S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

In re A. MASSAWAY, Minor.

UNPUBLISHED
October 18, 2016

No. 332036
Clinton Circuit Court
Family Division
LC No. 14-025674-NA

Before: RIORDAN, P.J., and METER and OWENS, JJ.

PER CURIAM.

Respondent mother appeals as of right a circuit court order terminating her parental rights to her child pursuant to MCL 712A.19b(3)(b)(*ii*), (c)(*i*), (g), and (j).[1] We affirm.

The minor child qualifies as an Indian child under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.* Accordingly, this case is governed by the evidentiary standards required to terminate parental rights under those acts.

Respondent argues that the trial court erred in finding that grounds for termination were established under both MCL 712A.19b(3) and ICWA. This Court reviews for clear error a trial court's ruling that a statutory ground for termination has been proven by clear and convincing evidence. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "Issues involving 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).

In *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 57-59; 874 NW2d 205 (2015), this Court provided the following analysis concerning the proof necessary to support termination of parental rights to an Indian child:

> Congress enacted ICWA in response to concerns over " 'abusive child welfare practices that resulted in the separation of large numbers of Indian

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[1] The child's father voluntarily released his parental rights. He is not a party to this appeal.

children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.' " *In re Morris*, 491 Mich at 97 (2012), quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). ICWA established "minimum Federal standards for the removal of Indian children from their families to protect the best interests of Indian children and to promote the stability and security of Indian tribes and their families." *In re Elliott*, 218 Mich App 196, 201, 554 NW2d 32 (1996) (citation and quotation marks omitted). Pursuant to ICWA, proceedings involving the termination of parental rights to an Indian child require a dual burden of proof. *Id*. at 209. That is, in addition to finding that at least one state statutory ground for termination was proven by clear and convincing evidence, the trial court must also make findings in compliance with ICWA before terminating parental rights. *Id*. at 209-210.

Subsection (f) of 25 USC 1912 governs the federal evidentiary standard necessary to terminate parental rights to an Indian child, and provides the following:

> No termination of parental rights may be ordered in such proceeding in the absence of 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.

Both MIFPA and the Michigan court rules contain similar requirements. MCL 712B.15(4) states the following:

> No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness as described in [MCL 712B.17], 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 [Indian] child.

MCR 3.977(G)(2) provides that a court may not terminate a parent's rights over an Indian child unless "the court finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness," that "continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child."

MCL 712A.19b(3) provides, in pertinent part, the following grounds for termination of parental rights:

> (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:

* * *

> (*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.

* * *

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

> (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.

* * *

> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The trial court did not clearly err in finding that each of these grounds for termination were established by clear and convincing evidence. The conditions that led to the child's adjudication involved, in part, respondent's failure to protect the child's half-sibling from being sexually abused by the child's father. In addition, respondent's home did not have heat for a time, the children had been subjected to frequent moves since 2008, respondent was struggling with regard to housing, and respondent had failed to provide the child's half-sibling with appropriate counseling and medical care. More than a year later, respondent still had failed to obtain suitable housing. Indeed, the caseworker testified that respondent's housing situation was worse than when the case started. Respondent had been evicted from her home and was essentially squatting in another home and waiting to be evicted from that home. Respondent's employment situation had also been unstable; she essentially worked on a "will call" basis.

The caseworker testified that she was concerned about respondent's ability to recognize the physical and emotional needs of the child at issue; the caseworker did not believe that respondent would be able to provide him with proper care and custody within a reasonable time. The continued barriers to reunification included respondent's inability to maintain housing and suitable employment for the support of herself and her child and her failure to fully accept the

sexual abuse that occurred. At the termination hearing, respondent admitted that she was then living with a friend and had lived there for only a couple of weeks. She was looking for her own residence. Although she was currently employed at a sports bar, she had worked there only two weeks. In addition, evidence was presented that respondent had not adequately accepted, understood, and dealt with the sexual abuse issue and that she had maintained contact with the perpetrator. The caseworker expressed concerns about respondent's ability to respond adequately to potential claims of harm made by the child in question. The evidence supported the trial court's finding that the conditions that led to the adjudication continued to exist and that respondent did not provide proper care and custody and would not be able to do so within a reasonable time. Accordingly, termination was warranted under §§ 19b(3)(c)(*i*) and (g).

Heidi Cotey, a caseworker for the Sault Tribe of Chippewa Indians, testified that the child's placement with respondent could result in emotional or physical harm to the child. A psychologist who examined respondent agreed that the child at issue would be at risk based on respondent's past and present behavior. The record supports the trial court's finding that the child was reasonably likely to be harmed if returned to respondent's home, thereby warranting termination under § 19b(3)(j).

We also reject respondent's argument that the trial court erred in finding that termination was justified under § 19b(3)(b)(*ii*). Respondent argues that there was no evidence that she was aware that the child's father was sexually abusing the child's half-sibling. We disagree. Respondent admitted at a pretrial hearing that she had read about alleged sexual contact on the sibling's Facebook account two years earlier. At the termination hearing, respondent again acknowledged that she had seen an online "blog" written by the sibling that discussed "fantasies" about the sibling and the child's father. Respondent also acknowledged that she had read, and taken from the sibling, a journal written by the sibling in which she wrote about sexually explicit fantasies concerning a boy band. The trial court did not clearly err in finding that respondent had reason to be aware of the sexual abuse and failed to protect her child, thereby supporting termination under § 19b(3)(b)(*ii*).[2]

Respondent additionally argues that petitioner failed to meet the requirements for termination under ICWA and MIFPA because Cotey, the qualified ICWA witness, testified only that returning the child to respondent "could" result in serious emotional and physical harm to him. In *In re Payne/Pumphrey/Fortson*, 311 Mich App at 59-60, this Court stated:

> Respondent further contends that the trial court failed to comply with the "beyond a reasonable doubt" evidentiary standard because the only expert witness to testify at the termination hearing expressly opined that returning AP and DP to respondent's care would not likely result in serious emotional or physical damage to either child. To terminate parental rights to an Indian child, 25 USC 1912(f), MCL 712B.15(4), and MCR 3.977(G)(2) each require that evidence beyond a

[2] We further note that only one statutory ground is necessary to support termination. *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012).

> reasonable doubt, *including* testimony of a qualified expert witness, must establish that the continued custody of the child by the parent will likely result in serious emotional or physical damage to the child. The term "including" is undefined in ICWA, MIFPA, and the Michigan court rules. The word "including" is neither a technical nor a legal term, so consultation of a dictionary is appropriate to determine its plain and ordinary meaning within the context of the statute. *Koontz* [*v Ameritech Servs*, *Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002)]. *Random House Webster's College Dictionary* (2000) defines "include" as "to contain or encompass as part of a whole[.]" *Black's Law Dictionary* (10th ed) similarly defines "include" as "[t]o contain as a part of something." Considering these definitions, we conclude that in order to terminate parental rights to an Indian child, a trial court's "beyond a reasonable doubt" finding must "contain" or "encompass" testimony of a qualified expert witness who opines that continued custody of the Indian child by the parent will likely result in serious physical or emotional harm to the child.

We first note that the trial court properly set forth the "beyond a reasonable doubt" standard in the course of its opinion. In finding that termination was warranted under this standard, the court discussed Cotey's testimony in depth. It is true that Cotey stated that "placement of [the child] . . . with his mother could result in physical, emotional harm." However, Cotey's testimony was far more detailed than this simple statement. Cotey emphasized respondent's failure to protect the half-sibling and respondent's failure to make progress in addressing her issues and supporting the half-sibling. Significantly, Cotey stated that respondent "hasn't shown that she would be able to protect or keep her children safe . . . ." Cotey indicated that respondent's continued support of the perpetrator was a "huge" issue. She agreed that, often, "past practice is indicative of future practice," but that sometimes parents could change. She went on to opine that, based on respondent's behavior over the prior year, it was not likely that respondent "will make a change at this point." She stated that she "would not feel comfortable placing a child in [respondent's] care," in light of respondent's failure to address the ongoing issues. Cotey testified that she kept in regular contact with the caseworker in forming her opinions and that she, as well as the Sault Tribe, supported the termination of respondent's parental rights. When viewed as a whole, Cotey's testimony was sufficient to support the trial court's finding that the child would be likely to incur serious emotional or physical harm if he remained in respondent's custody.

Respondent argues that the trial court erred when it found that termination of respondent's parental rights was in the child's best interests. We review this issue under the clearly erroneous standard. *In re Payne/Pumphrey/Fortson*, 311 Mich App at 63. "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). Factors to be considered with regard to best interests 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*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted).

Respondent's argument is that the trial court did not take into account the fact that, while the child would be placed with his paternal half-sister, he would not be placed with his three maternal half-siblings. She contends that it would be detrimental to the child to be the only maternal sibling with no legal ties to his mother. Respondent is correct that this Court has held that "[t]he sibling bond and the potentially detrimental effects of physically severing that bond should be seriously considered in custody cases where the children likely have already experienced serious disruption in their lives as well as a sense of deep personal loss." *Wiechmann v Wiechmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995). However, if it is in the best interests of the child to have alternate placement, that controls. *Id*. Here, the trial court was essentially forced to make a decision regarding which siblings to place the child with. The purpose of ICWA is to prevent the removal of Indian children from their homes and their subsequent placement in non-Indian homes. *In re Morris*, 491 Mich at 97-98. The policy is to place removed Indian children in homes that will reflect the Indian culture. *Id*. 98. Given that the child was placed with his Indian half-sibling, and placement with the half-sibling's mother had obtained the approval of the Indian Tribe, the trial court did not clearly err in approving of the child's placement. Considering the relevant factors, the trial court did not clearly err in finding that it was in the child's best interests to terminate respondent's parental rights.

Affirmed.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Donald S. Owens