

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 14, 2013

In the Matter of SALISBURY, Minors.

Nos. 312093; 312094
Kalamazoo Circuit Court
Family Division
LC No. 2010-000159-NA

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, respondent mother and respondent father appeal as of right the trial court's order terminating their parental rights to the minor children. For the reasons stated in this opinion, we conditionally reverse and remand for further proceedings.

I. IWCA

Respondent mother's singular argument is that petitioner failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* Petitioner admits to error in this regard. Pursuant to ICWA:

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 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).]

The appropriate remedy when the notice requirements of ICWA are not satisfied is conditional reversal and remand for a resolution of the notice issue. *In re Morris*, 491 Mich 81, 122; 815 NW2d 62 (2012). In this case, if the trial court determines on remand that ICWA does not apply, the order terminating parental rights is reinstated where there was clear and convincing evidence to support termination. *Id.* at 123. However, if the trial court determines ICWA does apply, then the order terminating parental rights is vacated, and the "proceedings must begin anew in accord with the procedural and substantive requirements of ICWA." *Id.*

II. STATUTORY GROUND FOR TERMINATION

In a case regarding the termination of parental rights, a petitioner must establish a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3). Only one statutory ground need be proven in order to terminate parental rights. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). This Court reviews both the lower court's factual findings and its ultimate decision whether a statutory ground has been proven for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding is clearly erroneous [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (citations and quotations omitted).

The trial court terminated the parental rights of both parties under MCL 712A.19b(3)(c)(ii), (g), and (j). Respondent father first challenges whether the statutory grounds were proven by clear and convincing evidence. However, we conclude that the statutory grounds for termination were established by clear and convincing evidence.

Regarding MCL 712A.19b(3)(c)(ii), the trial court found that respondent father failed to rectify his lack of housing, substance abuse, and domestic violence issues. These findings are supported by the record. Respondent father resided in several places during the two year duration of this case. The record, however, is devoid of any evidence that he used resources from continuous employment to secure any independent housing. Although petitioner noted that respondent father's parent's home, where respondent father resided at one point, was suitable, respondent father's intent at the conclusion of the termination hearing was to reside with a friend. At no time did respondent father provide an opportunity for this projected residence to be vetted.

Additionally, respondent father generally minimized the domestic violence issues. He did not make progress in the counseling sessions he attended with one counselor about whom he made complaint to the court. Subsequent to respondents' vehement request that he not be referred to a faith-based agency, the court ordered him to receive a referral to a counselor from a secular agency. Petitioner, in defiance of that order, gave respondent father a referral to another faith-connected agency and he declined the referral. Had this been the sole condition which was not rectified, respondent father's claim of error that petitioner failed to provide meaningful services might be persuasive. However, the domestic violence and attendant anger management issues for which the agency failed to abide by the court's order were not the only issues which were not rectified.

Throughout the two years of the case, respondent father did not address his drug issues. At the outset of the case there was testimony regarding both parents' use and production of methamphetamine. As recently as April, 2012, respondent father had a positive drug screen, and although most of his screens were negative, he missed several appointments for screening. Accordingly, the trial court did not clearly err when it terminated respondent father's parental rights for failure to rectify these conditions when given the recommendations and opportunity to do so, and there was no indication the conditions would be rectified in a reasonable time considering the ages of the children. MCL 712A.19b(3)(c)(ii).

Regarding MCL 712A.19b(3)(j), when considering termination of parental rights under this subsection, it is appropriate to consider the potential for emotional as well as physical harm to the children. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Considering father's failure to address his domestic violence issues, it was reasonably likely that the children could be either physically or emotionally harmed if returned to respondent father as the result of exposure to domestic violence.

Finally, based on respondent father's failure to make progress, the trial court did not clearly err when it determined the respondent father had failed to provide proper care and custody, there was no reasonable likelihood he would be able to in a reasonable time considering the children's ages, and that there was a reasonable likelihood that the children would be harmed if returned to the home of respondent father. MCL 712A.19b(3)(g).

III. BEST INTERESTS OF THE CHILDREN

Once a statutory ground for termination has been proven, the court shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5). This Court reviews for clear error a lower court's findings with regard to whether termination was in the best interest of the child. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). A child's need for stability and permanency may be considered in determining best interests. *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011). A strong bond between a parent and a child can be outweighed by other considerations when determining whether termination is in the best interest of the children. *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008).

Here, the trial court did not clearly err when it determined that termination was in the children's best interest. Although there was evidence that the children had a bond with respondent father, they were also scared to return home and, as described above, there was a continued risk of exposure to domestic violence with respondent father. The children were making progress and doing well in their placements. On this record, the trial court did not clearly err when it found termination was in the best interests of the children.

We conditionally reverse the trial court's order termination parental rights, and remand for the purpose of providing proper notice pursuant to ICWA. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra