STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 22, 2011

In the Matter of T. Dawson, Minor.

No. 303324
Kalamazoo Circuit Court
Family Division
LC No. 2009-000203-NA

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Respondent father appeals as of right the order terminating his parental rights to his minor daughter under MCL 712A.19b(3)(b)(*i*) (parent sexually abused child and child will suffer abuse if placed in parent's home), (g) (failure to provide proper care and custody), (j) (child will be harmed if returned to parent's custody), (m) (parent voluntarily relinquished parental rights to another child), and (n) (parent convicted of criminal sexual conduct). The parental rights of the child's mother were also terminated by the same order, but she is not a party to this appeal. The child is an Indian child as defined by the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and the Choctaw Nation of Oklahoma intervened in the lower court proceedings. We affirm.

Respondent first argues that the trial court erred in finding that termination of respondent's parental rights was not clearly contrary to the child's best interests. The petitioner, Department of Human Services, has the burden to establish by clear and convincing evidence the existence of at least one of the statutory grounds for termination. MCL 712A.19b(3); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). "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). We review for clear error the trial court's rulings regarding the statutory grounds for termination and the child's best interests. MCR 3.977(K); *In re JK*, 468 Mich at 209.

We initially point out that respondent employs the language of the old and no longer applicable best-interest standard that was changed through a statutory amendment back in 2008. See 2008 PA 199. Respondent argues that the trial court erred regarding the child's best interests, where the court relied on the fact that an aunt and uncle who were now caring for the child were in need of financial assistance and the only way to obtain aid would be through an adoption subsidy. Respondent contends that the court could have allowed a guardianship with

the aunt and uncle rather than terminate respondent's parental rights. Respondent further argues that the child stood to benefit financially from her father upon his death by way of Social Security survivorship benefits and possibly damages stemming from a pending lawsuit; however, termination of his parental rights effectively blocked any entitlement to these funds. Respondent is terminally ill, as he is in the end stage of chronic obstructive pulmonary disease (COPD). Respondent also argues that the child would benefit from having a relationship with him given that he could help her through the trauma she endured living with her mother, which at times exposed her to inappropriate sexual behavior and dangerous males.

The record reflects that after petitioner removed the child from her mother's care and placed her in respondent's custody not long after the case was opened, respondent proceeded to engage in conduct where he would become intoxicated while caring for the child and watch pornography in her presence. In December 2009, there was an incident in which respondent had a blood alcohol level of .25 while he cared for the child, he was viewing extremely explicit pornography in her presence and asked her to watch it, he requested that she have sex with him, and the respondent engaged in inappropriate sexual activity with the child, which led to a conviction for fourth-degree criminal sexual conduct, MCL 750.520e, and a year in the county jail.

With respect to its best-interests determination, the trial court found that the minor child was happy and thriving while in the care of her aunt and uncle and that she became upset when the subject of respondent arose given his inappropriate behavior while caring for her. The court did indicate that it was aware that a guardianship could be established with the aunt and uncle, thereby avoiding a need for termination, but they needed financial assistance to help in addressing the child's special needs, which was only obtainable through an adoption subsidy. The trial court then immediately indicated that it was "for these reasons" that it found termination to be in the child's best interests, whereupon the discussion of best interests ended. It is quite evident that the trial court's closing reference to the reasons for its best-interests determination pertained not only to the adoption subsidy/guardianship comments, but also to earlier remarks about the child's excellent progress after being removed from her parents' care, her current state of happiness, and the emotional anxiety the child felt when thinking about respondent. When considering the trial court's comments in the proper context, and given the fact that respondent cared for the child in an intoxicated state, showed her pornography, asked her to have sex with him, and engaged in improper sexual activity with her, the court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests. We also note that the child already received Social Security benefits for her own disability and that the likelihood of success in respondent's health-related lawsuit was never explored.

Respondent next argues that reversal is required because the petitioner failed to make "active efforts" to provide remedial services and rehabilitative programs designed to prevent the breakup of an Indian family, as required by 25 USC 1912(d), which is part of the ICWA. 25 USC 1912(d) provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs

> designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Issues concerning the application and interpretation of the ICWA are reviewed de novo as questions of law. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). In cases involving an Indian child, the petitioner must establish by clear and convincing evidence that "active efforts" were made under the ICWA to prevent the breakup of the Indian family. *Id.* at 318-319. "Active efforts" require more than the "reasonable efforts" required by state law. *Id.* at 321. "[T]he crux of the 'active efforts' requirement is undertaking affirmative, as opposed to passive, efforts[.]" *Id.* Active efforts require the petitioner to take a more pro-active approach with clients and actively support the client in complying with the case service plan rather than leaving the client on his own to perform under the plan. *Id.* at 322. Here, the expert witness from the Choctaw Nation testified that petitioner's efforts were active and sufficient under the ICWA, and the trial court agreed.

We find that resolution of this appeal is controlled by *In re SD*, 236 Mich App 240, 244-245; 599 NW2d 772 (1999), wherein this Court, addressing 25 USC 1912(d), held:

> Although we agree that subsection 1912(d) requires additional procedures to be followed where termination of parental rights would effect the breakup of an "Indian family," on the specific facts of this case, there was no disruption in the "Indian family" that would necessitate the application of subsection 1912(d) "active efforts" at reunification. First, the family had already broken up by the time the termination proceedings were initiated. Respondent and his wife separated and filed for divorce well before respondent's rights were terminated. Respondent moved away from his family and did not even financially support his children for nearly two years before the termination proceedings. He did not take part in caring for the children or provide a place for them to live with him. Second, respondent was also separated from his family by virtue of his imprisonment. Respondent was sentenced to four to ten years' imprisonment for crimes against his children. Thus, respondent himself undermined the instant family and there was no way that he would be able to take part in the lives of his family even if he wanted to do so. Under these circumstances, it can hardly be said that the actions of petitioner contributed in any way to the "breakup" of the instant family. Such a "breakup" was already a *fait accompli.*

Here, the child's mother had custody of the child and was caring for the child when protective proceedings were initiated. As indicated in the trial court's opinion, the child had historically "resided throughout her life mainly with her mother." Respondent only sporadically moved in and out of the child's life. He was never married to the child's mother, and he was not providing the child a place to live when protective proceedings commenced. With respect to respondent and the child, a family breakup already existed when petitioner became involved; petitioner did not cause the breakup or disruption. Indeed, it was petitioner that brought the two together when it placed the child in respondent's care and custody after removing the child from her mother. This action was greeted by respondent with bouts of intoxication and inappropriate sexual activity while the child was in his care, which led to another family breakup and a jail term for respondent. As before, this new breakup was not caused by petitioner but respondent's

own depraved conduct, which resulted in his imprisonment. Furthermore, respondent did not even wish to live as a family unit with the child, informing the trial court at the termination trial that he did not want to have care and custody of the child because of his medical condition. Overall, it was respondent himself who undermined any familial relationship with his daughter. On this record, *In re SD* dictates that 25 USC 1912(d) was not violated by petitioner.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot