STATE OF MICHIGAN

COURT OF APPEALS

In re C. FIELDS, Minor.

UNPUBLISHED
February 18, 2016

Nos. 328348; 328708
Berrien Circuit Court
Family Division
LC No. 2014-000003-NA

Before: HOEKSTRA, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated cases, respondent mother and respondent father appeal the trial court's order terminating their parental rights to the minor child, C.F., under various statutory grounds. For the reasons set forth below, we conditionally reverse the trial court's order and remand this case for further proceedings.

Mother and father are married, and they have one child together, C.F., who was born on January 10, 2014. Mother also has two older children, A.N. and A.A., from previous relationships.[1] Relevant to the present case, Child Protective Services (CPS) first received a report about the family in April of 2013, when A.A. was failing to thrive. CPS received a second report in December of 2013, expressing concerns that the children were not receiving adequate food, that they were told they could not leave their rooms, and that A.N. had suspicious marks on her body, including "black coloration around her eye." Despite instructions to take A.N. to the hospital for immediate evaluation, mother waited four days, by which time the marks had disappeared.

On January 7, 2014, while mother was pregnant with C.F., CPS received a report of father physically abusing both of mother's older children. Father held five-year-old A.N. upside down by the ankles, shook her, hit her with a belt, and then dropped her on her head. He also repeatedly slapped A.A., who was then less than two years old at the time. A.A., who had been diagnosed with failure to thrive as an infant, was also found to be underweight for her age. Mother proved herself uncooperative at the hospital and during the subsequent police investigation. She appeared unconcerned by the incident and, in an interview with police, she

[1] The older children are now in the custody of their respective fathers, and they are not at issue in this appeal.

attempted to protect father by claiming A.N. received her injuries by running into a door. Given these events, the older children were removed from mother's care and, within days of C.F.'s birth in January of 2014, she was likewise removed from respondents' care. Father later pled guilty to child abuse, and he was incarcerated during the proceedings in this case.

On March 5, 2014, the trial court assumed jurisdiction over C.F.[2] For over a year, respondents failed to make adequate progress toward reunification and, in April of 2015, the Department of Health and Human Services (DHHS) filed a supplemental petition requesting termination of respondents' parental rights. On June 24, 2015, the trial court found clear and convincing evidence supported termination of respondents' parental rights under MCL 712A.19b(3)(b)(*i*) (child or sibling suffered physical injury caused by parent's act), (b)(*ii*) (child or sibling suffered physical injury that parent failed to prevent), (c)(*i*) (conditions leading to adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if child is returned to the parent's home). The trial court also concluded that termination would be in C.F.'s best interests. Consequently, the trial court terminated respondents' parental rights. See MCL 712A.19b(5). Mother now appeals as of right. Father appeals by leave granted, and respondents' appeals have been consolidated by this Court.[3]

On appeal, in docket no. 328348, mother argues that the trial court erred by terminating her parental rights. In particular, mother first contends that the trial court erred by finding that a statutory ground for terminating her parental rights was proved by clear and convincing evidence. She asserts that the facts do not demonstrate that she failed to protect C.F.'s siblings, that she addressed many barriers to reunification during services and is capable of addressing any additional concerns, that there is no evidence that father poses a risk to C.F. given that he is incarcerated, and that mother is committed to withholding C.F. from father until DHHS deems him safe for C.F. Mother also maintains that termination was not in C.F.'s best interests because there have been no criticisms of mother's parenting skills and mother is committed to protecting C.F. from father.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40;

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[2] The trial court initially assumed jurisdiction based on mother's no contest plea and the application of the one parent doctrine, which was thereafter ruled unconstitutional in *In re Sanders*, 495 Mich 394, 422; 852 NW2d 524 (2014). However, following *Sanders*, the trial court held a second adjudication pertaining to father, at which time father pled no contest to the allegations in the petition.

[3] *In re Fields*, unpublished order of the Court of Appeals, entered August 20, 2015 (Docket No. 328708); *In re Fields*, unpublished order of the Court of Appeals, entered August 20, 2015 (Docket Nos. 328348 & 328708).

823 NW2d 144 (2012) (citations omitted). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "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 interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5).

On appeal, we review for clear error the trial court's factual findings, its determinations on the statutory grounds for termination, and its best interests determination. *In re White*, 303 Mich App 701, 709, 713; 846 NW2d 61 (2014); MCR 3.977(K). "A finding of fact is clearly erroneous 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 Moss*, 301 Mich App at 80 (quotation omitted).

At the outset, we note that while mother challenges the trial court's findings as to some of the statutory grounds, she does not challenge its finding with respect to MCL 712A.19b(3)(j). Because termination of parental rights need only be supported by a single statutory ground, *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009), her failure to challenge the trial court's finding with respect to (j) precludes appellate relief. *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000).[4] In any event, we conclude that the trial court did not clearly err in finding the existence of at least one statutory ground by clear and convincing evidence. Specifically, termination is warranted under MCL 712A.19b(3)(b)(*ii*) when:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
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> ***
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> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

The provision "is intended to address the parent who, while not the abuser, failed to protect the child from the other parent or nonparent adult who is an abuser." *In re LaFrance Minors*, 306 Mich App 713, 725; 858 NW2d 143 (2014).

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[4] We note that father does not raise any appellate challenge to the trial court's findings regarding the statutory grounds for termination. As such, we may assume that the trial court did not clearly err in finding that at least one of the statutory grounds relied upon by petitioner was proved by clear and convincing evidence. *In re JS & SM*, 231 Mich App at 98-99. In any event, based upon our independent review of the record, we conclude that the trial court did not clearly err in finding that termination of father's parental rights was warranted under MCL 712A.19b(3)(b)(*i*).

In this case, the trial court did not clearly err by finding that C.F.'s siblings suffered physical injury at father's hands, which mother failed to prevent. As detailed *supra*, father physically abused C.F.'s siblings in January of 2014. He was arrested and later pled guilty to child abuse. In addition, before this incident, CPS had received a referral alleging that there were suspicious marks on A.N.'s body, specifically, "black coloration around her eye." Yet, when CPS investigated the referral and requested that mother take A.N. to the hospital immediately for evaluation, mother neglected to do so. A week later, A.N. was found to have been severely beaten by father to the point that she was taken to the hospital, and she ultimately disclosed that father had abused her. A.A. was also found to have bruising and marks on her face consistent with child abuse. In response to this serious abuse, mother stated that she was "not concerned" and she denied that the injuries were the result of physical abuse. Rather than protect her children, she endeavored to protect father by asserting that A.N. sustained her injuries by running into a door. She also justified father's conduct by claiming that "sometimes kids need a whoopin' for what they do." Thus, there was more than sufficient evidence to support that mother failed to protect A.N. and A.A.—C.F.'s siblings—from physical abuse. MCL 712A.19b(3)(b)(*ii*).

Moreover, given the evidence presented, the trial court also did not clearly err by finding a reasonable likelihood that C.F. will suffer injury or abuse in the foreseeable future if placed in mother's home. MCL 712A.19b(3)(b)(*ii*). As discussed, father physically abused A.N. and A.A., and this abuse is indicative of how he may treat C.F. *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). For her part, mother had a history of minimizing father's conduct and failing to protect her own children from his abuse. This history supports the conclusion that C.F. faces a reasonable likelihood of harm if returned to mother's care. Indeed, after almost 18 months of services, including counseling, the evidence showed that mother still failed to appreciate the danger posed by father and she remained committed to her relationship with father following his release from jail.

It is true that, at various points in the proceedings, mother offered verbal assurances that she could adequately protect C.F. from father. But these verbal assurances carried little weight in light of her past failings and her ongoing conduct throughout the proceedings. For example, at one point, despite an order prohibiting father from contacting the children, mother directed A.N. to apologize to father for making the allegations against him. At other points, she insisted that father did not mean to hurt the children. On the whole, mother's actions throughout the case evidenced her failure to truly acknowledge the wrongfulness of father's conduct or her role in failing to protect her children. Based on this record, the trial court did not clearly err in finding that there was a reasonable likelihood that C.F. would suffer injury or abuse in the foreseeable future if returned to mother's care. MCL 712A.19b(3)(b)(*ii*).

Because the trial court did not clearly err in finding that termination was proper under (b)(*ii*), we need not address the additional grounds. *In re HRC*, 286 Mich App at 461. Nevertheless, we have considered these subsections and the same evidence warranting termination under MCL 712A.19b(3)(b)(*ii*) amply supports the trial court's determination that the statutory grounds in MCL 712A.19b(3)(c)(*i*), (g), and (j) were met by clear and convincing evidence. In sum, the trial court did not clearly err by finding that at least one statutory ground for termination had been shown by clear and convincing evidence.

Given the facts of this case, we also conclude that the trial court did not clearly err by determining that termination of mother's parental rights was in C.F.'s best interests.[5] When considering a child's best interests, the trial court should weigh all available evidence and may consider a wide variety of factors. *In re White*, 303 Mich App at 713. Examples of relevant factors 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. *In re Olive/Metts Minors*, 297 Mich App at 41-42 (citation omitted). A parent's compliance with a case service plan and the parent's visitation history may also be considered. *In re White*, 303 Mich App at 714. In addition, the court might also consider a child's safety and well-being, including a history of abuse and the risk of harm if returned to the home. *In re VanDalen*, 293 Mich App at 142.

In this case, at the time of termination, C.F. was approximately 17-months-old and she had spent her entire life in foster care. The trial court emphasized that her life had "remained in a state of flux," and that she was in need of permanence and stability. However, mother was unable to provide that permanence and stability because, despite efforts to reunify the family, mother substantially failed to participate in or benefit from important services designed to address her barriers to reunification and it was thus questionable whether C.F. could be returned to mother "within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012). Indeed, as discussed, given mother's commitment to her relationship with father, the evidence showed that C.F. faced a risk of harm if returned to mother's care. Moreover, there was essentially no bond between mother and C.F. because mother went substantial periods of time without seeing C.F. On the other hand, C.F. was placed in a loving foster home where all of her needs were being met. In these circumstances, the trial court reasonably concluded that "the bond of biology is displaced by the bond of nurturance." Overall, given the evidence presented, the trial court did not clearly err in finding that termination of mother's parental rights was in C.F.'s best interests.

Next, in docket no. 328708, father argues that the trial court denied his due process right to participate in proceedings. Specifically, defendant asserts that he was entitled, under MCR 2.004, to participate by telephone in the hearings that were held while he was incarcerated and that the trial court's failure to ensure his participation under that rule denied him due process.

"The fundamental requisite of due process of law is the opportunity to be heard." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (quotation marks and citation omitted). The opportunity to be heard requires notice of that opportunity and the opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Id.* (quotation marks and citation omitted). In *In re Mason*, 486 Mich 142, 152-154; 782 NW2d 747 (2010), our Supreme Court held that MCR 2.004 requires the trial court to arrange for a parent incarcerated in the Department of Corrections (DOC) to participate by telephone in *all* hearings held in a child protective proceeding. If the parent is not offered the opportunity to participate in the

[5] Father does not challenge the trial court's finding that it was in C.F.'s best interests to terminate his parental rights, and we see no clear error in the trial court's determination.

proceedings, MCR 2.004(F) prohibits the court from granting the moving party's request for relief regarding the minor child. *In re Mason*, 486 Mich at 154.

In this case, the record reflects that father was incarcerated, either in jail or prison, for the entirety of these proceedings. Nonetheless, he was afforded the opportunity to participate, either in person or by telephone, in all but three proceedings: a March 5, 2014 adjudication; a November 12, 2014 dispositional review hearing; and a December 22, 2014 permanency planning hearing.

With regard to the March 5, 2015 hearing, father's argument that the trial court was required to facilitate his telephonic participation at mother's adjudication lacks merit. It is clear from the record that father was in jail at that time, not prison. The plain language of MCR 2.004 makes clear that it applies only to persons who are incarcerated under the jurisdiction of the Michigan DOC. *In re BAD*, 264 Mich App 66, 74-75; 690 NW2d 287 (2004). In contrast, the rule does not apply to those incarcerated in a county jail. See MCR 2.004(A). Thus, contrary to father's argument, the trial court had no duty under MCR 2.004 to ensure father's telephonic participation at the March 5, 2014 hearing. Moreover, the record clearly reflects that father was provided notice of the hearing and that his attorney appeared on his behalf. In addition, while father was not present for mother's adjudication on March 5, 2014, following *In re Sanders*, 495 Mich at 422, the trial court held a second adjudication pertaining to father, at which time father pled no contest to the allegations in the petition. Under these circumstances, father was not deprived of due process and he is not entitled to relief on appeal.

With respect to father's absence at the November 12, 2014 and December 22, 2014 hearings, it is unclear from the record precisely what steps were taken to comply with MCR 2.004. That is, when a parent is incarcerated with the DOC, under MCR 2.004(B):

> (B) The party seeking an order regarding a minor child shall
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> (1) contact the department to confirm the incarceration and the incarcerated party's prison number and location;
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> (2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
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> (3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic or video hearing is required by this rule.

In this case, there was discussion on the record regarding father's absence and it appears there was some contact with the DOC regarding father's prison number and location. Specifically, Latoya Tyler, the DHHS representative, explained that following father's transfer from county jail to prison, he was in "quarantine for 30 to 40 days" at the Charles Egeler Reception and Guidance Center in Jackson, Michigan. She further stated that: "[o]nce he goes to his next placement, that will be his location and they'll let us know then." Despite these preliminary efforts to ascertain father's location, there is no record indication that petitioner or

the trial court attempted to offer father an opportunity to participate by telephone in those proceedings. This was erroneous. See MCR 2.004(B); *In re Mason*, 486 Mich at 154.

Nevertheless, we conclude that reversal is not warranted. We do not read *Mason* as requiring reversal when a respondent is absent from two hearings but is present for all others and is otherwise afforded an opportunity to participate in the case. Instead, as we acknowledged in *In re DMK*, 289 Mich App 246, 254-255; 796 NW2d 129 (2010), the relevant inquiry is whether the respondent suffered prejudice as a result of his or her absence during "a critical time in [the] child welfare proceedings." Based on our review of the record in this case, we cannot conclude that father was prejudiced in this manner. First, as noted above, the trial court's error only resulted in father missing two hearings; he participated in all other proceedings in this case, including the preliminary hearing, the initial dispositional hearing, multiple review hearings, a second adjudication for him, and the termination hearing. In other words, his inability to participate by telephone was the rare exception, not the norm over the course of the 17 months of proceedings. Cf. *Id*. at 255 (finding exclusion of parent "for a prolonged period of the proceedings" cannot be considered harmless). Indeed, it was on March 18, 2015—*after* the missed hearings on November 12, 2014 and December 22, 2014—that father was separately adjudicated by the trial court following *Sanders*, 495 Mich at 422. Thus, this case is not analogous to *Mason*, 486 Mich at 154-155, wherein the respondent father was denied an opportunity to participate in approximately 16 months-worth of proceedings, such that by the time he was allowed to participate again, the trial court was "ready to move on to the termination hearing." Second, although father himself was not present at the two hearings, there is no dispute that he was represented by counsel. Finally, despite father's absence at these two hearings, he was kept apprised of the proceedings and given a case service plan so that he could attempt to find services in prison that would help him address his barriers to reunification. He failed to do so. Thus, unlike in *Mason*, DHHS did not simply ignore its duties with respect to father, and father was not deprived of a meaningful opportunity to participate during the crucial child protective proceedings. On the facts of this case, father's absence from the November 12 and December 22 hearings was harmless and he is not entitled to relief.

Finally, father argues that the trial court and DHHS failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) after father indicated at the preliminary hearing that he might have Native American heritage.

In 1978, Congress enacted ICWA, 25 USC 1901 *et seq*., "in response to growing concerns over 'abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' " *In re Morris*, 491 Mich 81, 97-98; 815 NW2d 62 (2012), quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). The stated purpose of ICWA is to protect and preserve Indian families, Indian tribes, and tribal culture. *Id*. Likewise, in January 2013, the Michigan Legislature enacted the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., "with the purpose of protecting 'the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families.' " *In re Spears*, 309 Mich App 658, 669; ___ NW2d ___ (2015),

quoting MCL 712B.5(a). ICWA and MIFPA each establish various substantive and procedural protections that apply when an Indian child[6] is involved in a child protective proceeding. Relevant to this case, ICWA contains a notice provision which states, in relevant part:

> In any involuntary proceeding in a State court, where the court *knows or has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child *shall* notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary[7] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. . . . [25 USC 1912(a) (emphasis added).]

MIFPA contains a substantially similar notice requirement. See MCL 712B.9(1).

"[I]t is well established that only [an] Indian tribe can determine its membership." *In re Morris*, 491 Mich at 100 (citations omitted). "Therefore, when there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of the child custody proceedings, so that the tribe may advise the court of the child's membership status." *Id.* (citations omitted). As set forth above, the notice requirements of ICWA and MIFPA are triggered whenever the trial court "knows or has reason to know" that an Indian child is involved. 25 USC 1912(a)(2); MCL 712B.9(1). This "reason to know" standard has been set at "a rather low bar." *Morris*, 491 Mich at 105. That is, "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)." *Id*. at 108. Indicia sufficient to trigger tribal notice includes, for example: " 'situations in which (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, [or] (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified[.]' " *In re Johnson*, 305 Mich App 328, 332; 852 NW2d 224 (2014), quoting *In re Morris*, 491 Mich at 108 n 18.

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[6] Under ICWA, an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4). MIFPA more broadly defines "Indian child" to include a child "[e]ligible for membership in an Indian tribe as determined by that Indian tribe," without reference to whether the child is also the biological child of a member of an Indian tribe. See MCL 712B.3(k)(*ii*); *In re KMN*, 309 Mich App 274, 286-287; 870 NW2d 75 (2015).

[7] "Secretary" refers to "the Secretary of the Interior." 25 USC 1903(11). However, pursuant to 25 CFR 23.11(b) and (c)(2), when notice to the Secretary of the Interior is required for proceedings in Michigan, the notice is sent to the Minneapolis Area Director of the Bureau of Indian Affairs. *In re Morris*, 491 Mich at 103 n 14.

In this case, the ICWA and MIFPA notice requirements were triggered after father indicated, at the January 13, 2014 preliminary hearing, that his grandmother had told him that he had Native American heritage "in [his] blood line" and that he therefore "may be eligible" for tribal membership. Cf. *In re Morris*, 491 Mich App at 109. Although father did not specifically identify which tribe he might belong to, his statements were nevertheless sufficient to trigger the notice requirement. See *id.* at 108 n 18. However, despite this sufficiently reliable information of father's potential Native American heritage, the record contains no indication that notice was served upon the Minneapolis Area Director of the Bureau of Indian Affairs, as required under 25 USC 1912(a) and MCL 712B.9(1) when the tribe cannot be identified. This was error. See *In re Johnson*, 305 Mich App at 332-333. See also *In re Morris*, 491 Mich at 108 ("If there must be error in determining whether tribal notice is required, let it be on the side of caution.").

Given this error, the remedy is to conditionally reverse the trial court's termination order and remand this case to the trial court for resolution of the ICWA and MIFPA notice issue. *In re Morris*, 491 Mich at 121; *In re Johnson*, 305 Mich App at 333-334. The proceedings to take place on remand were explained in *In re Morris* as follows:

> On remand, the trial court[s] shall first ensure that notice is properly made to the appropriate entities. If the trial courts conclusively determine[s] that ICWA does not apply to the involuntary child custody proceedings—because the child[ren] are not Indian child[ren] or because the properly noticed tribes do not respond within the allotted time—the trial court['s] . . . order[s] terminating parental rights [is] reinstated. If, however, the trial court[s] conclude that ICWA does apply to the child custody proceedings, the trial court['s] order[s] 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 123.]

We affirm the trial court's order with respect to the substantive issues raised by mother and father on appeal. However, for the reasons explained above, we conditionally reverse the trial court's termination order and remand for the limited purpose of ICWA and MIFPA notice compliance. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Michael J. Kelly