

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 17, 2011

In the Matter of A. P. WHISLER, Minor.

No. 303222
Wayne Circuit Court,
Family Division
LC No. 09-490221

Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(i), (g), and (j). We conditionally affirm, but remand the case for the trial court to determine the applicability of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*

Respondent first contends that the agency and trial court erred in failing to provide notice to the child's Indian tribe and the opportunity to intervene as required by 25 USC 1912(a), MCR 3.965(B)(9), and former MCR 3.980(A)(2) (now MCR 3.977(G)). These provisions require the trial court to insure that petitioner has notified the child's Indian tribe of the proceedings by registered mail, return receipt requested, of the right to intervene, if the child is eligible for membership in a tribe that has been federally recognized as eligible for services. Determination of whether the child is an "Indian child" within the ICWA is for the tribes, not the trial court. *In re IEM*, 233 Mich App 438, 447-448; 592 NW2d 751 (1999).

However, the preliminary question of whether the claimed tribe is an "Indian tribe" within the ICWA must first be decided by the trial court. *In re Fried*, 266 Mich App 535, 540; 702 NW2d 192 (2005); *In re NEGP*, 245 Mich App 126, 133-134; 626 NW2d 921 (2001). An "Indian tribe" is defined in MCR 3.002(9) as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians." This provision is taken from 25 USC 1903(4), 1903(8), and 1911(a).

Here, the child was identified by respondent's maternal grandmother as possessing Indian blood on his mother's side. DHS alleged in its petition that it "made contact" with a person in the Walpole Island First Nation Tribe in Ontario. DHS claimed that the response received indicated that neither the child nor his mother were tribe members and only the mother was eligible for membership, not the child. The foster care worker testified that the child was not eligible for membership, but the court found, in its 10/13/09 Order after preliminary

examination, that the child was a member of, or eligible for membership in, an American Indian tribe or band. The court did not specifically consider whether the claimed tribe qualified as an “Indian tribe” under the ICWA and Michigan court rules by virtue of recognition by the Secretary of the Interior. This issue must be decided before the notice issue.

The remedy this Court has employed in similar situations, if the order terminating parental rights is otherwise appropriate, is to conditionally affirm the trial court’s order but remand for compliance with the ICWA and court rules. *In re TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001); *In re IEM*, 233 Mich App at 450, 456. We choose this remedy because we find sufficient evidence to support the court’s order of termination under the statutory grounds.

Next, respondent argues that the court clearly erred in terminating his parental rights because he did not receive sufficient appropriate services and was complying and progressing well when the court terminated his rights. We disagree. Termination of parental rights under state law is appropriate where petitioner proves one or more grounds for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000); *In re B & J*, 279 Mich App 12, 17; 756 NW2d 234 (2008). This Court reviews the lower court’s findings under a clearly erroneous standard. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

In the present case, clear and convincing evidence supported the court’s findings and order terminating parental rights. The child was removed in October 2009, after a tragic fire set by the child’s mother, respondent’s live-in partner, destroyed the home and killed two of the child’s half siblings. Respondent was not home at the time of the fire, and the caseworker testified that he admitted being under the influence and leaving the children with the mother despite knowing of her drug and mental instability problems. Respondent tendered a plea in which he did not admit these things, but did admit smoking marijuana previously. The court directed Methodist Children’s Home Society (MCHS) to refer respondent for outpatient drug treatment, weekly random screens, parenting classes, and individual counseling. Supervised visits at the agency were provided.

Over the next year, respondent’s participation was inconsistent and his improvement insufficient to return the child or even to allow unsupervised visits. Respondent completed parenting classes and participated in counseling, although he said the counselor only saw him for five to twenty minutes each time and it was not helping. Referred four times for drug treatment, respondent self-reported that he did not use drugs and was thus found not to need treatment. In October 2010, a screen was positive for cocaine. Respondent also admitted using Ecstasy. Previously, many screens were missed (missed screens are considered positive) or turned in on the wrong days. The court suspected that respondent had been using drugs all along.

Respondent also failed to visit the child consistently. He did not visit from 12/23/09 to 3/24/10 (three months) or 10/13/10 to 12/16/10 (nearly two months). When respondent did not visit, the child was sad and upset. Respondent offered various explanations at the hearings, but these were after the fact and did not make up for the time lost with the child. In its opinion, the trial court stressed the hurt to a young child when a parent does not visit.

At the last hearing, respondent was finally receiving drug treatment and turning in regular, negative screens. However, the court found his progress to be too little, too late. The court determined that his pattern of cooperating and then dropping out was likely to repeat and the child would again be disappointed. While the court might have delayed the hearing to see if this view was correct, we have no definite and firm conviction that the court erred in its findings. See *In re Miller*, 433 Mich at 337; *In re B & J*, 279 Mich App at 17-18. Because respondent failed to correct his drug problem, the child would be in danger in his home. His lack of sufficient progress in 17 months supported the reasonable inference that he would be unable to correct his drug problem within a reasonable time. Further, respondent's drug abuse and failure to visit consistently, considered with his lack of legal income and proper housing for much of the case, showed that he would be unable to provide proper care and custody. Respondent also failed to remedy his part of the conditions that brought the child into care, and it was unlikely he could do so within a reasonable time. See MCL 712A.19b(3)(c)(i), (g), (j).

Respondent further contends that the court clearly erred in finding termination to be in the child's best interests. We disagree. While respondent clearly loved the child and their interactions were appropriate when respondent visited, his failure to visit for long periods and inability or unwillingness to conquer his drug problem within a reasonable time meant that he would be unable to provide a safe, stable home. We find no clear error in the court's best-interest findings. See MCL 712A.19b(5); MCR 3.977(H)(3); *In re Trejo*, 462 Mich at 356-357; *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009).

Finally, respondent claims that the trial court did not properly terminate his parental rights because its findings and conclusions were not made in its orders. We disagree and find that the court made sufficient findings of fact and conclusions of law in its bench opinion. The court complied with MCR 3.977(I)(1) and (I)(3).

Accordingly, we conditionally affirm the order terminating parental rights, but remand for the court to decide whether the claimed Indian tribe is a federally recognized "Indian tribe" within the ICWA and Michigan court rules, and if so, whether DHS complied with applicable notice provisions. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens