

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
May 15, 2012

In the Matter of POCIASK/ALCORN/RIGSBY,  
Minors.

No. 307632  
Arenac County Circuit Court  
Family Division  
LC No. 10-011204 NA

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Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Respondent mother and respondent father appeal as of right the order terminating their parental rights to the children under MCL 712A.19b(3)(b)(i), (b)(ii), (c)(i), (c)(ii), and (g). Respondent father's parental rights were also terminated under MCL 712A.19b(3)(m). We conditionally reverse and remand.

Before terminating a respondent's parental rights, the trial court must make a finding that at least one of the statutory grounds under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erred in finding sufficient evidence under other statutory grounds. *In re Huisman*, 230 Mich App 372, 384–385; 584 NW2d 349 (1998). The trial court must order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). This Court reviews orders terminating parental rights for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). Clear error exists "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." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). A trial court may consider evidence on the whole record in making its best-interest determination. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).

Respondent father, who was the biological father of only the youngest of the five children, admitted being involved in a previous child protection proceeding, based on neglect, in North Carolina, which ultimately led to his voluntary release of parental rights to his child from an earlier relationship. Children's Protective Services (CPS) had been actively involved with the respondent mother in this case since 1999 and had received over 30 referrals and 16 complaints against her, four of which were substantiated. The fourth case was opened in December 2009 for physical abuse of the children. Respondent mother was reportedly homeless and in an abusive relationship. She was reportedly hitting her children in areas designed not to leave marks,

caused her oldest daughter to have a bloody nose, and had tied the children to a chair. The children were not properly fed. Respondent mother had also medically neglected the children by not seeking treatment for head lice, yeast infections, and tapeworm. Beginning in December 2009, respondent mother was provided with services to preserve the family that included an in-home nurse, substance abuse evaluation, counseling and mental health services, and assistance with housing, food, and other financial matters. The in-home nurse addressed parenting, nutrition, discipline, and the medical needs of the children.

On March 16, 2010, respondent mother's four older children were removed from her custody after she was incarcerated on a charge of child abuse, to which she later pleaded guilty. Approximately nine months after the children were removed from respondent mother's custody, respondent-mother gave birth to a fifth child. This child was also placed in foster care shortly after her birth after respondent mother had admitted making minimal progress toward reunification with her four older children. After more than 17 months of reunification services, the trial court terminated both respondents' parental rights in September 2011.

With the exception of MCL 712A.19b(3)(m), which plainly applied only to respondent father, the trial court did not clearly delineate which statutory grounds applied to which respondent. Nonetheless, we find no clear error in the court's determination that the five statutory grounds were established by clear and convincing evidence under Michigan law for the termination of both respondents' parental rights.

The condition that led to petitioner's intervention was respondent mother's physical abuse of at least one of her four older children, along with her inadequate parenting skills and emotional instability manifested in her longstanding neglect of the children. Respondent mother pleaded no contest to the allegations that the four older children were removed from her care after she struck her then eight-year-old daughter, leaving hand and fist imprints on the child's cheeks and scratches and bruising under her eyes and on the side of her nose. The original petition also contained many additional allegations that were not specifically admitted but were addressed in subsequent hearings, orders, and case service plans. Those allegations included extensive and ongoing parental neglect and abuse, substance abuse, physical abuse, and general parental unfitness. It was undisputed that respondent father also had a history with child protection officials in North Carolina. He voluntarily relinquished his parental rights to another child in a child neglect proceeding there after reunification services to improve his parenting skills proved to be unsuccessful.

Petitioner provided respondents with family reunification services to correct their parenting skill deficits and to establish stability in the home. Services included parenting skills classes, psychological evaluations, weekly parenting time, weekly in-home parent aide assistance, transportation assistance, and housing and food assistance. Respondent mother was also provided with individual therapy and random drug screens. Respondent father was provided anger management classes. Despite these services, there was ample evidence that respondents did not benefit, and the issues of respondents' inadequate parenting and inability to maintain a safe and stable home environment continued to exist. Respondent father clearly was unable or unwilling to appropriately parent the children. His evaluating psychologist opined that respondent father had weak parental instincts. Proofs showed that respondent father had failed to manage his anger as evidenced by his aggressive behavior during a supervised visit five months

before the termination hearing. This incident occurred after he had participated in more than seven months of anger management counseling. Both respondents consistently failed to fully internalize services, put into place the skills necessary to remedy the conditions that led to the children's removal, and prioritize the children's needs. After 17 months of services, they were unable to independently provide a suitable and stable home environment. The trial court properly concluded that there was no reasonable likelihood that respondents would be able to resolve the issues that led to the children's removal within a reasonable time.

Similarly, without regard to intent, respondents failed to provide the children with proper care or custody and there was no reasonable expectation that they would soon be able to do so. According to the foster care worker and the parent aide, respondent mother's pattern of behavior was to have the older children parent the younger children. After months of parenting skills instruction, respondents were unable to use appropriate parenting techniques, such as time outs to control the children's behavior, during supervised visits. The most compelling evidence was respondents' behavior and choices during the six months before the termination hearing. Respondent father missed several supervised visits with his child. Respondent mother also missed visits or was habitually late. Respondents were unable to properly care for the two boys, who were returned to their care over petitioner's objection. Neither showed any marked improvement in parenting that would be significant enough for all of the children to be returned safely to the home. Respondents struggled to meet the needs of the children even when only the two boys were in their care. Medical appointments were missed and medication prescriptions were not refilled. One boy's grades plummeted after he returned to the home and other was caught breaking into and vandalizing a neighbor's house. While in respondents' care, the boys were dirty and unkempt. Neither boy flourished, and the household appeared to be "just getting by." The proofs showed, despite respondents' argument to the contrary, that respondents would have completely failed in caring for their sons if not for petitioner's constant intervention. Respondents' psychological evaluations confirmed respondents' inability to properly parent.

Respondents assert that were not provided with a reasonable amount of time to rectify their issues. This argument is not supported by the record. There was ample proof that respondent mother's strikingly poor parenting behaviors that led to the children's removal had remained virtually unchanged despite nearly a decade of services to improve her parenting skills. Likewise, respondent father's parenting skills were inadequate after receiving more than 182 days of services in Arenac county and extensive parenting education services in the 2004 North Carolina proceeding. Respondents did not improve their disciplinary techniques or impulse management as seen through their actions just before termination. Thus, the trial court properly concluded that there was no reasonable expectation that respondents would be able to provide proper care and custody of the children within a reasonable time considering the children's ages.

Moreover, the evidence supported a finding that the children would likely be physically harmed if returned to respondents' care. Respondent mother's physical abuse of her daughter in March 2010, which led to a conviction of third-degree child abuse, was not an isolated incident but a manifestation of ongoing problems that had not been adequately resolved after numerous services. During visitation, respondent mother was physically aggressive with her son, grabbing him and threatening to "beat your ass when we leave" after she accused him of cheating at a board game. Respondent father, after eight months of anger management instruction and two parenting skills programs, was unable to control his emotions and behaved so erratically during a

supervised visit that the caseworker feared for her physical well being and asked him to leave the room. There was clear and convincing evidence that respondents failed to benefit from services or properly correct the issues which led to the physical abuse of one child and inappropriate physical discipline of others, including respondents spraying alcohol or vinegar in the children's eyes. The psychologist's testimony confirmed that the children would be emotionally harmed if returned to respondents' care because of their poor parenting skills and psychological deficits that led to a chronically unstable home environment. The trial court did not clearly err in finding that there was a reasonable likelihood that the children would likely suffer from physical injury or abuse in the foreseeable future if placed in respondents' home.

Respondents assert that they made significant progress in addressing the problems that led to the children's removal. Respondents argue that the trial court improperly disregarded Dr. Smith's opinion, rendered just before the termination hearing, that the boys' mental status had improved and that respondent mother should be able to continue to parent her two children. Additionally, they contend that the trial court improperly disregarded the opinion of respondent mother's therapist that respondent mother had made "a lot of progress over a short period of time," was functioning in a "normal range," and could be dismissed from counseling. Respondents also argue that the court put misplaced emphasis on the psychologist's one-day snapshot psychological evaluations over the therapist's opinion, which was based on ongoing interactions with the family. We disagree and find that the trial court properly considered the weight of this evidence. Smith's opinion was based on the self reporting of the two boys and was given without the knowledge that one was failing in school and the other was involved in criminal activity. Although her therapist stated that respondent mother was within "normal range" of functioning, she admitted that her counseling was not for "parenting" issues, a pivotal issue in this case, and she would defer to the expert, in this case the evaluating psychologist who testified regarding respondent mother's parenting abilities. The evaluating psychologist's expert testimony confirmed that the four older children suffered from acute and chronic distress due to family instability. He related the children's stress and related problems to the lack of parental support, standards of behaviors, stability, as well as a lack of permanency. The trial court reasonably concluded that the psychologist's testimony was relevant and credible.

Respondents further argue that the psychological evaluations were untimely made. They assert that respondent father's psychological evaluation was made early in the proceedings and thus did not take into consideration the progress he had made in the intervening time between the evaluation and the termination hearing. This argument misstates the record. The psychological evaluations were just one aspect of a plethora of evidence, including seven review hearings, extensive court reports, and testimony from several witnesses, which the trial court considered in terminating respondents' parental rights. The trial court reasonably considered respondent father's July 2010 psychological evaluation, along with other evidence, in determining his ability to parent. Respondent mother asserts that she was not given the opportunity to attain the stated goals and benefit from her psychological evaluation because it was made 20 days before the termination petition was filed. Again, respondents misstate the record. Respondent mother was first evaluated in April and May 2010 and therefore had ample time to benefit from the evaluation before being re-evaluated in August 2011. Respondents assert that the four older children were psychologically evaluated too late to provide important information for the family reunification efforts. This argument is groundless. First, two of the children were evaluated in May 2010. Second, the four older children were all psychologically evaluated in August 2011.

These evaluations confirmed what respondents already knew; they needed to improve their parenting skills before the children could be returned to their care. Third, the main purpose of the children's 2011 psychological evaluations was to appraise the court of the children's current emotional status and the ramifications on their well being if they were returned or remained in respondents' care.

Respondents also argue that the foster care worker was the biggest barrier that the respondents had to overcome to have their children returned to their care. Respondent father blames his outburst at the April 2011 supervised visit on the foster care worker. Respondents contend that the foster care worker improperly led the court to believe that respondents could not function without petitioner's help, including financial assistance. Respondents argue that the caseworker admitted that the services offered were completed satisfactorily and thus the children should have been returned to respondents or else it was incumbent on petitioner to suggest and promote other services.<sup>1</sup> Respondents argue that petitioner did not properly consider the effect of respondent mother being bedridden because of pregnancy complications when considering her treatment plan progress. They assert that petitioner's lack of effort to provide services is evident throughout the case. In essence, on one hand respondents argue that petitioner did not do enough to reunite the family, but on the other hand they claim that they were able to function without petitioner's help. There is considerable evidence that respondent mother's participation in services was minimal before and after her pregnancy and medical complications. Further, the court properly considered respondent mother's medical condition when it provided her with additional time to comply with and benefit from her treatment plan. Respondent mother received SSI benefits and respondent father had limited employment. There was sufficient testimony, corroborated by the GAL, the parent aide, and the foster care worker, that respondents were unable to live independently. In the months leading up to the termination hearing, respondents continued to rely heavily on petitioner's assistance and their "best efforts" were riddled with inadequacy, delinquency, and failure. Thus, the trial court correctly determined that petitioner made reasonable efforts to reunite the family and that respondents fell woefully short in being able to properly care for the children.

The trial court also properly determined an additional statutory basis to terminate respondent father's parental rights on the grounds of a prior voluntary termination of his parental rights to another child. The evidence was uncontroverted that respondent father's parental rights were terminated after a child neglect and abuse petition had been filed in North Carolina. The statutory basis of the North Carolina petition for terminating respondent father's parental rights is similar to MCL712A.19b(3)(c)(i). In the North Carolina proceeding, respondent father was found to be in a domestically violent relationship with the child's mother. He had left his four-month-old child unattended for more than an hour and the infant was malnourished. The home was unfit. Respondent father received more than 900 hours of services, including parenting classes to improve his inadequate parenting skills, over the 53 months the child was in foster

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<sup>1</sup> Respondents' appeal brief is sprinkled with innuendos that the trial court proceedings were unfair and procedurally flawed. The record does not support such an assertion.

care. Despite reunification efforts, the conditions that led to the child's removal continued to exist. Before the North Carolina termination hearing took place, respondent father voluntarily relinquished his parental rights as part of a concocted sham separation with the mother to get the child back without correcting the conditions that led to the child's removal. Respondent father's argument that the court improperly terminated his parental rights pursuant to MCL 712A.19b(3)(m) because it was not established that the North Carolina statute was similar to Michigan's child protection statutes is groundless. The court properly considered that North Carolina judgment that was part of the court record.<sup>2</sup>

The court also properly concluded that termination of respondents' parental rights was in the children's best interests. MCL 712A.19b(5). There was clear evidence that respondents would not be able to provide a safe and stable environment for the children in the near future because of chronically poor parenting skills and psychological limitations. It was uncontroverted, especially through the compelling testimony of the psychologist, that the children needed stability and permanency, which respondents were unable to provide.

Although it is undisputed that respondent mother shared a bond with her four older children and there was evidence that respondents had attempted to bond with the youngest child, the four older children were confused and grappled with mixed feelings about reuniting with respondents or remaining in their foster home. There also was credible evidence that the boys had been coached to present their home life with respondent mother as being "perfect." Respondents clearly lacked adequate parenting skills, and there was no evidence that respondents would be able to consistently meet the children's physical and emotional needs. The older children needed permanency. The youngest child was born with a significant and permanent medical condition. Her extremely high medical needs made the quality and commitment to outstanding parenting behavior more critical and immediate. The evidence clearly established that respondents generally lacked a commitment to even basic parenting. Thus, the trial court properly found that terminating respondents' parental rights was in the children's best interests.

Finally, respondents argue that the trial court erred when it failed to address respondent mother's claimed Native American heritage pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 *et seq.* Issues regarding the application and interpretation of ICWA are questions of law that are reviewed de novo. *In re Morris*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2012), slip op at 11.

Although ICWA does not entirely displace state child custody laws in proceedings involving Indian children, it does impose certain mandatory procedural and substantive

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<sup>2</sup> Respondent father improperly argues that the trial court erred in terminating his parental rights because there was no evidence of any "prior attempts to rehabilitate" in the North Carolina proceeding as required under MCL 712A.19b(3)(i). Termination pursuant to MCL 712A.19b(3)(m), however, does not require prior attempts to rehabilitate.

safeguards. *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1988); *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996). As relevant to this case, 25 USC 1912(a) mandates that notice of certain involuntary child custody proceedings be sent to the appropriate Indian tribe or to the Secretary of the Interior “where the court knows or has reason to know that an Indian child is involved . . . .”

On March 24, 2010, at the reconvened preliminary hearing, respondent mother stated “no” when the court asked her whether her four children were of Native American heritage. During the December 14, 2010, preliminary hearing, the trial court inquired into any possible Native American heritage of the youngest child, who had been born after the initial petition. Petitioner responded “no” to the court’s question of whether any one believed the child was of Indian heritage. Respondent mother was not present at that hearing and her counsel did not give the court any indication that the youngest child was possibly of Native American heritage. The court inquired again about the youngest child’s possible Indian heritage status at the December 22, 2010, adjudication trial, at which time respondent mother told the court, contrary to her previous statement, that her deceased mother was possibly a member of the Cherokee tribe and had “paperwork” concerning the Cherokee tribe. The guardian ad litem told the court that he believed that petitioner had made inquiries regarding respondent mother’s other children and that nothing had been received regarding affiliation with an American Indian tribe. The court directed petitioner to give notice again to assure full compliance with ICWA. The lower court record, however, does not contain the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a) or the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. It is thus impossible to discern from the record whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients. We cannot fulfill our appellate function without documentation in the record sufficient to allow review of a trial court’s efforts to comply with 25 USC 1912(a).

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 provision, the proper remedy is to conditionally reverse and remand for resolution of the ICWA-notice issue. *In re Morris*, slip op at 35. On remand, the trial court shall first ensure that notice is properly made to the appropriate entity. If the trial court conclusively determines that ICWA does not apply to the involuntary child custody proceeding— because the children are not Indian children or because the properly noticed tribe does not respond within the allotted time – the trial court’s order terminating parental rights is reinstated. If, however, the trial court concludes that ICWA does apply to the child custody proceeding, the trial court’s order terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA. *In re Morris*, slip op at 36. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald  
/s/ Christopher M. Murray  
/s/ Elizabeth L. Gleicher