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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-550

In the Matter of the Welfare of the Child of D.K., Parent.

Filed October 26, 2010
Affirmed; motion granted
Kalitowski, Judge

Hennepin County District Court
File No. 27-JV-09-10114

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Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

KALITOWSKI, Judge

On appeal from the termination of his parental rights, appellant D.K. argues that the record does not support the district court's findings that: (1) active efforts were made to reunite him with the child; (2) the child would suffer serious emotional or physical

harm if returned to appellant; and (3) termination was in the child's best interests. Appellant also argues that the district court should have certified the guardian ad litem as a qualified expert witness under the Indian Child Welfare Act. We affirm and grant appellant's motion to strike parts of respondent White Earth Band of Ojibwe's brief.

D E C I S I O N

Appellant D.K. is the father of a child born in April 2008. Appellant and the child's mother are enrolled members of respondent White Earth Band of Ojibwe (the band), and the child is eligible for enrollment in the band. Because the mother and child tested positive for opiates when the child was born, respondent Hennepin County Human Services and Public Health Department (the county) filed a child-in-need-of-protective-services petition. The district court placed the child in emergency protective care. The child was born prematurely and required intensive medical care. Upon his release from the hospital in June 2008, the child was placed in foster care with a relative.

In August 2008, the district court ordered reunification. In September 2008, appellant moved out of the apartment that he shared with the child's mother. In January 2009, the child's mother was evicted from the apartment. In February 2009, the district court transferred custody of the child to the county. The child was placed in non-relative foster care two months later, when the county was able to locate the child.

In September 2009, the county filed a petition to terminate the parental rights of appellant and the child's mother. A four-day trial began on January 21, 2010. On the first day of trial, the child's mother agreed to termination. On February 12, 2010, the district court ordered the termination of appellant's parental rights. Appellant moved for

amended findings, a new trial, and for visitation pending appeal. The district court issued an amended termination order and denied appellant's other motions.

I.

Appellant challenges the district court's finding that active efforts were made to reunite him with the child. Proceedings to terminate parental rights to an Indian child must comply with the Indian Child Welfare Act (ICWA). Minn. Stat. § 260C.001, subd. 3 (2008). ICWA states:

> Any party seeking to effect . . . 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.

25 U.S.C. § 1912(d) (2006). Active efforts "shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the Tribe, the Indian social service agencies, and individual Indian care givers." *In re Welfare of M.S.S.*, 465 N.W.2d 412, 418-19 (Minn. App. 1991) (quotation omitted). Examples of active efforts include: involving the child's tribe as early as possible; providing services when needed, including financial assistance, food, housing, health care, and transportation; and arranging visitation. Minn. Dep't of Human Servs., *Tribal/State Indian Child Welfare Agreement* 9-10 (2007) [hereinafter *Tribal/State Agreement*]. The beyond-a-reasonable-doubt standard applies in determining whether active efforts have been made. *M.S.S.*, 465 N.W.2d at 418.

Here, the district court concluded that "the evidence proved beyond a reasonable doubt that the efforts of the [county] and [the band] were active and appropriate to rehabilitate the parent and reunify the family." The district court noted that a social worker for the county, a social worker for the White Earth Reservation, and a representative of the band testified that the social services provided to appellant constituted "active efforts" under ICWA. The district court's deference to these witnesses, who have extensive social-services experience, was not clearly erroneous. And the district court's detailed findings support its determination that active efforts were made. While appellant was in contact with the county, the county's social worker arranged for parenting programs, housing, urine analysis, chemical-dependency evaluation, parenting assessment, and psychological evaluation. The county and the band made attempts to locate relatives of the child for foster care and permanent placement.

Appellant argues that the county did not offer him any housing assistance and offered only "minimal help" with regard to visitation with the child. These arguments are contradicted by the record. As to housing, the record supports beyond a reasonable doubt the district court's findings that the county provided housing assistance to appellant in 2008, that appellant chose to leave the apartment, and that appellant has not been forthcoming in providing the county with information about his living arrangements.

As to visitation, the record shows that despite offers of travel assistance and despite encouragement from service providers, appellant has not visited the child since May 2009. In the summer of 2009, appellant lived in White Earth but did not visit the child. After rejecting the county's offers of travel assistance, and without explanation, he

missed a visit with the child that was scheduled to take place in November 2009. The record supports beyond a reasonable doubt the district court's finding that appellant's failure to visit the child is attributable to appellant's subjective feelings that visiting the child is inconvenient, rather than attributable to the county's failure to provide assistance. The record also supports beyond a reasonable doubt the district court's finding that it is more convenient for appellant to travel to the child than vice versa.

In light of the entire record, the district court's determination that the county complied with section 1912(d) of ICWA addresses the statutory criteria and is supported by evidence beyond a reasonable doubt.

II.

Appellant challenges the district court's finding that returning the child to appellant is likely to result in serious physical or emotional harm to the child. *See* 25 U.S.C. § 1912(f) (2006) (providing that termination of parental rights to an Indian child requires "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 . . . is likely to result in serious emotional or physical damage to the child").

Appellant contends that his rights were terminated simply because he failed to visit the child and that this failure does not constitute proof beyond a reasonable doubt that the child would suffer serious physical or emotional harm if the child were returned to appellant. But a district court can consider the parent-child relationship in making this determination. *See In re Welfare of J.B.*, 698 N.W.2d 160, 169 (Minn. App. 2005) (concluding that the district court was correct in making determination under section

1912(f) of ICWA where, among other things, father had a "spotty relationship with the child"). And the district court did not base its determination solely on appellant's admitted failure to visit the child: the district court also cited the testimony of the band's representative (and qualified expert witness under ICWA) that the child would suffer serious emotional damage if returned to appellant. The ICWA expert based her opinion on appellant's lack of employment, lack of stable housing, failure to be available to learn about the child's needs, and lack of effort to build a relationship with the child.

The district court's determination is supported by evidence beyond a reasonable doubt. Evidence was presented at trial that the child requires extensive services and routine, appellant has not shown the ability to keep appointments or to establish and maintain stability in his own life, appellant was not familiar with the child's needs before trial, and appellant places his wants above the needs of the child. Evidence was also presented that appellant has five other children, whom he has not supported adequately, and that appellant "does not have insight into how his instability and infrequent involvement with his children affects their development, emotional well-being and relationships."

Finally, appellant argues that the testimony of the guardian ad litem (GAL) is more credible than that of the ICWA expert. But the weight to be given to testimony, including expert testimony under ICWA, "is ultimately the province of the fact-finder." *Id.* at 167.

We conclude that the district court's determination that returning the child to appellant is likely to result in serious physical or emotional harm to the child addresses the statutory criteria and is supported by evidence beyond a reasonable doubt.

III.

Appellant, relying on the GAL's testimony, argues that termination is not in the child's best interests beyond a reasonable doubt. *See* Minn. Stat. § 260C.301, subd. 7 (2008) (providing that the best interests of the child is "the paramount consideration" in a termination proceeding and must be determined consistent with ICWA); Minn. R. Juv. Prot. P. 39.04, subd. 2(b) (requiring proof beyond a reasonable doubt to terminate parental rights to an Indian child).

The district court found, beyond a reasonable doubt, that termination of appellant's parental rights is in the best interests of the child. The district court explained its determination in a series of well-reasoned, detailed findings, including that appellant has "ongoing patterns of instability and related inadequate parenting"; appellant prioritizes his own desires over the needs of the child; appellant has failed to visit or otherwise maintain contact with the child, resulting in a "severely compromised" parent-child relationship; the child requires extensive services related to his health and well-being; and appellant's failure to establish stability, engage in parenting programming in a timely or consistent fashion, and maintain contact with the child indicate that he will not meet the child's needs. The district court also found that the child, who exhibited developmental delays when he was placed in foster care in April 2009, has shown

marked improvement in many areas after extensive efforts by the foster parents and social services.

Moreover, the district court specifically addressed the GAL's testimony in its analysis of the child's best interests:

> 21.6 The [GAL] testified contrary to the [ICWA expert's] testimony. She does not feel that the child would experience serious harm or danger if returned to [appellant]. She does not think the child should be returned to [appellant] at this time, however. The [GAL] did not even opine that [appellant] will make the necessary improvement to parent the child, but she urged the court to give him more time—at least three more months.
>
> 21.6.1 The [GAL]'s testimony showed a clear bias against termination of parental rights based on a distrust of the foster care and even adoption systems.
>
> 21.6.2 [Appellant] had six additional weeks to work on his case plan after the original trial date and he missed several parenting appointments and did not visit the child during that time. He has not indicated that he is making strides toward being able to care for his son.

This court does not second-guess a district court's resolution of conflicting testimony and witness credibility. *See J.B.*, 698 N.W.2d at 167; *see also In re Welfare of Children of S.W.*, 727 N.W.2d 144, 151 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007). In addition to the ICWA expert's testimony that reunification would present "a great possibility" of serious harm to the child, the county's social worker testified that termination was in the child's best interests. On this record, we conclude that the district court's best-interests determination addresses the statutory criteria and is supported by evidence beyond a reasonable doubt.

IV.

Appellant argues that the district court erred by refusing to certify the GAL as a qualified expert witness under ICWA. Appellant contends that the GAL is "a professional person who has substantial education and experience in the area of his or her specialty and substantial knowledge of the prevailing social and cultural standards and child rearing practices within the Indian community." *See Tribal/State Agreement*, *supra*, at 17-18; *see also In re Welfare of B.W.*, 454 N.W.2d 437, 444-45 (Minn. App. 1990) (holding that standards set forth in the Tribal/State Agreement apply in determining whether a witness is a qualified expert witness under ICWA). Whether a witness meets the standards set forth in the Tribal/State Agreement, and thus qualifies as an expert witness under ICWA, is a determination within the discretion of the district court. *S.W.*, 727 N.W.2d at 150.

Here, the district court found that the GAL did not meet the criteria for a qualified expert witness under ICWA. In light of (1) the GAL's testimony that she has little knowledge of the ceremonial and religious practices of the band and (2) her lack of certainty as to the child-rearing practices of the band, we conclude that the district court did not abuse its discretion by rejecting appellant's argument that the GAL has "*substantial* knowledge of prevailing social and cultural standards and child rearing practices within the Indian community." *See Tribal/State Agreement*, *supra*, at 18 (emphasis added); *see also M.S.S.*, 465 N.W.2d at 417 (stating that a GAL "is not automatically qualified as an [ICWA] expert").

Moreover, appellant concedes that the GAL's testimony would not have differed in substance if the district court had certified the GAL as a qualified expert witness under ICWA. Rather, appellant argues that he was prejudiced because the GAL's testimony would have been given more weight if the district court had certified the GAL as a qualified expert witness under ICWA. But appellant cites no legal authority to support his argument that the testimony of an ICWA expert is to be given more weight than the testimony of a GAL. And we note that the district court specifically considered the GAL's testimony in its entirety, including her opinions. Thus, appellant has failed to show that he was prejudiced by the district court's determination that the GAL was not a qualified expert under ICWA.

Finally, appellant moved to strike parts of the band's brief on the ground that they pertain to matters outside the record on appeal. The record on appeal consists of "[t]he papers filed in the [district] court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. The band's brief contains non-record information related to the Anishinaabeg culture. This court will strike material included in a party's brief that is not part of the appellate record. *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993). We therefore grant appellant's motion to strike the non-record information, which we did not consider in reaching our decision here.

Affirmed; motion granted.