STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SCOTTIE LA-RAY YEARY, DAIMOND LEE ZGORZELSKI and BRANDON JORELL ZGORZELSKI, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ALLYSON YEARY,

Respondent-Appellant.

UNPUBLISHED
February 9, 2001

No. 224475
Monroe Circuit Court
Family Division
LC No. 98-013672-NA

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(i), (c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(b)(i), (c)(i), (g) and (j). Although we conclude that the trial court did not err in its findings of fact and did not err by terminating respondent's parental rights under Michigan law, we conditionally affirm and remand for additional proceedings.

Respondent first argues that the trial court lacked jurisdiction to terminate her parental rights because the trial court failed to properly determine whether the minor children were Indian children subject to the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. Whether the trial court failed to comply with the provisions of the ICWA is a legal question that we review de novo. *In re IEM*, 233 Mich App 438, 443; 592 NW2d 751 (1999). During the initial stages of the proceedings below, respondent informed the trial court that she might be of Cherokee Indian descent. This statement on the record was sufficient to trigger the notice requirements of the ICWA. *Id*. at 448. The trial court properly ordered petitioner to notify the Bureau of Indian Affairs or other appropriate authority in order to determine whether the children qualified as Indian children subject to the ICWA. MCR 5.965(B)(7); MCR 5.980. However, the record is silent as to whether petitioner complied with that order and satisfied the ICWA's notice requirements before the court proceeded to termination. Although it appears from documents attached to the brief filed on the children's behalf that petitioner may have taken the steps

necessary to notify the appropriate tribes, we believe that the trial court must make a factual determination, on the record, regarding the applicability of the ICWA to respondents' children and petitioner's compliance with those requirements.[1]

Because, as discussed below, we find that the trial court properly terminated respondent's parental rights under Michigan law, we conclude that we need not reverse the trial court's termination order. *In re IEM, supra* at 449. Rather, we remand this matter to the trial court with instructions for it to determine whether respondent's children are Indian children, and if so, whether petitioner satisfied the notice requirements of the ICWA and whether any Indian tribe wishes to intervene.[2]

Respondent next argues that the trial court committed clear error in finding that at least one statutory ground for termination was established by clear and convincing evidence. We disagree. In a termination proceeding, the petitioner bears the burden of demonstrating a statutory basis for termination by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 360; 612 NW2d 407 (2000). This Court reviews for clear error the trial court's decision that a ground for termination has been proven by the requisite evidence. *Id*. at 356-357. The two specific incidents that were the subject of respondent's plea, that she struck one of the children and attempted suicide in the children's presence, did not reoccur during the pendency of this case because the children were removed from respondent's custody. However, it is apparent from the record that respondent's mental illness caused the incidents which led to the court's assumption of jurisdiction. The evidence in the record fails to demonstrate either that respondent's mental condition was sufficiently under control at the time of trial or that it would remain under control for the foreseeable future. Therefore, the trial court did not clearly err in finding that the conditions that led to the adjudication proceeding had not been rectified for purposes of § 19b(3)(c)(i).

We also find clear and convincing evidence in the record that respondent physically abused her children in the past and that there was a reasonable likelihood that the children would suffer further abuse or harm in the foreseeable future if returned to respondent's custody. Accordingly, termination was also proper under §§ 19b(3)(b)(i) and (j). The evidence also showed that respondent was consistently unable to provide proper care and custody for her children and there was no reasonable expectation that she would be able to do so within a reasonable amount of time, considering the children's ages. Therefore, respondent's parental rights were also properly terminated under § 19b(3)(g).

---

[1] Because the documents attached to petitioner's brief are not part of the lower court record, we may not consider those documents on appeal. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).

[2] We note that, on remand, it "is not the responsibility of respondent to establish the applicability of the ICWA." *In re IEM, supra* at 449. Once petitioner demonstrates that it provided notice as required by the ICWA and that a tribe failed to respond or intervened but is unable to determine the child's eligibility for membership, the burden would then shift to the respondent to show that the ICWA applies to her children. *Id*.

Finally, respondent argues that the trial court committed clear error in determining the best interests of the children. Once the petitioner has established at least one statutory ground for termination, the trial court must terminate parental rights unless it finds that doing so is clearly not in the children's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo Minors*, *supra* at 350. This Court reviews for clear error the trial court's decision regarding the children's best interests. *Id*. at 356-357. Our review of the evidence does not show that termination of respondent's parental rights was clearly not in the children's best interests. Although respondent had a bond with the children, petitioner presented overwhelming evidence that respondent's continued relationship with the children would be harmful to them and that the children needed permanency and stability in their lives, which respondent could not provide.

Despite the need for further proceedings regarding compliance with the ICWA, the trial court's decision to terminate respondent's parental rights need not be set aside. If, on remand, the trial court finds that the children are not Indian children under the ICWA, then the trial court's decision to terminate respondent's parental rights shall stand. If the trial court finds that the children are Indian children subject to the ICWA, but determines that petitioner properly complied with the ICWA's requirements, then the trial court's decision shall stand. However, if the trial court determines that that the children qualify as Indian children under the ICWA, that proper notice was not provided, or that an Indian tribe wishes to intervene, then the trial court shall take whatever additional steps are necessary to comply with the ICWA. See *In re IEM*, *supra* at 448-450; MCR 5.965(B)(7); MCR 5.980.

We conditionally affirm the trial court's order terminating respondent's parental rights, but remand for the purpose of determining whether the requirements of the ICWA apply to respondents' children, and if so, whether petitioner satisfied those requirements. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage