

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
June 30, 2011

In the Matter of ORIANWO/MCCRARY, Minors.

No. 299332  
Wayne Circuit Court  
Family Division  
LC No. 08-482621

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Before: FORT HOOD, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19(b)(3)(c)(i), (g), and (j). We conditionally affirm, but remand for further proceedings.

Before terminating a respondent's parental rights, the trial court must make a finding that at least one of the statutory grounds has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). The trial court must order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). This Court reviews parental termination cases for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009); MCR 3.977(K). To warrant reversal, the trial court's decision must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Clear error exists "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 BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Although respondent does not challenge the trial court's finding of clear and convincing evidence to establish the statutory grounds to terminate her parental rights, a review of the trial court's findings provides a necessary context for respondent's challenge to the court's best interests ruling.

The conditions that led to petitioner's intervention included respondent's long-standing substance abuse, chronic mental illness, unstable housing, financial instability, and allegations of physical abuse and failure to protect. Respondent had more than a year and a half to overcome her drug addiction, manage her Bipolar Disorder, provide a stable home environment, and achieve financial stability. There was substantial evidence that petitioner provided respondent with ample services to facilitate reunifying the family. Offered services included psychiatric evaluations, medication reviews and mental health assessment, inpatient and outpatient substance

abuse treatment, individual and family therapy, domestic violence counseling, parenting classes, parenting time, transportation assistance, and random drug screening.

The court properly concluded that respondent had not minimally complied with her case service plan, which justified termination of her parental rights based on continuing neglect. *In re Jacobs*, 433 Mich 24, 38-39; 444 NW2d 789 (1989). Specifically, she failed to (1) successfully complete and benefit from individual counseling and parenting classes, (2) maintain stable, suitable housing, (3) maintain regular, legal employment, (4) maintain regular weekly contact with petitioner, and (5) regularly attend court-ordered parenting time. Most importantly, respondent failed to complete substance abuse treatment and follow all recommendations. The court correctly found that respondent was a chronic substance abuser for more than 20 years. Clearly, respondent failed to address the issues that brought her children before the court.

The trial court also heard persuasive testimony from the case worker that, despite support services, respondent's behaviors and drug dependence remained unchanged. These proofs similarly satisfied the statutory grounds for termination. Although respondent had not abused drugs for one month before the termination hearing, the court record, as a whole, supported a finding that respondent, who used cocaine for more than 20 years, would be unlikely to maintain her sobriety in the long term.

The trial court record does not support respondent's claim that she was left on her own to find services for her drug addiction and Bipolar Disorder. The evidence showed that petitioner offered respondent inpatient and outpatient substance abuse treatment. Also, there was clear evidence that she was referred for evaluations, individual counseling, and parenting classes multiple times and failed to fully participate. She was referred to domestic violence counseling. The trial court properly concluded, during five periodic dispositional review hearings and at the termination hearing, that petitioner made reasonable efforts to unify respondent with her children. Any inadequate mental health treatment was the direct result of respondent's choices and actions and not because of any shortfall by petitioner. The law can and does impose obligations on petitioner to offer services to reunite families but cannot mandate desired outcomes that are determined, in large measure, by the participant's motivation and attitude — attributes that respondent clearly lacked throughout this case.

Respondent asserts that she was unable to timely comply with her case service plan because she was involved in a serious automobile accident and confined to a wheel chair. Again, this argument is not substantiated by the trial court record. The case worker testified that respondent was told that she would be provided with accommodations for services while she convalesced from two broken legs upon her discharge from the hospital. Respondent was discharged on or before June 22, 2009, but did not follow up with her case worker until August 10, 2009. The trial court also considered respondent's physical therapy needs when it ordered a second referral for substance abuse treatment. The court reasonably concluded that respondent's hospitalization and convalescence did not vitiate her noncompliance with the treatment plan over a 20-month period.

Respondent argues that her due process rights were violated because her older daughter was not provided with court-ordered individual counseling. Essentially, respondent asserts that petitioner failed to comply with its statutory duties to assist her in reuniting with her child. It is

well established that petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights. See *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000); MCL 712A.18f; MCL 712A.19(7). The record establishes that the child was provided with individual counseling at Hegira, Community Care Services, Northeast Guidance Center, a special summer camp, and while she was placed in a residential facility. It is undisputed that counseling started seven months after the initial court order. This occurred because the teenager had to be referred to different agencies for counseling, in part because her placements continued to change based upon her behavior. In addition, a referral was made for family counseling; however, that service was terminated because the counseling agency was unable to make contact with respondent. Further, the trial court took into account the delay in counseling services when considering the teenager's placement and provided respondent with additional time to comply with her case services plan.

