pretrial hearing, petitioner indicated that respondent had Indian ancestry and was affiliated with the Chippewa Tribe in Standish. However, the trial court record does not reflect whether the tribe was notified of the proceedings. After the minor children were placed in foster care, a parent-agency agreement was adopted. Respondent was incarcerated and when he was released, he failed to comply with the parent-agency agreement. Respondents pleaded no contest to the allegations in the petition, and the trial court terminated their parental rights.

At the best interests hearing, the evidence showed that respondent had recently begun complying with the parent-agency agreement as follows: he had completed substance abuse counseling, he had five negative drug screens during the previous month, he had been attending domestic violence counseling classes, he had been working part-time for two months, and he had completed parenting classes. Respondent admitted that he had not complied with the agreement before the beginning of 2007 because he had been unemployed. Respondent acknowledged that he had significant mental health issues that needed to be addressed, including posttraumatic stress disorder, bipolar disorder, and depression, and a psychological evaluation from the prior year indicated that it would not be appropriate to place the children with him because his issues would not be resolved in the short term. Because the children had been in foster care for 16 months, the trial court found that respondent's recent compliance had begun too late for it to conclude that termination would hurt the minor children.

II. Standard of Review

This Court reviews a trial court's decision to terminate parental rights for clear error. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). If the trial court determines that petitioner established the existence of one or more statutory grounds for termination by clear and convincing evidence, the trial court must terminate respondent's parental rights unless it determines that to do so is clearly not in the children's best interests. *In re Trejo*, 462 Mich 341, 353-354; 612 NW2d 407 (2000). A finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). In applying the clearly erroneous standard, the Court should recognize the special opportunity the trial court has to assess the credibility of the witnesses. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

III. Compliance with the Indian Child Welfare Act

Respondent argues that the trial court erred in failing to ensure that petitioner complied with the notice provisions of the ICWA. We review de novo issues involving the application of the ICWA because they are questions of law. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

The record does not reflect whether the trial court ensured compliance with the notice requirements of the ICWA after it learned that respondent was a member of the Chippewa tribe in Standish, Michigan. This Court has held that the notice provisions of the ICWA are "mandatory, regardless of how late in the proceedings a child's possible Indian heritage is uncovered." *In re TM*, 245 Mich App 181, 188; 628 NW2d 570 (2001) (citation omitted). Further, we recognize that failure to comply with the requirements of the ICWA may invalidate proceedings terminating a parent's rights. 25 USC 1914; *TM*, *supra* at 187; *In re NEGP*, 245 Mich App 126, 131; 626 NW2d 921 (2001).

This Court has held that where a respondent's parental rights have otherwise been properly terminated under Michigan law, but the petitioner and the trial court failed to comply with the ICWA's notice provisions, reversal is not necessarily required. *TM*, *supra* at 187; *In re IEM*, 233 Mich App 438, 450; 592 NW2d 751 (1999). Instead, the remedy adopted in *IEM* was to "conditionally affirm the [trial] court's termination order" but remand the matter "so that the court and [petitioner] may provide proper notice to any interested tribe." *Id.* (citation omitted). Here, as in *IEM*, the "sole deficiency at this time is in notice and there has been no determination that the ICWA otherwise applies to this proceeding." *Id.* (citation omitted). Therefore, we follow the remedy fashioned in *IEM*, *supra*, in this case. Accordingly, if after proper notice pursuant to 25 USC 1912(a) and MCR 3.980, the tribe does not seek to intervene, or, after intervention, the trial court concludes that the ICWA does not apply, the original orders will stand. *IEM*, *supra* at 450. If the trial court does conclude that the ICWA applies, further proceedings consistent with the ICWA will be necessary. *Id.*

IV. Best Interests Determination

Respondent challenges the trial court's finding that termination was not against the children's best interests. We disagree.

Respondent pleaded no contest to the allegations in the termination petition, and the trial court conducted a best interests hearing. The trial court did not err in its best interests determination. The minor children were five and six and a half years old at the time of the best interests hearing. They had come into care because respondent and the minor children's mother had been leaving them in the care of their maternal grandmother and would not inform the maternal grandmother where they were going and when they would be back. Respondent did not have a job, did not contribute to the support of the minor children, and did not have a stable home. He admitted to using drugs, had a significant mental health history including depression, bipolar disorder, and posttraumatic stress disorder resulting from a brutal event that occurred in 1999, and he had a history of domestic violence. Respondent pleaded to some of the allegations in the initial petition and was given the opportunity to work on a parent agency agreement. Respondent did not initially comply with any of the requirements of the parent agency agreement and, shortly after signing it, was incarcerated for several months on a probation violation. While he was incarcerated, a psychological evaluation was completed, wherein the psychologist concluded that his mental health issues were significant and that placing the children with him was not appropriate.

Shortly after respondent was released from jail, he moved upstate to live with a girlfriend and still failed to comply with the requirements of the parent agency agreement. After a termination petition was filed and respondent pleaded to the allegations in the termination

petition, he made some efforts to comply. He completed a substance abuse program, completed parenting classes, entered into a domestic violence program, provided random drug screens that were negative, and obtained employment. At the time of the best interests hearing, respondent had shown good effort for several months, and he asserts that he was not given enough time to maintain compliance, namely his sobriety and stability. However, the children had been in temporary care for 16 months, and respondent had not spoken to them in three or four months. He had not addressed his significant mental health issues, admitted that he could not sleep for more than two or three hours a night, and he needed medication. However, he did not get the appropriate medication and support to help him address these significant issues, and he had just begun to address the substance abuse issue that he had been dealing with for at least 15 years. The court did not commit clear error when it found that respondent had done too little too late, that the minor children needed stability, and that they would not suffer any detriment if respondent's parental rights were terminated.

We conditionally affirm the order terminating respondent's parental rights, *IEM*, *supra* at 450, but remand for the purpose of providing proper notice to any interested Indian tribe pursuant to the ICWA. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly