S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re MCMILLAN, Minors.

UNPUBLISHED
March 15, 2016

No. 327556
Mackinac Circuit Court
Family Division
LC No. 2012-006082-NA

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Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

In Docket No. 327556, respondent-mother appeals as of right the trial court order terminating her parental rights to CM and AM under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (c)(*ii*) (other conditions exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm). In Docket No. 327557, respondent-father appeals as of right the same trial court order, which also terminated his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). Respondent-father is a member of the Sault Sainte Marie Tribe of Chippewa Indians, and it is undisputed that both the Michigan Indian Family Protection Act ("MIFPA"), MCL 712B.1 *et seq*., and the Indian Child Welfare Act ("ICWA"), 25 USC 1901 *et seq.*, are implicated in this appeal.

Respondents raise the same issues in both appeals. For the reasons set forth below, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In December 2012, petitioner, the Michigan Department of Health and Human Services ("DHHS"),[1] sought jurisdiction over respondent-mother's three children, NHV, SP, and CM, due to "[o]n-going physical neglect and homelessness."[2] Of the three children, only CM was respondent-father's child. Petitioner alleged that NHV had been scared by witnessing respondent-father's arrest, and that this was not the first time that this had occurred; that respondent-mother was pregnant despite respondents' ongoing struggles to provide for the children that already had been born; that respondents had moved five times since May 2012; and that respondents had "either not complied with or failed to benefit from the services in order to reduce the risk of child abuse/neglect within their home." At that point, respondents had received services for six months. The trial court authorized the petition later in December.

In January 2013, a tribal caseworker with Anishnaabek Community and Family Services ("ACFS"),[3] Tara Stevens-Calder, was assigned to CM. Early in 2013, CM was diagnosed with a dairy allergy, a cigarette smoke allergy, and asthma. His pediatrician reported that CM "should avoid any exposure to cigarette smoke[,] even on clothing or other items." Accordingly, the pediatrician provided written instructions on February 20, 2013, that CM "is not to be around any second or third hand smoke as it significantly negatively affects his breathing."

In April 2013, the trial court exercised jurisdiction over CM pursuant to a plea entered by both respondents, which admitted the following: "having an unstable home environment having moved at least three times since May 2012; being unemployed; and [respondent-father] having been arrested for nonpayment of child support in another matter; all of which resulted in neglectful parenting causing stress and anxiety to the minor children."

Between April and June 2013, additional issues arose during respondents' visits with the children. In April, CM smelled of smoke and had to use his rescue inhaler twice when he returned to his foster home. In May, respondents provided graham crackers to CM that contained soy, to which he was allergic. In June, respondent-mother gave CM a brand of animal crackers that contained milk proteins. Also during this period, respondents told an ACFS worker that they smoked outside the house when CM visited and smoked inside the home when he was not there. Accordingly, respondents' caseworker discussed smoking cessation and meeting with a nutritionist.

Late in June, AM was born. The day after her birth, petitioner filed a supplemental petition for her removal from respondents' care, which was later authorized by the court. In early July, respondents entered a plea admitting the allegations in the petition concerning AM, which included a failure to benefit from services that had already been provided.

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[1] References to DHHS include its predecessor, the Department of Human Services ("DHS").

[2] Ultimately, NHV and SP were placed with their biological fathers. They are not involved in this appeal.

[3] ACFS provides human and social services for the Sault Sainte Marie Tribe of Chippewa Indians.

Until this point in the proceedings, respondents had experienced difficulty in securing housing due to respondent-father's history of not meeting financial obligations, his previous vacation of Section 8 housing without notice, and his prior lease violations, as well as other issues. Respondent-father had an unpaid debt of $1,900 owed to the Sault Tribal Housing Authority, which ACFS and petitioner ultimately paid in order to assist respondents in obtaining stable housing.

Subsequently, CM again returned from a visit with respondents smelling of cigarette smoke, even though they had received smoking cessation materials. After this visit, CM had to use his inhaler due to breathing issues. He was also vomiting, which indicated that he had been given foods containing dairy. Respondents were referred to a nutritionist, and respondent-mother later met with the nutritionist twice, while respondent-father met with her once. In July 2013, respondent-mother attended one of CM's doctor's appointments, but both respondents declined to attend an appointment in August for AM in order to visit respondent-mother's other children.

In September 2013, CM and AM were transitioned to a new foster home when their former foster family relocated out of state. Around the same time, respondents received a new foster-care worker, Christina Menard. As Stevens-Calder was transitioning out of the case, respondent-mother had made progress with her behavioral health, but respondents still exhibited parenting issues, particularly with smoking and dietary issues.

Beginning in October 2013, respondents occasionally began to provide positive drug tests for tramadol, an opioid pain medication. They were not always able to provide valid prescriptions for the medications.[4] Respondents also continued to exhibit a problem with feeding CM dairy foods during visits, and the foster mother reported that the children were returned to her care smelling of smoke.

By November 2013, respondents had obtained tribal housing and were participating in unsupervised visits at their home. However, the children began to return from the visits smelling like cigarette smoke. On one occasion, AM was experiencing extreme breathing difficulties, which nearly triggered an asthma attack. By the end of December, however, respondents reported that they both had been smoke-free since November and did not expect to resume smoking. Both respondents were evaluated as having made "substantial" progress on their parenting skills and obtaining appropriate housing, but only partial progress on resource availability and management. Although respondent-father was receiving unemployment, it was not sufficient to meet the needs of the family. Despite this stated progress, the foster mother again reported that the children returned home "completely covered in smoke" after a visit in late December.

[4] In 2014, respondents occasionally tested positive for oxycodone, oxymorphone, and hydrocodone, and it is unclear whether they consistently presented prescriptions for medications containing those substances.

In the early morning hours on January 31, 2014, both respondents were arrested on outstanding child support warrants. Respondent-mother was released shortly after being detained because lower Michigan authorities did not want to travel to St. Ignace to pick her up. Unannounced home visits in February found the home to be "extremely smoky" with cigarettes and an ashtray on the living room table. Nevertheless, both respondents insisted that they had quit smoking. By late February, however, an unannounced home visit indicated that the house was clear of smoke.

In March, when overnight visits began, there were issues with AM receiving the wrong formula during the visits, which resulted in blotchy skin and constipation. Soon afterward, there were additional reports of respondents' home smelling of cigarette smoke. Additionally, cigarettes, both burned and unburned, were found.

In late April 2014, the foster mother dropped off AM and CM and reminded respondents that both children had a doctor's appointment an hour later. Respondents only took AM to the appointment, leaving CM asleep in the car even though CM was visibly ill with a cough and runny nose. When asked why they did not retrieve CM from the car once they were informed that CM had an appointment, respondent-mother replied that they would just reschedule it. Because of the continued smoking issue and the missed doctor visit, respondents' parenting time was changed from overnight visits to two-hour supervised visits three times a week. Respondents canceled the next visit, explaining that they were going downstate to take care of respondent-mother's outstanding child support warrants.[5]

In May 2014, the trial court ordered respondents to submit to a nicotine test. After the appointment was rescheduled more than five times for each respondent, both respondents finally submitted to tests in July. However, at the time, respondent-mother was wearing a nicotine patch, and respondent-father admitted that he had been using chewing tobacco. Both respondents were still unemployed as of July 2014 and remained without a source of income for the rest of the proceedings.

In December 2014, petitioner filed a supplemental petition requesting the termination of respondents' parental rights. The termination hearing was held over three days between January 26, 2015, and March 26, 2015. Testimony was taken from both respondents, multiple caseworkers, the foster mother, and Stacey O'Neill, a caseworker with the Sault Tribe who provided expert testimony concerning ICWA issues. The testimony provided by the witnesses discussed employment, financial assistance, transportation issues and assistance, housing issues and assistance, the children's allergies, counseling, substance abuse issues, continually missed and rescheduled appointments, outstanding warrants, and conflicts with ACFS and service

[5] It appears as though respondents again obtained unsupervised visits because the record includes a notation that visits became supervised again on June 2, 2014, returning to the two-hour three times a week schedule. In response, respondents again cancelled the next visitation and said they were going downstate to take care of respondent-mother's warrants. Although respondent-mother paid off one Friend of the Court warrant for $1,087, a second warrant for $500, dating back to August 2012, remained unpaid and outstanding as of the termination hearings in 2015.

workers. Respondents arrived late to the second day of the hearing and failed to show up at all for the third day, even after their attorneys attempted to contact them multiple times. After the hearing began, respondent-mother contacted her attorney and explained that she was in the emergency room with either pneumonia or gall bladder issues. Closing arguments were made, but the trial court took the matter under advisement until April 9, 2015, in order provide an opportunity for respondents' attorneys to contact their clients and provide proof that their failure to appear was due to a verifiable medical emergency.

After receiving no proofs or communications from respondents, the trial court issued its order terminating respondents' parental rights to CM and AM. It first concluded that petitioner had proven by clear and convincing evidence that a statutory basis for termination existed under MCL 712A.19b(3)(c)(*i*), (*ii*), (g), and (j). It also found that active efforts to provide services and programs had been made. Additionally, the trial court noted that each issue in this case, when considered independently, did not necessarily rise to the level of causing serious emotional or physical harm to the children. However, it noted that "[r]espondents' apparent lack of understanding of the seriousness of the impact of smoking around [CM] and the dietary allergies concerning [AM] led the [expert] witness to conclude that placing the children back in respondents' care would likely result in serious emotional or physical damage to the children." Likewise, the court, in "taking all of these concerns together along with the children's specific medical issues and the length of time the respondents have been involved in services," found "beyond a reasonable doubt that continued custody with respondents will likely result in serious emotional or physical harm to the children." It similarly concluded that termination was in the children's best interests.

II. STATUTORY GROUNDS

Respondents first contend that the trial court erred in finding that a statutory basis for termination existed under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). We disagree.

A. STANDARD OF REVIEW

In order to terminate parental rights, the trial court must find that a statutory basis for termination under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014), citing 3.977(K). "A finding is clearly erroneous [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted; alteration in original); see also *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004) ("A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses.").

B. ANALYSIS

Pursuant to MCL 712A.19b(3)(c)(*i*),

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . :

(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

The trial court did not clearly err in concluding that a statutory basis for termination existed under this subsection. The original circumstances that brought CM and AM under the jurisdiction of the court were unstable housing, unemployment, respondent-father's arrest on a child support warrant, and respondents' failure to benefit from services already provided. During the proceedings, respondents made some progress in their parenting plans. However, by the time the trial court rendered its opinion and order terminating their parental rights, (1) respondents were facing instability related to their housing, as demonstrated by multiple utility bills in shutoff status;[6] (2) respondents were still unemployed with no source of income;[7] (3) respondent-father had been arrested at least twice more on a child support warrant, respondent-mother was arrested once (although she was released afterward due to the reluctance of authorities to travel to upper Michigan to pick her up), and respondent-mother still had an outstanding child support warrant; and (4) both respondents had failed to lastingly benefit from, or even attend, many of the services provided over the course of two years.

After the trial court took jurisdiction over the case in 2012, respondents received two years of services, including smoking cessation assistance; meetings with a nutritionist about their children's dietary needs; budgeting instruction; multiple referrals for substance abuse and mental health assessments and counseling; and thousands of dollars in food, housing, and transportation assistance. In addition, they inherited approximately $20,000 in April 2014. However, despite this influx of income, within a few months, they had only paid off one child support warrant (with two still outstanding), they were already facing multiple potential utility shutoffs due to

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[6] Although not considered in determining whether termination of respondents' parental rights was proper under MCL 712A.19b(3)(c)(*i*), see MCR 3.977(H)(2), or the other statutory grounds for termination, see MCR 3.977(E)(3), we note that tribal housing reported to the trial court, after the close of proofs, and after respondents failed to appear for the last day of the termination hearing, that respondents no longer lived at the home in Kincheloe, but had "moved downstate leaving a delinquent water bill in the hundreds of dollars."

[7] Respondent-father testified at the termination hearing that he had applied for disability benefits a few months before the hearing, but he currently was not receiving disability or unemployment benefits. Their caseworker testified that she had never seen an application for disability benefits.

nonpayment, and they lacked transportation due to their inability to pay for repairs on a vehicle that they had purchased with money from the inheritance. Notably, according to respondent-mother, their heat was shut off in November and December 2015 due to nonpayment.

With regard to their progress from services, respondents did participate substantially in visitation services. However, throughout the proceedings, they continued to allow the children to be exposed to smoke, feed them food to which they were allergic, and cancel visitation appointments, often without documented reasons. They did not attend the necessary appointments for required nicotine testing until near the end of the proceedings, and they missed some of the other drug tests. They often blamed others for their problems, changed their testimony, and provided implausible explanations for why at least four separate people saw cigarette butts or smelled smoke in their homes and on the children after they were aware of their children's health issues. Respondent-mother made progress during counseling services earlier in the proceedings, but she was terminated from later counseling services due to a failure to attend numerous appointments between August 2014 and January 2015. Similarly, both respondents also missed or canceled their transportation for numerous service appointments and failed to establish contact with various caseworkers as requested at various times throughout the proceedings. Due to their repeated absences, often without calling or providing any other notice, they were terminated from services, sometimes permanently. Transportation was frequently identified as an issue with completing services, but it is clear that respondents failed to take advantage of numerous transportation options and opportunities throughout the proceedings. Respondents also received significant assistance with acquiring and dropping off employment applications in the summer of 2013, with no continued progress.[8] Likewise, both respondents continued to make poor choices and exhibit misguided priorities as the case continued.

As we previously explained in *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012),

> While the DH[H]S has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered. *In this instance, services were proffered, but respondents failed to either participate or demonstrate that they sufficiently benefited from the services provided.* While respondents were offered various services and did participate in and complete certain mandated requirements of their respective treatment plans, they failed to demonstrate sufficient compliance with or benefit from those services specifically targeted to address the primary basis for the adjudication in this matter . . . . [Citation omitted; emphasis added.]

[8] Contrary to respondent-father's testimony at the termination hearing, the record indicates that respondents received assistance with dropping off employment applications on more than one occasion, and a caseworker personally picked up respondent-mother for at least one job interview.

Likewise, here, despite numerous services and extensive financial assistance, respondents still were without employment; were unable to consistently provide stable housing with utilities, as demonstrated by the pending shutoff notices and unpaid bills; and had failed to exhibit sufficient improvement through the services provided. Most significantly, respondents' management of the inheritance demonstrated that no amount of financial assistance or additional services would make the children safe in respondents' care.[9] AM was almost two and had been in foster care her entire life, and CM was three and had spent most of his life in foster care. Given respondents' history, a permanent change in their ability to provide for the minor children was only a "mere possibility." See *In re Williams*, 286 Mich App 253, 273; 779 NW2d 286 (2009) ("The circuit court correctly determined that the two years [the child] already had spent in foster care, her entire life, constituted too long a period to await the mere possibility of a radical change in respondent mother's life.").

Thus, on this record, the trial court properly concluded that there was clear and convincing evidence that the conditions that led to the adjudication continued to exist, and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages. MCL 712A.19b(3)(c)(*i*).[10]

III. BEST INTERESTS

Respondents next contend that the trial court erred in concluding that termination was in the children's best interests. Again, we disagree.

A. STANDARD OF REVIEW

Pursuant to MCL 712A.19b(5), "[t]he trial court must order the parent's rights terminated if the [petitioner] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that

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[9] To the extent that respondents contend that the smoking, dietary concerns, and substance and mental health issues were not specifically identified as barriers at the time of removal, respondents' failure to benefit from the services they were provided, and for which they were referred, only further demonstrates the original condition that brought them under the court's jurisdiction and further confirms their inability to benefit from services.

[10] Because only one statutory ground must be established to support termination of a respondent's parental rights, it is not necessary for us to consider whether an independent statutory basis for termination existed under MCL 712A.19b(3)(c)(*ii*), (g), and (j). *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009). Nevertheless, we have reviewed each statutory ground for termination identified by the trial court and conclude that the record reveals that termination was also proper under MCL 712A.19b(3)(c)(*ii*), (g), and (j) in light of respondents' ongoing failure to properly attend to CM's and AM's documented allergies and sensitivities, failure to obtain income in order to support their family, failure to consistently provide utilities—and, therefore, suitable housing—despite significant financial assistance and inheritance proceeds, and ongoing failure to comply with their case service plans.

termination is in the children's best interests." *In re White*, 303 Mich App at 713 (footnotes omitted). We review a trial court's best-interest determination for clear error. *Id*., citing MCR 3.977(K).

B. ANALYSIS

> To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*Id*. at 713-714 (quotation marks and footnotes omitted); see also *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).]

Although respondents shared a bond with their children, the testimony at the termination hearing shows that their bond with the children was outweighed by the children's need for permanence and stability. Considering respondents' continued inability to adequately address their children's medical needs, obtain employment, or maintain utilities in their housing, there is no indication that respondents would be able to provide permanence and stability in the foreseeable future. AM had been in foster care her whole life, and CM had been in care for at least two years. The evidence revealed that respondents had "failed to derive any lasting benefit" from the services and financial assistance provided to them throughout the duration of the child protective proceedings, despite the progress that they had exhibited periodically. See *In re Olive/Metts*, 297 Mich App at 43. The trial court concluded that respondents "had exhausted community resources for assistance," and the record evidence, including the testimony of O'Neill, established that "there were no additional services that could be provided" to promote reunification. *Id*. Further, the evidence established that the children were doing well in foster care and that the foster mother was willing to provide a permanent home for them. See *In re White*, 303 Mich App at 714.

Thus, on this record, the trial court did not clearly err in concluding that termination of respondents' parental rights was in the best interests of the children.[11]

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[11] Respondent-mother also asserts in passing that her due process rights were violated because the trial court, in effect, terminated her parental rights based on her financial instability and lack of transportation. Because it was not raised in the statement of questions presented, this issue is not properly before this Court. *In re McEvoy*, 267 Mich App 55, 75 n 5; 704 NW2d 78 (2005). Additionally, although she briefly states that this argument is "based on the factors set forth in [*Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976),]" she provides no explanation regarding the way in which the factors identified in that case apply to the circumstances of this case as well as no further explanation of the merits of her argument. Thus, we deem this claim abandoned. See MCR 7.212(C)(5); *In re TK*, 306 Mich App 698, 712; 859

IV. ICWA AND MIFPA

Next, respondents contend that the trial court erred in concluding that "active efforts" were provided to prevent the separation of respondents' family and that these attempts were unsuccessful, thereby failing to comply with the requirements of the ICWA and the MIFPA. Respondents also argue that the trial court erroneously concluded that the evidence showed, beyond a reasonable doubt, that the children were likely to be physically or emotionally harmed if they remained in respondents' custody. We disagree.

A. STANDARD OF REVIEW

"[T]the default standard of proof for termination of parental rights cases, clear and convincing evidence, applies to the determination whether [petitioner] provided 'active efforts . . . to prevent the breakup of the Indian Family' under 25 USC 1912(d)." *In re E M England*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 327240); slip op at 7 (omission in original). The same standard applies to whether active efforts were provided under MCL 712B.15(3). *Id*. at ___; slip op at 7.

Additionally, under the ICWA, the MIFPA, and the Michigan court rules, termination of parental rights cannot be ordered unless the trial court finds, beyond a reasonable doubt, that the Indian child would experience serious emotional or physical damage if he or she remained in the continued custody of the parent. See 25 USC 1912(f); MCL 712B.15(4); MCR 3.977(G)(2); *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 58-60; ___ NW2d ___ (2015). We review *de novo*, as questions of law, issues involving the interpretation and application of the ICWA and the MIFPA. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 462-463; 861 NW2d 303 (2014). "We review a trial court's factual findings underlying the application of legal issues for clear error." *In re Payne/Pumphrey/Fortson*, 311 Mich App at 56.

B. ACTIVE EFFORTS

Both the ICWA and MIFPA impose two additional requirements when a trial court is considering termination of parental rights to an Indian Child. See MCR 3.977(G). The first is that petitioner must "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." 25 USC 1912(d); see also MCL 712B.15(3). The ICWA does not specifically define "active efforts," but § 3 of the MIFPA provides a definition:

> (a) "Active efforts" means actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active

NW2d 208 (2014); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 543; 730 NW2d 481 (2007), lv gtd in part 480 Mich 910 (2007). Nevertheless, as explained *supra*, it is clear that the termination of respondent-mother's parental rights was not based solely on her financial instability and lack of transportation.

efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following:

(*i*) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.

(*ii*) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.

(*iii*) Conducting or causing to be conducted a diligent search for extended family members for placement.

(*iv*) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.

(*v*) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

(*vi*) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding.

(*vii*) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

(*viii*) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.

(*ix*) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

(*x*) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively assisting the Indian child's family or offering active assistance in accessing those resources.

(*xi*) Monitoring client progress and client participation in services.

(*xii*) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family. [MCL 712B.3(a).]

Michigan courts must use this definition when deciding whether to terminate a respondent's parental rights to an Indian child. MCR 3.977(G)(1) (cross-referencing the definition of "active efforts" in MCR 3.002); MCR 3.002(1) (providing a definition of "active efforts" for the purpose of applying the ICWA and the MIFPA, that is identical to the definition in MCL 712B.3).

The trial court did not clearly err in concluding that active efforts were made in this case, and that those efforts were unsuccessful. As discussed *supra*, respondents received two years of services after the trial court took jurisdiction over the case in 2012. These services included smoking cessation assistance; meetings with a nutritionist about their children's dietary needs; budgeting assistance; parenting education; thousands of dollars in food, housing, and transportation assistance; assistance with obtaining employment;[12] and multiple referrals for substance abuse and mental health assessments and counseling.[13] In particular, from December 2012 until October 2014, respondents received $175 in Walmart cards, $1,250 in gas cards, and $225 in bus cards from ACFS. In addition, the foster mother received $550 in gas cards in order to transport the children to or from St. Ignace for visitation with respondents. "Transporters" were also offered for parenting time appointments. Between February and September 2013, ACFS and DHHS jointly paid off a $1,900 housing bill to Sault Tribe Housing. Then, in October 2013, respondents received over $900 in assistance from ACFS in the form of payments to the Sault Tribe Housing Authority, Cloverland Electric, and K-Mart. All of this aid was provided despite the fact that ACFS generally had a $500 per year limit on assistance for a single

[12] Contrary to respondent-mother's claims on appeal, respondents received assistance with obtaining and submitting employment applications.

[13] In addition, by the time the petition was filed to initially remove CM and the other children from respondents' care in December 2012, CPS had conducted investigations, and respondents had received mental health services, services through the Families First program, DHHS Food Assistance Program benefits, services through the Family Independence Program, services through Indian Outreach Services, services through the Strong Families/Strong Children Program on two occasions, and Family Reunification services, among others.

family. Additionally, a DHHS worker testified that respondents had received $411 in heating and water assistance between November and December 2014, and had received food assistance of $668 to $793 per month in 2012 (roughly $8,016 for the year as a low estimate) and $347 per month in 2013 and 2014 (roughly $4,164). The record also clearly indicates that multiple ACFS and DHHS caseworkers and other staff members consistently maintained contact, or attempted to maintain contact, with respondents and monitored their progress, adjusting case service plans accordingly, throughout the course of the proceedings.

Respondents argue that they never received budgeting instruction or services, but the record shows otherwise. Respondent-father also argues that ACFS's failure to further assist them with repairing their truck reflects a lack of active efforts, but the record clearly shows that ACFS worked with respondents regarding the vehicle and was willing to provide assistance with fixing the truck as soon as respondent-mother provided three repair estimates. Likewise, it is very apparent that ACFS provided extensive transportation assistance during the pendency of the case.

Respondents also contend that they were never offered the opportunity to obtain GEDs, but the record indicates that at least one of them, and possibly both of them, began GED classes in March 2013. Likewise, testimony at the termination hearing indicated that a prior continuity worker discussed GED classes with respondent-mother. Additionally, the testimony at the termination hearing indicated that the agencies assisting respondents were not aware of literacy issues throughout the proceedings, and that literacy-related services would have been provided if the agencies were aware that such services were needed. Likewise, numerous documents in the record indicate that caseworkers believed that both respondents were able to read and write. Accordingly, we cannot conclude that the mere fact that respondents did not complete GED classes establishes that active efforts were not made in this case.

Respondents also contend that they should have been educated about the children's dietary needs and food and smoke allergies, but the record shows that they received information on these subjects on multiple occasions. For example, both respondents attended one or two appointments with a nutritionist, they were invited to attend doctor's appointments with the children, and they received additional information through caseworkers and the foster mother, which was based on information received from medical professionals.

Relatedly, respondent-mother asserts they should have been permitted to take the children to doctor's appointments and receive information from the physicians themselves. Again, however, the record shows that respondents received notice of several doctor's appointments scheduled for the children. Additionally, even though respondent-mother denied at the termination hearing that she attended any doctor's appointments, the record shows that respondent-mother attended CM's well-child exam on July 23, 2013. On April 25, 2014, both respondents took AM to the doctor. CM also had an appointment that day, but respondents left him in the car even though they were informed of the appointment and CM was visibly sick. Respondents were offered other opportunities to attend doctor's appointments, which they declined for various reasons. Thus, respondent-mother's claim is unsupported by the record.

Respondents assert that they should have been provided with services to quit smoking. Again, respondents do not indicate what more ACFS or DHHS could have done, and the lower

court record plainly demonstrates that they were given smoking cessation materials and advice on multiple occasions. Indeed, both respondents testified that they received information regarding how to quit smoking.

Furthermore, respondent-mother contends that they did not receive assistance with obtaining housing. However, the record clearly shows that respondents secured tribal housing in November 2013, after receiving financial assistance from ACFS and DHHS to payoff past housing bills as well as extensive assistance with completing housing applications and finding housing resources.

Additionally, respondents argue that active efforts were not made because a family continuity worker was not assigned to their case for six months in 2014. However, the record shows that Menard, the primary caseworker overseeing respondents' case during that time period, had taken on most of the responsibilities of the family continuity worker in this case after the previous continuity caseworker left the agency in April 2014. When it became apparent that respondents' progress was declining, a new continuity worker was assigned in October 2014, which was more than one month before the termination petition was filed in December 2014. Accordingly, respondents were not without support during that six-month period. Additionally, it is noteworthy that respondents did not meet with their new continuity worker before the filing of the termination petition due to their continued pattern of failing to stay in communication with caseworkers and failing to keep appointments.

In sum, ACFS made substantial and significant attempts to provide respondents with the services that they needed, going well beyond its established financial limits, referring and re-referring respondents for services four and five times when necessary. At the termination hearing, the qualified expert witness stated that she could not think of any other service that respondents could have received. Although she recognized that it was possible that additional recommendations for substance abuse or behavioral health could have been made, it was impossible to provide those referrals in light of respondents' failure to complete substance abuse and behavioral health assessments.

Accordingly, the trial court properly determined that active efforts were made in this case. See *In re JL*, 483 Mich at 318; *In re E M England*, ___ Mich App at ___; slip op at 7.

C. LIKELY HARM

As indicated *supra*, the ICWA provides:

> No termination of parental rights may be ordered in such 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. [25 USC 1912(f).]

Similarly, the MIFPA states:

> No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness . . . , 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. [MCL 712B.15(4).]

MCR 3.977(G)(2) also delineates similar requirements. Despite the differing language under the federal and state standards, only one expert witness is required to testify pursuant to 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2). *In re Payne/Pumphrey/Fortson*, 311 Mich App at 59-60. Additionally, under these provisions, "in order to terminate parental rights to an Indian child, a trial court's 'beyond a reasonable doubt' finding must 'contain' or 'encompass' testimony of a qualified expert witness who opines that continued custody of the Indian child by the parent will likely result in serious physical or emotional harm to the child." *Id*.

Although both respondents objected to the fact that O'Neill was employed by an agency that was also seeking termination, neither respondent timely objected to O'Neill's qualifications as an expert witness for the Sault Tribe in the trial court, see *In re E M England*, ___ Mich App at ___; slip op at 9, and neither respondent has raised any issue of impartiality or lack of expertise on appeal. Nevertheless, given O'Neill's "extensive knowledge and experience, coupled with the fact that she is a member of the Tribe, any challenge to [her] qualification as an expert would have been futile." See *In re E M England*, ___ Mich App at ___; slip op at 7.

As the expert witness, O'Neill testified that, after reviewing the file and speaking with Menard, her opinion was that the children would continue to have ongoing health issues that could become substantially worse and even life-threatening if they were returned to respondents' home. In sharing that opinion, O'Neill cited the amount of time that the children had been in care, during which time respondents failed to complete their service plan or show that they had lastingly benefitted from the services provided, as demonstrated by their continued poor decision-making. When asked how respondents had actually harmed the children, O'Neill identified instances when the children required medical attention after respondents returned them to the foster mother sick or smelling of smoke, and she opined that respondents' actions and testimony indicated that they did not fully understand the consequences of their actions on the health of the minor children. She also mentioned respondents' testimony during the termination hearing, which revealed that they prioritized their own personal desires or comfort level over the health of their children. Additionally, she noted, *inter alia*, the potential substance abuse issues that arose during the course of the child protective proceedings and respondents' failure to follow through with the services that were offered to them.

Respondents both take issue with the fact that there were no physician reports, doctor evaluations, or "medical expert" testimony regarding CM's and AM's "alleged" allergies and the way in which the children were harmed previously. However, both respondents testified that they were aware of their children's sensitivity to smoke and dietary allergies. Furthermore, the record is replete with references to the physicians and nurse practitioners who diagnosed AM's and CM's food- and smoke-related allergies and sensitivities. There is also considerable evidence regarding the physical consequences that CM and AM suffered each and every time they were exposed to cigarette smoke or given dairy foods to eat. Accordingly, no physician testimony was necessary to confirm the existence and harm of these conditions.

Likewise, the record clearly reveals that respondents, throughout the pendency of the case, either failed to take their children's allergies seriously, did not understand the extent and significance of the issues, or simply did not care enough to take the necessary steps to protect them. There were multiple instances of cigarette smoke being detected in the home and on the children. Respondent-mother frequently failed to provide a consistent or credible explanation for many of the instances when the children were returned following visitations smelling like smoke, or of the cigarettes and cigarette butts in respondents' home. In addition, there were multiple reported instances of respondents failing to provide the children with the proper food in light of their allergies.

Furthermore, respondents' words and actions, as documented in the record, also reflect a refusal or reluctance to take responsibility for their own behaviors and the well-being of their children. For example, respondent-father recognized that the court had instructed him not to use chewing tobacco prior to the nicotine test to determine if respondents were still smoking, but he stated, "I'm over [21], so if I want to chew, I'm going to chew." Respondent-mother also testified that she was not comfortable asking her father-in-law to smoke outside of their home when it was cold outside despite her knowledge of the children's smoke allergies.

Finally, respondents assert that the factors on which the trial court based its conclusion, that the children remaining in respondents' custody would result in serious emotional or physical harm, comprised new conditions that were not addressed through active efforts. However, as detailed *supra*, extensive efforts were made to educate respondents and facilitate their progress with regard to these issues.

In short, the record reveals that when respondents were left alone to care for CM and AM, they made poor choices, which included smoking around the children despite their allergies and other medical conditions, permitting others to smoke around the children, or feeding the children foods to which they were allergic. Combined with O'Neill's expert testimony, the trial court did not err in concluding that the evidence showed, beyond a reasonable doubt, that if CM and AM were returned to respondents' care, it was likely that their medical and physical needs would not be attended to appropriately, thereby causing serious physical harm.

V. CONCLUSION

In Docket Nos. 327556 and 327557, respondents have failed to establish that any of the claims of error raised on appeal warrant reversal of the order terminating their parental rights.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan