STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of NICOLE ANN HIDALGO, JAIME HIDALGO II, MARIO J. HIDALGO, and SHANNA R. A. HIDALGO, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JAIME HIDALGO,

Respondent-Appellant,

and

RUBY ANN HOLDEN and ROBERT MARTINEZ,

Respondents.

UNPUBLISHED
June 1, 1999

No. 214139
Wayne Circuit Court
Family Division
LC No. 94-321242

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Respondent-appellant father appeals as of right from a trial court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i); MSA 27.3178 (598.19b)(3)(c)(i), (the conditions that led to the adjudication continue to exist and are not likely to be rectified within a reasonable time given the age of the children), (g) (without regard to intent, the parent fails to provide proper care or custody and is unlikely to be able to do so within a reasonable time given the age of the children), and (j) (given the parent's conduct or capacity, the children are likely to be harmed if returned to the parent's home). We affirm.

Respondent and the children in this case are registered members of the Grand Traverse Band of Ottawa Chippewa Indians. The order terminating respondent's parental rights was entered on August 5, 1998. Because this case involves Native American children, the trial court was required to comply with the requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. Respondent now appeals, raising several issues related to the order terminating his parental rights to the children. We do not find any issue to require reversal.

First,[1] we find that, contrary to respondent's contention, the trial court did not terminate respondent's parental rights without the testimony of a qualified expert witness. Initially we note that respondent failed to raise this issue below because there was no objection regarding the witnesses' qualifications to testify as experts and no objection to their actual testimony. In any event, the witnesses' qualifications were elicited by petitioner. Simone Rubio, the caseworker assigned to the Hidalgo family, testified that she works for the Michigan Indian Child Welfare Agency, has a bachelor's degree in psychology, and is of Mexican and Native American descent. Linda Stewart, who had been involved with the children for about two years, testified that she works for the Grand Traverse Band of Ottawa Chippewa Indians as the director of the Indian Child Welfare Program and designee of the Indian Child Welfare Committee. Stewart is likewise Native American and worked for the tribe for over fourteen years. These two witnesses were clearly qualified to testify as experts, as required by 25 USC 1912(f) and MCR 5.980(D).

Next, respondent argues that the trial court failed to make separate findings under the ICWA and the state Juvenile Code. The dispositional review hearing was held on July 9, 1998 before a referee. The referee stated on the record at the end of the hearing that the standard of proof was "beyond a reasonable doubt." Specifically, the referee stated:

> This Court is convinced by a high standard of beyond a reasonable doubt, based on the lack of completion of parental classes, the lack of completion of substance abuse therapy, the lack of completion of any kind of inpatient treatment or intensive outpatient treatment. . . . Therefore, the Court is going to terminate the parental rights [of] Mr. Hidalgo also, and the Court believes, as testified by Ms. Rubio, Ms. Jones and Ms. Stewart, that it is in the best interest of the children.[2]

In her written report and recommendation, filed July 31, 1998, the referee made detailed factual findings and concluded that the parents had not shown any commitment to any plan for reunification and that the period necessary for the parents to provide for the children would be longer than the needs of the children could tolerate. The referee also found that reasonable efforts were made by petitioner to prevent the children's removal from their home and reasonable efforts had been made to attempt to rectify the conditions causing the removal. The referee further found that the statutory grounds were proved by clear and convincing evidence.

The trial court's actual order terminating parental rights, also filed on July 31, 1998, specifically states that (1) reasonable efforts were made to preserve and unify the family; (2) there was evidence beyond a reasonable doubt[3] that a statutory basis existed for terminating respondent's parental rights and that termination was in the best interest of the children; and (3) the children are American Indian and

there was evidence beyond a reasonable doubt, including testimony from qualified expert witnesses, that continued custody of the children by the parent or Indian custody would result in serious emotional or physical damage to the children. The trial court also adopted the factual and legal findings of the referee.

The ICWA precludes termination of parental rights to an Indian child absent (1) proof "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), and (2) "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). The requirements of the ICWA and this state's Juvenile Code create a dual burden of proof: "the [trial] court must find beyond a reasonable doubt that 'continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,' *and* the court must also find that clear and convincing evidence supports termination under the applicable state statutory ground." *In re Elliott*, 218 Mich App 196, 209-210; 554 NW2d 32 (1996).

We find that the trial court's order, taken in conjunction with the factual and legal findings of the referee, is sufficient to show that separate findings were made under the state Juvenile Code and the ICWA. The trial court's order clearly sets forth the standards under the ICWA and the state statute, and the factual findings detailed in the referee's report and recommendation, as adopted by the trial court, support the trial court's conclusions that a statutory basis existed for termination of parental rights and that such was in the best interest of the children, and that there was evidence beyond a reasonable doubt that continued custody of the children by the parent would likely result in serious emotional or physical damage to the children. Therefore, the dual burdens under the ICWA and the state statute were applied and supported by the evidence in this case.

Respondent next argues that termination was not justified under the ICWA because he was not given enough time to demonstrate the possible success of the efforts at rehabilitation. Under 25 USC 1912(d), it must be shown that active efforts have been made to procure remedial services to prevent the break up of the Indian family and that these efforts have proven unsuccessful. The children in this case initially came into care in October 1994 and were made temporary wards of the court on May 16, 1995. Respondent, who did not provide support for the children but visited them, signed a parent/agency agreement in June 1996. Respondent then moved to Ohio to find work and did not provide support for the children, although some attempts were made to comply with the agreement. By May of 1997, the children were again removed from the mother's care and were placed into foster care. In June 1997, respondent came forward with a plan for the children. The plan centered on respondent and included supervised visits, parenting classes, individual therapy, and drug screens and assessments.

The evidence indicated that respondent did not finish parenting classes, did not have suitable housing, his attendance at therapy was sporadic, he continued to use alcohol, he did not attend AA regularly, and his only drug screen was positive for cocaine. Thus, there was not full compliance with the plan and respondent's rights were ultimately terminated in August 1998. Accordingly, we cannot

agree with respondent's assertion that he was not given enough time to rehabilitate. Rather, the evidence shows that services were provided to respondent to facilitate reunification but that they proved to be unsuccessful.

Respondent next contends that none of the statutory grounds under the state Juvenile Code were demonstrated by clear and convincing evidence. A review of the record indicates that the trial court did not clearly err in finding that §§ 19b(3)(c)(i) and (g) were established by clear and convincing evidence. *In re Hall-Smith*, 222 Mich App 470, 472-473; 564 NW2d 156 (1997); *In re Vasquez*, 199 Mich App 44, 51-52; 501 NW2d 231 (1993). The evidence showed that respondent had little involvement in the lives of the children, instead leaving them with the mother to raise. Due to respondent's lack of involvement (and the mother's apparent inability to care for the children), the children entered foster care. Respondent did not have a suitable home, did not complete parenting classes, and failed to complete substance abuse treatment. Respondent was admittedly using cocaine about one month before the hearing and had a history of abusing alcohol. Given that the children had been in care for more than three years, it was clear that respondent would not be able to provide proper care and custody within a reasonable time considering the ages of the children. Also, such evidence necessarily proved that remedial services had been provided to respondent and were unsuccessful in achieving reunification. Accordingly, there was sufficient evidence that grounds for termination were established by clear and convincing evidence under § § 19b(c)(i) and (g).[4]

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Helene N. White

[1] We note that the statement of questions presented in respondent's appellate brief do not correspond to the arguments set forth in the argument section of the brief. Although this is a violation of MCR 7.212(C)(5) and (7), we will address the issues as set forth in the argument section of the brief.

[2] It also bears noting that the referee stated that she was weighing "very highly" the testimony of the Grand Traverse Band Indian Child Welfare Committee, as presented by Linda Stewart. The tribe recommended termination of respondent's parental rights.

[3] The trial court utilized a higher standard of proof in this regard. Under the state statutory provisions, the evidence must be clear and convincing, but not beyond a reasonable doubt.

[4] Because clear and convincing evidence was established as grounds for termination under § § 19b(3)(c)(i) and (g), any error in terminating respondent's parental rights under § 19b(3)(j) was harmless because only one of the statutory grounds must be established by clear and convincing evidence in order to terminate parental rights. MCL 712A.19b(3); MSA 27.3178(598.19b)(3).