STATE OF MICHIGAN

COURT OF APPEALS

In re FELKER/KONSDORF, Minors.

UNPUBLISHED
May 10, 2016

No. 329244
Saginaw Circuit Court
Family Division
LC No. 11-032989-NA

Before: HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Respondent-father, B. Konsdorf, appeals as of right the trial court's order terminating his parental rights to his two minor children under MCL 712A.19b(3)(c)(*i*), (g), (h), and (j). We affirm.

I. FACTUAL BACKGROUND

In April 2011, the Department of Health and Human Services (the Department) petitioned to remove respondent's children from his care after he sexually assaulted the children's older stepsister. Respondent was convicted of three counts of second-degree criminal sexual conduct (involving a child under the age of 13) and one count of distributing sexually explicit material to a minor. His earliest release date is June 17, 2017, and his maximum release date is January 16, 2032. When the trial court asked respondent if his children had any Indian heritage, he made no verbal response. The Department indicated in a later document that respondent denied that the children had Indian heritage. The children were eventually returned to their mother's care.

In January 2014, the Department petitioned to remove the children a second time after the mother physically abused them while intoxicated. Respondent was served by ordinary mail, and the trial court adjourned the preliminary hearing to allow respondent to secure counsel and participate in the hearing. Respondent admitted that he was unable to parent his children because he was incarcerated for molesting the children's stepsister. Respondent acknowledged receipt of a court report and parent-agency treatment plan.

Respondent attended some of the review hearings by videoconference. Respondent acknowledged receiving court documentation and that the Department had asked him for a report of family needs and strengths. The Department detailed services it could not provide because respondent was prohibited from having contact with the children, but it offered parenting advice and suggestions.

A court report for a hearing in June 2014 indicated that the children's paternal grandmother had requested placement but were no longer being considered for placement because of the grandmother's poor health. In January 2015, the Department petitioned to terminate respondent's parental rights. Following a hearing, the trial court found that statutory grounds supported terminating respondent's parental rights. After considering the children's bond, respondent's ability to provide support, the health of the children's paternal grandmother, and the children's needs for stability, the trial court found that terminating respondent's parental rights was in the children's best interests.

II. ICWA

Respondent contends that the trial court violated the Indian Child Welfare Act (ICWA), 23 USC 1901 *et seq*, because the children had Indian heritage through his paternal grandmother. According to respondent, the trial court accordingly failed to properly assume jurisdiction over the children. We disagree.

This Court reviews de novo issues of law, including the interpretation and application of the ICWA. *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). We review for clear error the trial court's findings of fact underlying the legal issues. *Id*.

Congress enacted the ICWA in 1978 to respond to abusive child welfare practices that separated large numbers of Indian children from their families and harmed the children, their parents, and the Indian tribes. *Id*. The "ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving children." *Id*. at 99. However, the ICWA is only applicable if the trial court received sufficiently reliable information that the proceeding involves an Indian child. *Id*. at 108. If the trial court has no reason to know that the child is an Indian child, the ICWA does not apply. See *id*. at 105; 29 USC 1912(a).

In this case, even presuming that the children are Indian children,[1] the trial court had no reason to know that the children were Indian children before it terminated respondent's parental rights. Contrary to respondent's assertions on appeal, the trial court specifically asked respondent and his attorney if any of the children had American Indian heritage. Neither respondent nor his attorney gave any response. The documentary evidence reflects that when the Department asked respondent if the children had Indian heritage during a December 2013 telephone call, respondent denied any Indian heritage. Child protective proceedings are a single continuous action, *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973), and the trial court properly took judicial notice of the children's file after their second removal in January 2014. Respondent first raised this assertion on appeal. Because the trial court had no indication that the children were Indian children, we conclude that it did not err by failing to apply the ICWA.

III. DUE PROCESS

[1] Respondent has failed to provide evidence supporting his assertion.

Respondent also contends that the trial court violated his rights to due process by failing to properly notify him of hearings in the case. Respondent specifically argues that he was denied the opportunity to participate in the preliminary hearing. We disagree.

Essentially, respondent seeks to collaterally attack the trial court's assumption of jurisdiction over the children. Parents have a significant constitutional liberty interest in the care and custody of their children. *In re Miller*, 433 Mich 331, 346; 445 NW2d 161 (1989); *MLB v SLJ*, 519 US 102, 119; 117 S Ct 555; 136 L Ed 2d 473 (1996). This right entitles the parent to due process before the state may remove the parent's child from his or her custody. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014).

When a direct appeal is available, a parent may not challenge the court's initial assumption of jurisdiction over the child in a collateral attack after the court has terminated the parent's parental rights. *In re Kanjia*, 308 Mich App 660, 667; 866 NW2d 862 (2014). However, a challenge to the trial court's failure to assume jurisdiction over the children under the Michigan Supreme Court's decision in *Sanders* is not a collateral attack. *Id*. at 670. It directly challenges the trial court's decision to terminate the parent's parental rights in the absence of sufficient due process. *Id*. at 670-671.

In this case, respondent does not raise a *Sanders* challenge. Accordingly, he may not collaterally attack the trial court's assumption of jurisdiction on this basis. Respondent should have raised these challenges in a direct appeal of the trial court's assumption of jurisdiction over the children, and it is too late for him to do so now.

III. THE CHILDREN'S BEST INTERESTS

Finally, respondent contends that the trial court clearly erred when it found that terminating his parental rights was in the children's best interests. We disagree.

The trial court must order the parent's rights terminated if it finds from a preponderance of evidence that termination is in the children's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012); *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). We review for clear error the trial court's determination regarding the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The trial court has committed clear error if we are definitely and firmly convinced that it made a mistake. *Id*.

To determine whether termination of a parent's 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." *Olive/Metts*, 297 Mich App at 41-42. 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." *White*, 303 Mich App at 714.

In this case, the trial court considered a wide variety of factors when determining the children's best interests. It considered that, while respondent kept in touch with the

children through letters and cards, there was no evidence of any bond between him and the children. The children's therapist testified that they needed permanence, yet respondent may be in prison until 2031. Also, respondent had sexually abused the children's sibling. We conclude that the record supported the trial court's findings regarding the children's best interests.

Additionally, respondent attacks the Department's failure to place the children with their paternal grandmother. Michigan law prefers placement with relatives during termination proceedings. MCL 722.954a; *In re COH*, 495 Mich 184, 195; 848 NW2d 107 (2014). However, "the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests . . . ." *Olive/Metts*, 297 Mich App at 43.

In this case, the Department began the process to place the children with their paternal grandmother, and the grandmother testified at the termination hearing that she sought to have the children placed with her. However, the Department ultimately did not place the children with their grandmother because she suffered from health issues. The trial court found that the grandmother was physically frail, consistent with the Departments' determination, and that placement with her would not be in their best interests. We are not convinced that the trial court made a mistake.

Viewing the record as a whole, we conclude that the trial court did not clearly err when it found that termination of respondent's parental rights was in the best interests of the children.

We affirm.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Christopher M. Murray