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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1194

In the Matter of the Welfare of the Children of:
S. R. K. and O. A. K., Parents.

Filed December 11, 2017
Affirmed
Peterson, Judge
Concurring specially, Jesson, Judge

Clay County District Court
File Nos. 14-JV-16-1365, 14-JV-16-1367, 14-JV-16-1371

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Spirit Lake Nation, Fort Totten, North Dakota (respondent)

Laurie Christianson, Moorhead, Minnesota (guardian ad litem)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal challenging the termination of their parental rights, appellants-parents argue that the evidence does not support beyond a reasonable doubt the district court's

finding that appellants' continued custody of the children is likely to result in serious emotional or physical damage to the children. We affirm.

FACTS

Appellant-mother S.R.K.'s four children were removed from her home on July 25, 2015, after she was stabbed during an incident that occurred in front of one of the children. Appellant-father O.A.K. is the father of the youngest two children removed from mother's home and of mother's fifth child, who was born in September 2016, and immediately placed in foster care. Respondent Clay County provided reunification services to the family, but ultimately filed termination petitions on April 21, 2016. It is undisputed that because mother is an enrolled member of the Spirit Lake Indian Nation, the children are subject to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1911-1923 (2016), and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §§ 260.751-.835 (2016).

Following a three-day court trial, the district court ordered mother's and father's parental rights terminated on three grounds: palpable unfitness, failure to correct conditions leading to out-of-home placement, and neglect leading to the children's placement in foster care. The court also concluded that termination is in the children's best interests.

Mother and father appealed to this court, which affirmed the district court's grant of a mid-trial continuance and its conclusion that the county had made active efforts to reunify the children with the parents, but reversed and remanded to the district court to make a finding required by ICWA and MIFPA as to whether continued custody of the children by appellants is likely to result in serious emotional or physical damage to the children. *In re*

Welfare of Children of S.R.K., A16-2067, 2017 WL 2062137, *5 (Minn. App. May 15, 2017). This court declined to address the sufficiency of the evidence to support termination, concluding that it was premature to do so. *Id.* On remand, the district court reviewed the entire record, considered testimony and evidence submitted at trial and arguments of counsel, and found by proof beyond a reasonable doubt that "[c]ontinued custody of [the children] by [mother and father] is likely to result in serious emotional or physical damage to the Children." This was the only amendment made to the findings. Mother and father appeal.

D E C I S I O N

We review a district court's findings for clear error. *In re Welfare of A.D.*, 535 N.W.2d 643, 647 (Minn. 1995). Under ICWA, termination of parental rights to an Indian child may not be ordered "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." 25 U.S.C. § 1912(f). MIFPA adopts the standards of section 1912(f). Minn. Stat. § 260.771, subd. 6(a). MIFPA also provides that

> [t]he local services agency . . . shall make diligent efforts to locate and present to the court a qualified expert witness designated by the Indian child's tribe. The qualifications of a qualified expert witness designated by the child's tribe are not subject to a challenge in Indian child custody proceedings.

Id. at subd. 6(b); *see also In re Welfare of Children of J.B.*, 698 N.W.2d 160, 166-67 (Minn. App. 2005).

At trial, the county presented the testimony of Agnes Cavanaugh, whom the Spirit Lake Indian Nation had designated as a qualified expert witness. Mother and father have not overtly challenged Cavanaugh's credentials as an expert witness, but their statement of facts suggests that they believe Cavanaugh was not qualified: she "is not a social worker"; she stated that she was qualified "because I'm raising four of my grandchildren"; and "[t]his is the first and only case where Cavanaugh was asked to serve as a qualified expert witness in court." MIFPA, however, expressly provides that because Cavanaugh is an expert witness designated by the children's tribe, her qualifications, "are not subject to challenge in Indian custody proceedings." Minn. Stat. § 260.771, subd. 6(b).

The county submitted into evidence Cavanaugh's affidavit, in which she averred that she reviewed the county files and spoke to the assigned social worker; as a tribal member, she was knowledgeable about tribal customs as "they pertain to family organization and child-rearing practices; the county had provided appropriate services; and "[c]ontinued custody of the children by the parent(s) is likely to result in serious physical and/or emotional damage to the child[ren]." The affidavit concluded, "The Spirit Lake Tribe has determined that the child[ren] cannot be returned to the parent(s) and supports permanency for th[ese] child[ren]."

Cavanaugh's trial testimony was more equivocal than her affidavit. She acknowledged that she did not speak to either parent and that she relied on files and discussions with the county. She thought that the termination petitions should be granted but said that she had no opinion about whether the children could be returned to the parents

or whether the parents would damage the children. When shown her affidavit, however, she agreed that the parents' continued custody of the children would cause physical and/or emotional harm. On cross-examination, she acknowledged that she could change her opinion if she met with father.

In its findings, the district court stated that Cavanaugh affirmed her affidavit, "which includes her opinion that continued custody by the parents is likely to result in serious physical and/or emotional damage to the Children," and "Cavanaugh's Expert Witness Affidavits address all relevant issues to the Court's satisfaction." "The weight to be given any testimony, including expert testimony, is ultimately the province of the fact-finder." *J.B.*, 698 N.W.2d at 167.

A court need not rely solely on the testimony of the qualified expert witness appointed by the tribe. *See id.* at 169 (permitting court to consider the entire record as well as the testimony of qualified expert witness). The district court's amended finding that placement of the children with the parents "is likely to result in serious emotional or physical damage to the Children," which the court stated was supported "by proof beyond a reasonable doubt," was based on "the entire record, considered testimony and evidence submitted at trial."

After reviewing the entire record, we conclude that evidence beyond a reasonable doubt supports the district court's finding that the parents' continued custody of the children is likely to result in serious emotional or physical damage to the children. The county first became involved with the family because of concerns about the oldest child's

behavior and mother's chemical dependency, and the county removed the children after the oldest child witnessed his mother being stabbed during a party at her home. Mother's documented chemical-dependency problems extend back to at least 2012, and she has refused to take advantage of the resources offered by the county for chemical-dependency and mental-health treatment. Mother was in detox the night before the final court hearing. She told the county child-protection worker that she would continue to use chemicals as a coping mechanism. She has never successfully completed treatment, despite the fact that this was central to the county's recommendations for services. She was using marijuana regularly and methamphetamine sporadically throughout the time that she received services.

The record is also replete with references to mother's anger at and lack of cooperation with county social workers who attempted to enroll her in services. Mother was charged with disorderly conduct after attempting to assault a detox worker. A review of her trial testimony discloses serious issues regarding her mental illness. Mother stated that she was not interested in parenting her three daughters, and only wanted the two boys. Mother missed 22 supervised visits with the children between March and October 2016. She never progressed beyond supervised visitation. At one visit, she arrived so late that the case aide was leaving with the children, and she traumatized the children by attempting to pull them out of the case-aide's van. The fifth child, born in September 2016, was the subject of a proceeding in North Dakota, where she was born. When the child's case was

transferred to Clay County in Minnesota, mother became upset, yelled, threatened self-harm, and pounded on the walls until security intervened.

All of the children have significant special needs; three are participating in "trauma-focused therapy," and the oldest child had to be placed in a different foster-care setting because of his disruptive behavior. The district court found that "[g]iven [mother's] own chaotic history, chronic chemical dependency and unresolved mental health issues, it will take several years for her to be able to meet the needs of the Children consistently and keep them safe on a full-time basis." The district court also found that "[a]ctive efforts to provide remedial services and rehabilitative programs to [mother] have been unsuccessful," and "[t]he conditions that led to the Children's removal from [mother's] care have not been corrected." Mother "is not capable of providing the Children with permanency or stability, either now or in the reasonably foreseeable future." Mother's issues "create chaos and instability" and are "chronic and . . . of a duration that renders [her] unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the Children."

This is particularly serious when the children have special needs that require stability. The guardian ad litem (GAL), who had more than 30 years of experience as a child-protection worker and GAL, observed no improvement in mother's parenting and noted mother's failure to follow through on services. She also testified that the children require permanency, stability, and a nurturing environment, which mother is not able to provide.

The district court made similar findings about father. Father showed little interest in parenting the children and was absent for much of their lives. Father stated that he only wanted the girls, including the child who is not his by birth. He became involved with services only after it appeared that mother's rights would be terminated, and then "showed no insight into basic parenting principles, including boundaries, routine, and discipline." A psychologist diagnosed him with specified personality disorder with antisocial traits, parent-child relational problems, and spousal-violence traits. Father has three convictions for domestic abuse. The district court found that father cared for the children for only limited periods and that he would need months of intensive services before he could independently care for the children. Despite this, father failed to complete services or apply for appropriate housing, even after the county gave him housing vouchers. Father's chemical-dependency issues are not as profound as mother's, but he was removed from supportive housing because of chemical use, and he failed to complete chemical-dependency treatment. Although father initially participated in supervised visitation, his visits became sporadic over time. Visits remained supervised because of "the recommendations of the parental capacity evaluation, his lack of participation in a case plan and services, and his inability to parent absent said services."

The GAL observed no improvement in father's parenting ability, and noted his failure to follow through on services. The district court found that father would be "unable to provide . . . permanency, either now or in the reasonably foreseeable future." The court observed that father "does not understand the Children's needs and does not understand

how to meet their needs." This is particularly important in light of the children's significant special needs.

The standard in an ICWA case requires proof beyond a reasonable doubt. 25 U.S.C. § 1912(f); Minn. Stat. § 260.771, subd. 6(a). Under this standard, the party charged with proving a case "does not have the burden of removing all doubt, but of removing all reasonable doubt." *State v. Andersen*, 784 N.W.2d 320, 330 (Minn. 2010). The record demonstrates that these children suffered emotional damage at the hands of these parents, and there is no indication in the record that either parent corrected the issues that existed prior to the children's removal, or that they would in the reasonably foreseeable future. We are satisfied that the county has proved beyond a reasonable doubt that the parents' continued custody of the children is likely to result in serious emotional or physical damage to the children.

Affirmed.

JESSON, Judge (concurring specially)

With a backdrop of historical trauma and a high number of Indian children being removed from their families and tribes by nontribal agencies, Congress passed the Indian Child Welfare Act (ICWA). *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-37, 109 S. Ct. 1597, 1599-1602 (1989) (detailing the background for ICWA). Government must meet a high bar to terminate a parent's parental rights in any case.[1] ICWA and the Minnesota Indian Family Preservation Act require an even higher standard to terminate parental rights to an Indian child: proof beyond a reasonable doubt that returning the children to the parent will likely result in serious emotional or physical harm to the child. 25 U.S.C. § 1912(f) (2016) (ICWA); Minn. Stat. § 260.771, subd. 6(a) (2016).

Scant attention was given to this high standard during trial. This is troubling. Only one witness was asked to opine on the ultimate question of proof beyond a reasonable doubt. And, as the majority points out, that witness equivocated. And even after this court remanded the case to the district court, asking the court to directly address this question, the district court did not elaborate on the critical issue. It simply amended the findings to state that "[c]ontinued custody of [the children] by [mother and father] is likely to result in serious emotional or physical damage to the Children."

I expect more when it comes to termination of parental rights for Indian children. We all should.

[1] *See* Minn. Stat. § 260C.317, subd. 1 (2016) (stating that a district court may terminate parental rights if "the court finds by 'clear and convincing evidence' that one or more of the [bases for terminating parental rights] exist"); Minn. R. Juv. Prot. P. 39.04, subd. 2(a) (same).

Yet I concur with the majority's decision despite my view that, based on the nature of the expert testimony, this is a close case. I concur because the majority is correct that when we dive deep into the record we see children who suffered serious emotional damage with no realistic path to a different future with their parents. I concur because the tribe was unwilling to accept a transfer of jurisdiction to tribal court. I concur because the tribe supports termination of parental rights. And, most fundamentally, I concur because these children, like all children, deserve a permanent home, without additional delay.

But I remain concerned. In a state in which out-of-home placement for Indian children far exceeds the percentage for any other group of children,[2] we need greater diligence in adhering to the high standards dictated by ICWA and the Minnesota Indian Family Preservation Act.

[2] Minn. Dep't of Health and Human Servs., *Minnesota's Out-of-Home Care and Permanency Report 2015* at 9 (2017) (finding that American Indian children were 16.9 times more likely than white children to experience out-of-home care in Minnesota, more than any other group studied).