STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
October 19, 2010

In the Matter of C. L. SWINSON, Minor.

No. 296586
Mackinac Circuit Court
Family Division
LC No. 08-005943-NA

Before: HOEKSTRA, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Respondent father appeals as of right the order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*ii*), (g), (j), and (l) and 25 USC 1912(f). We affirm.

In April 2008, the Department of Human Services (DHS) filed a petition seeking temporary custody of C.L.S. and his older half-brother M.M. The petition alleged that the children, who were living with their mother, were neglected and abused. There was inadequate food in the home, no heat, and C.L.S. slept on a garbage bag. The petition also alleged inappropriate sexual contact between the mother and M.M. and between M.M. and C.L.S. The children were adjudicated temporary wards based on the mother's no contest plea. Given C.L.S.'s undisputed membership in the Sault Ste. Marie Tribe of Chippewa Indians, the trial court granted the Tribe's request to intervene. The mother moved to have the matter transferred to the Tribal Court. However, before her request was entertained, the mother voluntarily released her parental rights to both children. Respondent then became the focus of the proceedings. After he failed to make progress on the parent-agency agreement, DHS filed a petition to terminate his parental rights.

Respondent argues that the trial court erred when it failed to transfer the proceedings to the Tribal Court. We disagree. Application and interpretation of a provision of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, are questions of law, which we review de novo. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

The ICWA provides:

> 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 Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe,

> absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe. [25 USC 1911(b).]

There is no indication in the lower court record that any further action was taken on the petition for transfer following the mother's voluntary release. For his part, respondent did nothing to indicate a desire that the matter be transferred. In addition, the Tribe's Child Welfare Committee indicated that it did not support transfer of the matter to the Tribal Court. Following a meeting of the Child Welfare Committee on September 9, 2008, the Committee decided to support termination of the mother's parental rights and specifically added, "Committee is not supporting transfer to Tribal Court at this time." Under these circumstances, respondent's argument that the trial court erred in failing to transfer the proceedings is without merit.

Respondent also argues that the trial court erred in allowing Martha Snyder to testify as an Indian expert and that counsel was ineffective for failing to move to strike her testimony. We disagree on both counts. The decision to admit expert testimony and the question of whether an individual is qualified as an expert are reviewed for an abuse of discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989).

Both the ICWA, 25 USC 1912(f), and the Michigan court rules, see former MCR 3.980(D),[1] require the testimony of "qualified expert witnesses" before parental rights to an Indian child can be terminated. "Witnesses" has been interpreted to require one witness. *In re Elliott*, 218 Mich App 196, 207; 554 NW2d 32 (1996). In *In re Kreft*, 148 Mich App 682, 690; 384 NW2d 843 (1986), this Court stated:

> "Persons with the following characteristics are likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:
>
> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organizations and child rearing practices.
>
> (ii) A lay expert witness having substantial experience with the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty." [Quoting 44 Fed Reg 67593, § D.4(b).]

The trial court did not abuse its discretion by allowing Snyder to testify as an Indian expert. Snyder testified that she was qualified as an expert as it relates to tribal children in hundreds of cases in Michigan, Florida, New York, California, and Alaska. She did 30 years of casework within the Tribe. She was involved in writing a research and development grant for

[1] Now MCR 3.977(G) (effective May 22, 2010).

Michigan's first Indian child placement agency and helped to write and testify to the need for the ICWA. Snyder was familiar with the parenting, customs, and standards for the Sault Tribe of Chippewa Indians. She had sat on the Child Welfare Committee since her retirement.

As a member of the Child Welfare Committee, Snyder was familiar with C.L.S.'s case. Snyder believed that the ICWA had been met with regard to C.L.S. being an Indian child. The Tribe had been involved from the beginning of the case and respondent was offered remedial services. Snyder admitted that she never met respondent. Nevertheless, she formulated her opinion "knowing that [respondent] is with the Tribe, knowing what the Tribe does with clients, knowing what the workers do with clients, and based on my own experience in cases like this that I have had with the same thing as [respondent]." Her focus was on making sure that the tribe was involved and that active and reasonable services were made under the ICWA. Snyder's position was not to second guess the workers; rather, she was there to advise the workers of what the Tribe expected them to offer a parent in the way of services in order to comply with the ICWA. To the extent that respondent argues Snyder was not qualified as an expert, the argument must fail.