Next, respondent argues that the trial court erred when it ruled that it was in the children's best interests to terminate her parental rights. "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). This Court reviews the trial court's determination regarding the child's best interests for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).

The record establishes that termination of respondent's parental rights was clearly in the children's best interest. Respondent's children became temporary court wards because of her chronic drug abuse and her domestically violent relationship with the father of her younger child. Respondent's behaviors, despite reunification services over one and one-half years, remained unchanged. Respondent admitted ongoing issues with alcohol and cocaine and last reported using crack cocaine within a month of the termination hearing. Respondent was incapable of providing the children with a safe and stable home because she continued to abuse cocaine and remained in a domestically violent relationship.

Respondent offered some proof of an "uncontroverted" bond she shared with her children. Respondent further claims that the older child, a teenager, did not want the court to terminate respondent's parental rights, and it was unlikely that this girl would be provided with any permanency through adoption. Also, respondent argues that if her rights were not terminated, her financial circumstances would improve because the children would receive Social Security benefits. For these reasons, respondent argues that it was against the children's best interest to terminate her parental rights.

These arguments are groundless. Respondent behaved inappropriately during visitations and lacked essential parenting skills, particularly concerning her teenage daughter. Her bond with the younger child was tenuous at best. Respondent and this child both tested positive for cocaine shortly after the child's birth. The child spent all but six days of her life in foster care, and respondent missed numerous weekly visits with her over a 20-month period. Also, petitioner reported that the younger child had bonded with the foster parent, not respondent. Respondent's bond with her teenage daughter was also questionable. Respondent had not cared for the child for seven years before this proceeding. The trial court record provides a sad trail of anger and bitter interactions between respondent and this child. Based on the Clinic for Child Study

evaluation made before the hearing addressing the children's best interests, terminating respondent's parental rights would benefit the child by giving her certainty of her future even if she was not placed for adoption. It would be improper for the trial court to base its best interests determination on improving respondent's financial circumstances, by allowing the children to collect Social Security benefits, while ignoring the substantial risk of harm in returning the children to an un-rehabilitated chronic drug addict. The trial court correctly ruled that terminating respondent's parental rights was in the 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 the Indian Child Welfare Act, 25 USC 1901 *et seq.* Issues regarding the interpretation and application of the ICWA present questions of law that this Court reviews de novo. *In re Roe*, 281 Mich App 88, 96; 764 NW 2d 789 (2008).

If it is determined that a child may be an Indian child, the trial court must give notice of the proceedings to the Indian child's tribe. 25 USC 1912; MCR 3.920(C)(1). In addition to other required findings, the court must find that "active efforts have been made to provide remedial service and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful." MCR 3.977(G)(1). Moreover, an order terminating parental rights to an Indian child must meet a higher evidentiary standard. A parental rights termination order regarding an Indian child must be supported by "evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child." MCR 3.977(G)(2). See also 25 USC 1912(f).

In this case, the trial court only partially complied with the ICWA. It asked respondent whether the children were of Native American heritage. The trial court, after respondent stated that her grandfather was possibly a member of the Cherokee tribe, ordered petitioner to provide notice as required by the ICWA. However, the trial court record is silent regarding whether the appropriate notice was given, and whether the children were eligible for membership in an Indian tribe.

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, reversal is not necessarily required. *In re IEM*, 233 Mich App 438, 449-450; 592 NW2d 751 (1999). Rather, the remedy is to conditionally affirm the trial court's termination order, but remand the matter so the trial court and the petitioner may properly provide notice to the interested tribe. *In re TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001).

The trial court had reason to believe the children had some Indian heritage. Therefore, petitioner was required to send notice of the termination proceedings and of the applicable tribe's right of intervention through registered mail, return receipt requested, to the tribe, if identity and location could be determined, or to the Secretary of the Interior. 25 USC 1912(a); MCR 3.920(C)(1). The lower court record, however, does not reflect that petitioner subsequently pursued the matter. Only after notice has been provided and a tribe has failed to respond or has intervened but is unable to determine the child's eligibility for membership does the burden shift to the parties to show that the ICWA applies. *In re IEM*, 233 Mich App at 449. Therefore, we

conditionally affirm the trial court's termination order and remand this matter for further proceedings to ensure compliance with the ICWA notice provisions. If the trial court determines that appropriate notice was given and that the ICWA does not apply, the termination order is affirmed. If the trial court does conclude that the ICWA applies, further proceedings consistent with the Act will be necessary.

Conditionally affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Pat M. Donofrio  
/s/ Amy Ronayne Krause