Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-265

NOVEMBER TERM, 2017

In re K.T., Juvenile	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 239-9-15 Cnjv
		Trial Judge: Alison S. Arms

In the above-entitled cause, the Clerk will enter:

Parents appeal from the termination of their rights in K.T., born in September 2015. They argue that the court failed to make findings as to whether their lack of progress was based on a factor beyond their control. Father argues that the State failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA). We affirm.[*]

The Department for Children and Families (DCF) has been involved with this family since 2013 when T.T., one of K.T.'s older siblings, was born with cocaine and THC in her system. At that time, DCF had concerns that parents' substance abuse was affecting their ability to safely parent T.T. and another sibling, M.T. Parents' rights in the older children were terminated in August 2016, a decision that this Court affirmed on appeal. See In re M.T. & T.T., No. 2016-318, 2017 WL 253584 (Vt. Jan. 12, 2017) (unpub. mem.), https://www.vermontjudiciary.org/opinions-decisions. The trial court found there, among other things, that parents failed to make progress in addressing their substance abuse issues, engaging with service providers, and developing their parenting skills and understanding of the children's needs, and that their sporadic visitation caused the children "significant distress." Id. at *1. The trial court adopted the findings in M.T. & T.T. by reference in the instant case.

K.T. was also born with cocaine and THC in her system. She was taken into DCF custody at birth. In June 2016, DCF moved to terminate parents' rights. One year later, the court issued an order granting DCF's request. The court made numerous findings, none of which are challenged on appeal. Essentially, the court found that parents continued to have little to no insight as to why K.T. was taken into custody. They were resistant to complying with recommendations to improve their substance abuse issues, mental and emotional health issues, and parenting skills. They failed to make sufficient progress to enable them to assume their parental duties. The court also emphasized that, as in the case involving K.T.'s siblings, parents were very inconsistent in attending visits. They missed an estimated 40% of visits offered. When visits did not occur due to illness or weather, parents did not make up or reschedule visits despite DCF's attempts to

[*] Given our conclusion, we deny the State's motion to dismiss as moot. We also deny father's motion to strike portions of the State's brief. We did not rely on any information that was not part of the record on appeal.

reschedule. DCF also attempted to help parents with their transportation issues to facilitate visitation, to no avail. The court noted that K.T. had begun to verbalize that she did not want to go to visits and had on three recent occasions refused to be transported. The court described K.T.'s behavior struggles when she returned from visits with parents. The court explained that K.T. had lived with the same foster parents since birth and she shared a strong bond with them.

Based on these and numerous other findings, the court concluded that there had been a change of circumstances since the disposition order and that termination of both parents' rights was in K.T.'s best interests. The court found that all of the statutory best-interest factors favored termination. As noted above, parents had missed numerous visits with K.T., which diminished their ability to establish a parent-child bond. As to the most important statutory factor, the court concluded that parents continued to face the same challenges as they did at the outset of this case, and indeed, at the outset of the case involving K.T.'s siblings, which began in 2013. Parents' inability to make sufficient progress around the issues that brought K.T. into custody precluded parents from being able to assume their parental duties within a reasonable period of time. For these and other reasons, the court terminated parents' rights. This appeal followed.

We begin with parents' argument that the court should have made findings on whether a factor beyond parents' control—K.T. missing visits due to illness or refusal to be transported—caused parents' lack of progress. Parents cite testimony by father that K.T. was frequently not transported to visits, and question whether such decisions were made in good faith.

As we have often repeated, the court must consider four statutory factors in evaluating whether termination of a parent's rights is in a child's best interests. See 33 V.S.A. § 5114. The most important factor is the likelihood that the natural parent will be able to resume his or her parental duties within a reasonable period of time. See In re B.M., 165 Vt. 331, 336 (1996). As long as the court applied the proper standard, we will not disturb its findings on appeal unless they are clearly erroneous; we will affirm its conclusions if they are supported by the findings. In re G.S., 153 Vt. 651, 652 (1990) (mem.). The court's findings—all of which are unchallenged—amply support its conclusion here. The court specifically rejected the notion that parents' lack of progress was based on a factor beyond their control. It held parents responsible for missing appropriately 40% of the visits offered, noting that this continued a pattern found in the sibling case. It further found that even when visits were cancelled due to illness, parents rebuffed DCF's attempts to make up or reschedule visits. The court's decision to terminate parents' rights did not rest on missed visits alone, moreover, but also on parents' failure to make progress in addressing numerous other parental shortcomings. We reject parents' claim of error.

Father complains about the court's finding that K.T. is not a member of a registered Native American Tribe. See 25 U.S.C. § 1903(4) (defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"). The court based its finding on three exhibits provided by DCF; parents stipulated to the admission of these documents. The exhibits were letters from the Blackfeet Tribe, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Eastern Band of Cherokee Indians. The letters indicated that the respective offices had reviewed their tribal registries and determined that K.T. was neither registered nor eligible to register as a member of those tribes.

Father now argues for the first time on appeal that "there is no evidence that the government sent proper notice to the required address." He maintains that the record below cannot establish minimal compliance with the applicable regulations.

We reject father's characterization of the issue before us. The question before the Court is whether the trial court's finding that K.T. is not an Indian child is supported by the evidence. In re G.S., 153 Vt. at 652. This finding is plainly supported by the three letters referenced above, which clearly state that K.T. was not eligible for enrollment in their tribes and she therefore was not an "Indian Child" as defined by the ICWA, 25 U.S.C. § 1911. Father essentially challenges the reliability of the letters. He did not contest the reliability of these letters below, nor did he argue that the tribes' unequivocal statements were based on an inadequate foundation. Instead, he stipulated to the letters' admissibility. Had father raised these arguments, DCF would have had the opportunity to respond by presenting additional evidence and the trial court would have been provided the opportunity to rule on this question. This is the precise reason that we require parties to preserve their arguments below. See In re Entergy Nuclear Vt. Yankee, LLC, 2007 VT 103, ¶ 9, 182 Vt. 340 (explaining that "purpose of the [preservation] rule is to ensure that the original forum is given an opportunity to rule on an issue prior to our review" (quotation omitted)). While generally parties can raise an ICWA argument for the first time on appeal, see In re M.C.P., 153 Vt. 275, 289 (1989), father invited the alleged error here by stipulating to the admissibility of the letters from the tribes. See State v. Longe, 170 Vt. 35, 39 n.* (1999) ("The invited error doctrine, which applies in both civil and criminal cases, is a branch of the doctrine of waiver by which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside." (citation and quotation omitted)). Father stipulated to facts that established that ICWA did not apply. Under the circumstances in this case, we find no error.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Karen R. Carroll, Associate Justice