Respondent seems to argue that Snyder should have been barred from testifying as a means of punishing petitioner for failing to timely identify the expert it intended to call at trial. Respondent served on petitioner a request for discovery, including the "name[s] and addresses of all lay and expert witnesses whom any party intends to call at trial." Petitioner's witness list included a "Tribal Family Expert, TBD." Respondent cites MCR 6.201(A), the mandatory discovery provision of the rules of criminal procedure, but does not explain why the rule would be applicable to this juvenile proceeding. Respondent also does not explain how he was prejudiced by not knowing the name of petitioner's expert. See MCR 2.613(A). Therefore, this argument by defendant must fail as well.

Because there was no basis for counsel to object to Snyder's qualifications as a witness, it follows that counsel's failure to so object did not fall below objective standards of reasonableness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel was not required to raise a meritless objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Finally, respondent argues that the trial court violated 25 USC 1912(d) by failing to specifically find that DHS made "active efforts" to provide respondent with remedial services and rehabilitative programs designed to keep Indian families together. We disagree.

25 USC 1912(d) provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [Emphasis added.]

It is true that "active efforts" require more than "reasonable efforts" under Michigan law. *In re JL*, 483 Mich 300, 321; 770 NW2d 853 (2009). It implies an affirmative undertaking, rather than a passive effort. *Id.* Thus, when an Indian child is involved, the agency must actively support

the parent in complying with the service plan rather than requiring that the service plan be performed by the parent alone. *Id.* at 322. The efforts must also take into account the prevailing social and cultural conditions and way of life of the tribe. *Id.* at 323.

Contrary to respondent's claim, it is clear that the trial court complied with § 1912(d). The court referred to the "reasonable and active efforts" of the agency to facilitate visitation. The court noted that while C.L.S. was placed nearly three hours away from respondent, the agency arranged for parenting time to take place at a closer location and offered respondent gas cards to help defray travel costs. Respondent may have had transportation problems, but he never alerted the workers, who testified that they could have provided transportation with enough notice. When respondent used his wife's illness as an excuse for failing to visit, he failed to provide doctor's notes even after numerous requests to do so. The court noted that the agency also provided parenting classes and requested that respondent attend counseling and AA/NA meetings. Although respondent completed parenting classes, he failed to provide documentation that he was receiving counseling or attending AA/NA meetings. The trial court noted that the agency also ensured that C.L.S. was available to receive telephone calls from respondent every Saturday morning. Again, respondent failed to avail himself of the opportunity and was often late in calling or did not call at all. Thus, the trial court properly found that the agency was actively involved in the reunification process.

Although respondent's argument on appeal focuses on the lack of "active efforts" by the agency, it is clear that such an argument is really an attack on the overall conclusion of the court that clear and convincing evidence existed to terminate respondent's rights under MCL 712A.19b(3). As mentioned above, the evidence clearly showed that respondent was not availing himself of services and was not in a position to care for C.L.S., who had special needs because of abuse and neglect he suffered while with his mother.

One basis for termination was the termination of respondent's parental rights to his younger child J.B. J.B. was born addicted to drugs and had numerous health problems, necessitating a three-month stay in the hospital following his birth. In spite of the fact that respondent and his wife were provided gas cards and a free hotel room, they visited J.B. infrequently. Respondent's wife failed to make progress on her parent agency agreement and became belligerent with workers. The workers counseled respondent in an attempt to get him to separate himself from his wife and provide for J.B. He was unable to do so. The Tribal Court terminated both of their parental rights. However, as respondent points out in his reply brief, the Tribal Court's decision was recently reversed. He argues that a statutory basis for termination no longer existed under MCL 712A.19b(3)(l). We disagree.

Respondent did not contest that the prior termination occurred but did elicit testimony that the appeal was pending. Still, at the time the trial court rendered its opinion in C.L.S.'s case, respondent's parental rights to J.B. had been terminated and it was not error for the trial court to consider the prior termination. Even if the termination in J.B.'s case was reversed, the facts underlying the termination were still very relevant to C.L.S.'s case. Additionally, the order reversing termination of respondent's parental rights in J.B.'s case appeared to do so because of procedural defects and not due to a finding that the facts did not support termination. In fact, the Tribal Appeals Court cautioned that the reversal of the Tribal Court's order "should not be seen, however, as implicit support for the parenting ability of these individuals. The Court is very concerned regarding their ability to successfully and safely parent the child. . . . Even if

[respondent] is capable of parenting his son, his parental rights should be terminated if he continues to permit an environmental [sic] where his son will likely suffer because of [his wife]."

The facts in J.B.'s case revealed that respondent's wife had a very serious prescription drug problem and did not enter inpatient drug treatment until after the termination petition was filed against her. She was verbally abusive and threatening to the workers on the case, necessitating a lockdown of the agency's facility. Her lack of progress resulted in the workers trying to help respondent to plan separately from his wife. Although he seemed amenable to the idea, he simply could not make the decision to do so. He chose his wife over his child, knowing that she continued to be a threat to his well being. Additionally, J.B. was a special needs child who spent several months in the hospital after his birth. Respondent and his wife failed to take an active interest in J.B. during that time, even though they were provided a free hotel room and gas cards. These facts are relevant to C.L.S.'s case. C.L.S. also had special needs that respondent did not appreciate. C.L.S. needed structure and consistency and respondent provided neither.

After concluding that clear and convincing evidence existed to terminate respondent's parental rights to C.L.S., the trial court then had to make a determination under 25 USC 1912(f), which provides:

> No termination of parental rights may be ordered in such a proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[2]

The trial court's determination that continued custody of C.L.S. by respondent and his wife would result in serious damage to C.L.S. was supported by the evidence.

Martha Snyder was familiar with the parenting, customs, and standards for the Sault Tribe of Chippewa Indians. She sat on the Child Welfare Committee since her retirement. As a member of the Child Welfare Committee, Snyder was familiar with C.L.S.'s case. The Committee supported termination of respondent's parental rights. Snyder believed that the law had been met with regard to C.L.S. being an Indian child. The tribe had been involved from the beginning of the case and respondent was offered remedial services. He may have participated in services, but he did not demonstrate a benefit. Respondent was provided with help from the Family Continuity program, an intensive in-home program similar to Families First. Respondent was also provided assessments and visitation. Snyder could not think of what more could have been provided. J.B.'s case was relevant to the extent that it demonstrated how respondent responded to prior services. The prior termination, standing alone, was not the reason for Snyder's opinion that respondent's rights should be terminated.

[2] See also former MCR 3.980(D), now MCR 3.977(G) (effective May 22, 2010).

Snyder testified, "I strongly, strongly believe with this child and all the problems he has, [respondent] cannot meet his needs. . . . [L]ove is not the key. It's the ability to parent and nurture." When asked whether returning C.L.S. home to respondent would result in serious emotional or physical damage to C.L.S., Snyder testified:

> I am absolutely positive and believe that if [C.L.S.] would be returned to [respondent], it would also, be in contact with [respondent's wife]. But even if [respondent's wife] was out of the picture, I absolutely believe that [respondent] could not handle [C.L.S.'s] needs. And I believe that, you know, [C.L.S.] would be at risk, serious emotional, physical, I mean, mentally. I mean, he would be at risk for all of them. I believe that way beyond a reasonable doubt.

Snyder formulated her opinion "knowing that [respondent] is with the Tribe, knowing what the Tribe does with clients, knowing what the workers do with clients, and based on my own experience in cases like this that I have had with the same thing as [respondent]." She disputed that a bond existed between C.L.S. and respondent, pointing to the fact that respondent failed to visit and also failed to have contact with C.L.S. when he was living with the child's mother.

In addition to the Indian expert, C.L.S.'s therapist, Jennifer Towns, provided additional support for the trial court's finding that termination of respondent's parental rights was in C.L.S.'s best interests. She testified that when C.L.S. first came into care, he exhibited a lot of social disconnect, did not interact well with others, was mean, and lacked impulse control. He had no social skills. Since being in care, C.L.S.'s progress "has been phenomenal." Towns attributed C.L.S.'s progress to being in "an extremely structured and nurturing environment." C.L.S. would continue to need ongoing services, but primarily needed structure and consistency. Changing him to an environment that lacked structure would likely cause a significant lapse because "he really needs structure one hundred percent of the time." Regarding a bond between C.L.S. and his father, Towns stated that C.L.S. did not express any feelings of love or connectedness with respondent; rather, the most common theme was disappointment at missed visits and lack of consistency." C.L.S. was not "amenable" to a future relationship with respondent. Towns testified, "All I can really say is that [C.L.S.] has expressed to me that there is no, uh, and I'm paraphrasing, um, he does not feel connection with his father. He does not feel love towards his father. He does not want to live with his father. He does not feel safe with his father."

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens