

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
September 11, 2012

In the Matter of HOWARD, Minors.

No. 308511  
Wayne Circuit Court  
Family Division  
LC No. 93-306058-NA

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Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

In this termination of parental rights case, respondent father appeals the trial court's order terminating his parental rights to his two children. Respondent argues that the trial court erred in finding that petitioner established statutory grounds for termination under MCL 712A.19b(3)(g) and (h). Respondent also contends that this court should conditionally reverse the termination order, and remand to the trial court so the requirements of the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 *et seq.*, can be satisfied. We conditionally reverse and remand for resolution of the ICWA notice issue.

This Court reviews for clear error a trial court's finding that the state established a ground for termination of parental rights and that the termination of a parent's rights is in the best interest of the child. MCR 3.977(J); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). A finding is clearly erroneous when, despite the fact that there is record evidence to support it, this Court 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). This Court should give consideration to the special opportunity of the trial court to judge the credibility of witnesses who appeared before it. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). An erroneous termination of parental rights under one statutory basis is harmless error if the court properly terminated rights under another statutory ground. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Respondent argues that the trial court clearly erred in finding that statutory grounds for termination of his parental rights existed. To terminate a respondent's parental rights, the state must first establish at least one statutory ground for termination. *In re LE*, 278 Mich App 1, 22; 747 NW2d 883 (2008). MCL 712A.19b(3) provides, in relevant part that "[t]he 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:"

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to

provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

The trial court specifically found sufficient grounds for termination under MCL 712A.19b(3)(h) and (g). In respondent's statement of the issue, he argues broadly that the trial court erred by terminating his rights, and that the termination was not in the best interest of the children. In his brief, however, respondent fails to specifically address the termination of his parental rights under MCL 712A.19b(3)(h). To properly present an appeal, an appellant must appropriately argue the merits of the issues he identifies in his statement of the questions involved. *PIC Maintenance, Inc v Dep't of Treas*, 293 Mich App 403, 414; 809 NW2d 669 (2011); *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). By failing to specifically argue that termination under MCL 712A.19b(3)(h) was in error, respondent has abandoned this issue.

Respondent's failure to address this issue is fatal to his entire appeal because only one statutory ground for termination must be established by clear and convincing evidence, after which an appellate court need not consider whether other grounds cited by the trial court also support a termination decision. *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009).

Nonetheless, even if we were to address respondent's argument that the trial court erred in terminating his parental rights under MCL 712A.19b(3)(g) and MCL 712A.19b(3)(h), we would conclude that the trial court did not err.

Respondent had custody of his two young daughters until he became incarcerated in April 2010 in the State of Nebraska. Respondent was convicted of possession with intent to deliver marijuana and was given a sentence of 10-14 years to be served in a Nebraska correctional facility. During the ten months between his arrest and conviction, respondent failed to arrange "proper care or custody" for the girls. He unsuccessfully attempted to establish a guardianship with Latonya Ballard, his former girlfriend and mother of his older child. Once it became the petitioner's duty to find a placement for the girls, it was statutorily required to give special consideration and preference to the girls' relatives, which it did. MCL 722.954a(5); MCR 3.965(E). As a result, the girls were placed with their mother's aunt.

Because Ballard is unrelated to the girls and was not a licensed foster parent, she was not a legally appropriate option for the girls. Indeed, 18 months after the girls' removal, Ballard was still "in the process of getting licensed" as a foster parent. While an incarcerated parent may provide "proper care and custody" for purposes of subsections 19b(3)(g) and (h) by placement

with a suitable caretaker, respondent's plan to further delay the girls' permanency by leaving them indefinitely under a guardianship with Ballard was not suitable.

Furthermore, there is no reasonable expectation that defendant himself will be able to provide proper care and custody within a reasonable time considering the ages of his children. The girls were three-and-a-half years old and two months old when respondent first became incarcerated. His earliest release date is April 2015, and if he serves his entire sentence, he will not be released until 2024. Even if defendant were released at the earliest possible date, his children would have spent five years in foster care, and would be at least five and eight-years-old by the time he could conceivably parent them again. The trial court properly concluded that the girls had waited long enough for a permanent and safe home. The trial court's determination that clear and convincing evidence was presented to support termination of the respondent's parental rights under MCL 712A.19b(3)(g) and (h) was not clearly erroneous.

MCL 712A.19b(5) requires "if the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interest, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." Once the trial court finds that a statutory ground for termination has been established, it shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests." *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). The trial court cannot terminate parental rights unless it finds that termination is in the child's best interests. There is no specific burden on either party to present evidence of the child's best interests; rather, the trial court must weigh all evidence available. *In re Trejo*, 462 Mich at 354. The trial court's findings need not be extensive; "brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1). This Court reviews the trial court's determination regarding the child's best interests for clear error. *In re Jones*, 286 Mich App at 129; *In re Trejo*, 462 Mich at 356-357; MCR 3.977(K).

Respondent is not able to provide his children a home where caregivers provide safety, stability and permanency, nor is it reasonably likely that he will be able to do so in the foreseeable future, given his incarceration. Children should not have to wait indefinitely for parental reformation and rehabilitation which may never come to pass. This Court has firmly stressed its belief in *In re Dahms*, 187 Mich App 644, 647; 468 NW2d 315(1991) that "...the Legislature did not intend that children be left indefinitely in foster care, but rather that parental rights be terminated if the conditions leading to the proceedings could not be rectified within a reasonable time." Considering the respondent's current incarceration and indefinite separation from his children, the trial court's termination decision was proper. The record reveals that termination of the respondent's parental rights was in the minor children's best interests.

Finally, respondent argues that the trial court erred when it failed to address respondent's claimed Native American heritage pursuant to ICWA. Issues regarding the application and interpretation of ICWA are questions of law that are reviewed de novo. *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012).

Although ICWA does not entirely displace state child custody laws in proceedings involving Indian children, it does impose certain mandatory procedural and substantive 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). In the present case, respondent’s attorney indicated during the preliminary hearing that respondent may have American Indian heritage. Under MCR 3.965(B)(2), a court must “inquire if the child or either parent is a member of an Indian tribe [.]” and if so, “must determine the identity of the child’s tribe[.]” If it is determined that a child may be an Indian child, the trial court must give notice of the proceedings to the Indian tribe and of its rights of intervention. Sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC § 1912(a). *In re Morris*, 491 Mich at 108. The record is silent on whether the trial court complied with the notification requirements of ICWA.<sup>1</sup>

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*, 491 Mich at 121. 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*, 491 Mich at 120-121.

Conditionally reversed and remanded for resolution of the ICWA notice issue. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher  
/s/ Donald S. Owens  
/s/ Mark T. Boonstra

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<sup>1</sup> The trial court is required to maintain a documentary record of all correspondence between the Department of Human Services, the trial court, and the Indian tribe or other person or entity entitled to notice. *In re Morris*, 491 Mich at 89.