

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MICHAEL DEBASSIGE and
ANTHONY AIKEN, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

V

TOREY AIKEN,

Respondent-Appellant.

UNPUBLISHED

May 15, 2008

No. 282735

Marquette Circuit Court

Family Division

LC No. 07-008589-NA

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Respondent mother Torey Aiken appeals as of right from the October 22, 2007, order terminating her parental rights to Michael Debassige (d/o/b 5/18/04) and Anthony Aiken (d/o/b 10/5/05), under MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (children will be harmed if returned to parent's home), which was entered by the Marquette Circuit Court. Respondent and Michael were members of the Sault Tribe of the Chippewa Indians, and Anthony was eligible to be a member. The trial court found that the continued custody by respondent mother would result in serious emotional or physical damage to the children, under 25 USC 1912(f). Respondent appeals as of right. We affirm.

I. Facts

Shortly after Michael's birth, a protective services case was opened because respondent wished to remove him from the intensive care unit against medical advice. Petitioner offered respondent services and a protective services caseworker checked on the children a few times a month for two years. Over this period, there were calls to protective services regarding respondent's care of the children and respondent took the children out of Early-On services several times.

On March 10, 2007, a petition for temporary custody was filed alleging, among other things, that (1) on March 9, 2007, police responded to a child abuse call at the St. Vincent DePaul store in Gwinn, where two employees witnessed respondent and her mother yelling and swearing at Michael, calling him a "f***ing retard" and a "f***ing bastard," and saw respondent

mother yanking Michael's arms, (2) respondent mother told employees to mind their own business and that Michael was retarded and needed to be yelled at, and (3) police removed the children from respondent mother on that date.

On August 7, 2007, a petition to terminate respondent mother's parental rights was filed. Respondent initially signed a release of parental rights on August 30, 2007, but on September 14, 2007, she filed a motion to revoke her release. On October 20, 2007, an order revoking respondent mother's release was entered. The termination trial began on October 22, 2007.

The trial court took testimony from seven witnesses familiar with respondent's situation. The trial court also heard testimony from respondent, who attempted to counter or explain her conduct as testified to by the other witnesses. After the close of proofs, the trial court authored an eight-page written opinion that thoroughly set forth the court's findings of fact and cogently expressed the court's conclusions of law. The trial court terminated respondent's parental rights. This appeal followed.

II. Standard of Review

This Court reviews decisions terminating parental rights for clear error. MCR 3.977(J). Clear error has been defined as a decision that strikes this Court as more than just maybe or probably wrong. *In re Trejo*, 462 Mich 341, 357; 612 NW2d 407 (2000). Additionally, the trial court's findings of fact may not be set aside unless they are clearly erroneous, and this Court shall give regard to the trial court's special opportunity to judge the credibility of witnesses who appeared before it. MCR 2.613(C).

III. Analysis

Respondent argues on appeal that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence and in finding that petitioner proved beyond a reasonable doubt, as is required by 25 USC 1912(f), that the continued custody of the children by respondent was likely to result in serious emotional or physical damage to the children. In state court proceedings involving Indian children, both state statutory grounds and the ICWA must be proven. *In re SD.*, 236 Mich App 240, 246; 599 NW2d 772 (1999).

A. Sections 19b(3)(c)(i) and (g)

The trial court did not clearly err in finding that there was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(c)(i) and (g). MCR 3.977(G)(3); MCR 3.977(J). The conditions leading to adjudication were respondent's verbal and physical abuse of Michael and respondent's lack of progress despite being offered services by petitioner for two years before the removal of the children. The child protective services worker who oversaw respondent's case before the children were removed testified that respondent regularly removed the children from Early-On and other services, which were crucial to the correction of the children's many developmental delays, and re-enrolled them only after his intervention. After adjudication, respondent continued the same behavior, beginning a psychological assessment for Michael, then stopping when she learned that a psychiatric appointment was involved, and then completing the assessment weeks later. The children had

severe developmental delays, and respondent did not always acknowledge these delays. Even more troubling was respondent's verbal and physical abuse of Michael. Although respondent did not continue this after adjudication, she was distant and uninvolved during visitation, was unsure she wanted further visitation, and said so in front of the children. The trial court did not clearly err in finding that the conditions of adjudication continued to exist or that respondent could not provide proper care and custody for her children.

Although respondent argued to the trial court and on appeal that she had just begun services and was doing better on medication, she was offered many of these services before adjudication and did not take advantage of them, and many of the delays to the start of services were attributable to respondent. Further, respondent testified that she previously took psychotropic medication for three to six months but stopped, and that she had been taking her current prescription for only a few months. Respondent had ample opportunity to show improvement in her parenting abilities and did not. Therefore, the trial court did not clearly err in finding that there was no reasonable likelihood that respondent would rectify the conditions leading to adjudication within a reasonable time or that she would be able to provide proper care and custody within a reasonable time.

B. Section 19b(3)(j) and 25 USC 1912(f)

The trial court also did not clearly err finding that there was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(j) or that 25 USC 1912(f) was proven beyond a reasonable doubt. The children had such severe developmental delays that petitioner's caseworker testified that she was surprised by the severity and the tribe's caseworker testified that she had not seen such delays in her 30 years of experience. Several witnesses testified that respondent did not acknowledge that anything was wrong with her children. Respondent verbally and physically abused Michael in the thrift store and there was testimony that respondent became frustrated at the end of visits. Respondent said many times that she wanted to release her parental rights and that she did not want future visits, and she did release her parental rights at one point in the proceedings only to retract the release. Further, the tribe's caseworker testified that the tribe's Child Welfare Committee supported termination of parental rights. The tribe's caseworker believed that, if the children were returned to respondent, they would continue to be exposed to physical and verbal abuse, because respondent had not done anything that would alleviate the situation and enable her to cope with her problems, and the children would continue to be denied beneficial services necessary to correct their severe developmental delays. Based on respondent's past conduct, the children's needs, and the expert's testimony, the trial court did not clearly err in finding that there was a reasonable likelihood that the children would be harmed if returned to respondent's home and that respondent's continued custody was likely to result in serious emotional or physical damage to the children.

C. The Trial Court's Best Interest Determination

Respondent next argues that the trial court clearly erred in its best interests determination where it unfairly compared the foster home to her home. We disagree. Termination of parental rights is mandatory if the trial court finds that the petitioner established a statutory ground for termination, unless the court finds that termination is clearly not in the child's best interest. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 344; 612 NW2d 407 (2000). Although the trial

court cannot weigh the advantages of a foster home against the home of the respondent parent, the trial court can consider a child's progress in foster care when weighing the respondent parent's fitness. *In re Hamlet (After Remand)*, 225 Mich App 505, 520; 571 NW2d 750 (1997), overruled on other grounds, *Trejo, supra* at 353 n 10.

Here, the trial court considered the children's amazing improvements while in foster care and found that the likelihood of respondent's parenting skills improving dramatically was not sufficient to establish that termination was not in the children's best interests. The trial court did not clearly err where the children's improvement was not solely based on the foster family but also on the children being allowed consistent access to Early-On and other beneficial services, which respondent inconsistently accessed while they were in her care. Because of the children's improvement and respondent's lack of bond with the children, as demonstrated by her lack of involvement during visits, talk of releasing parental rights, and not wanting future visits, the trial court did not clearly err in its best interests determination.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher