

STATE OF MICHIGAN
COURT OF APPEALS

In re PAYNE/ PUMPHREY/FORTSON, Minors.

UNPUBLISHED
September 18, 2014

Nos. 318105; 318163
Calhoun Circuit Court
Family Division
LC No. 2009-003732-NA

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In Docket No. 318105, respondent-mother appeals as of right the order terminating her parental rights to all four minor children — DP, AP, KP, and DF — under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). In Docket No. 318163, respondent-father appeals as of right the order terminating his parental rights to two of the minor children, DP and AP, under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).¹ In Docket nos. 318105 and 318163, we reverse and remand for further proceedings in compliance with the provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, with regard to the two Indian children, DP and AP. In Docket no. 318105, we also affirm the finding of statutory grounds for termination of respondent-mother’s parental rights to the two non-Indian children, KP and DF, but we vacate the trial court’s best interests determination as to those two children and remand for best interest findings concerning them.

It is uncontroverted that DP and AP were Indian children under ICWA, whereas KP and DF were not. In both Docket No. 318105 and 318163, respondents argue that the trial court terminated their respective parental rights to the Indian children without applying the correct evidentiary standard of proof under ICWA. We agree. We review respondents’ unpreserved claims of error for plain error affecting their substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. When plain error has occurred, “[r]eversal is

¹ Respondent-father is not the father of KP or DF. The fathers of KP and DF did not have their respective parental rights terminated, and neither father is a party to this appeal.

warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant *or* when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” [*In re Utrera*, 281 Mich App at 9 (citations omitted).]

In 1978, Congress enacted the ICWA, 25 USC 1901 *et seq.*, “in response to growing concerns over ‘abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.’” *In re Morris*, 491 Mich 81, 97-98; 815 NW2d 62 (2012), quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). “In adopting the ICWA, Congress sought to establish ‘minimum Federal standards for the removal of Indian children from their families’ in order to protect the best interest of Indian children and to promote the stability and security of Indian tribes and their families.” *Empson-Lavolette v Crago*, 280 Mich App 620, 625; 760 NW2d 793 (2008), quoting 25 USC 1902. “ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children.” *In re Morris*, 491 Mich at 99.

The various protections afforded by ICWA in proceedings involving Indian children include . . . 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*” in termination of parental rights proceedings, 25 USC 1912(f). [*Id.* at 100 n 9 (emphasis added).]

The record demonstrates that although the trial court found that DP and AP were Indian children under the ICWA, the trial court did not apply the heightened “beyond a reasonable doubt” evidentiary standard of proof at the termination hearing as required under ICWA. *Id.*; 25 USC 1912(f). The record further demonstrates that although a representative of DP and AP’s Indian tribe testified at the termination hearing, the witness was never qualified as an expert and, importantly, the witness did not testify that respondents’ “continued custody of” DP and AP was “likely to result in serious emotional or physical damage to the” Indian children. 25 USC 1912(f); *In re Morris*, 491 Mich at 100 n 9. In both Docket No. 318105 and 318163, petitioner concedes that the trial court “committed reversible error” by applying the incorrect evidentiary standard of proof, and petitioner requests that we reverse the trial court’s termination of respondents’ respective parental rights to the Indian children and remand for further proceedings consistent with applicable ICWA provision. On the record before us, we agree that the trial court committed plain error affecting respondents’ substantial rights. *In re Utrera*, 281 Mich App at 8-9; see *In re Morris*, 491 Mich at 100 n 9. In both Docket No. 318105 and 318163, we reverse the termination of respondents’ respective parental rights to the two Indian children, DP and AP, and remand for proceedings in compliance with ICWA, 25 USC 1912(f).

In Docket No. 318105, respondent-mother also challenges the termination of her parental rights to the two non-Indian children, KP and DF. In order to terminate a respondent’s parental rights to a non-Indian child, “a trial court must find by clear and convincing evidence that one or more grounds for termination exist and that termination is in the child’s best interests.” *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). Here, the trial court correctly applied the clear and convincing evidentiary standard as to the two non-Indian children, KP and DF.

The record supported that two of the men with whom respondent-mother had a previous relationship were convicted of abusing KP and AP, respectively, and that she entered into a relationship with DF's father despite knowledge that he had been convicted of fourth-degree criminal sexual conduct. The record also supported that respondent-mother did not adequately address her mental health concerns by consistently taking her prescribed medications or consistently attending counseling referrals. The record further supported that respondent-mother's housing situation was unstable and that she was unemployed at the time of termination. The assigned foster care supervisor and respondent-mother's Family and Children Services worker each testified that respondent-mother had not benefitted from services to the point that the children would no longer be at risk of harm in her care. By the time of the termination hearing, the case had been pending for almost two years and the record did not support a reasonable likelihood that respondent-mother would be able to properly care for KP and DF within a reasonable time. Thus, the record before us supports the trial court's finding of a statutory basis for termination for termination of respondent-mother's parental rights to KP and DF under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (child will be harmed if returned to parent).

Having concluded that the trial court did not clearly err by finding a statutory ground for termination under MCL 712A.19b(3)(g) and (j), we do not need to address the trial court's additional grounds for termination. *In re HRC*, 286 Mich App at 461. Nevertheless, we also find that the record supported the trial court's finding that MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (c)(ii) (other conditions exist that cause the child to come within the court's jurisdiction) constituted an additional grounds for termination of respondent-mother's parental rights to KP and DF. In reaching our conclusion, we reject respondent-mother's argument that the trial court somehow erred by not specifically reciting statutory subsection numbers in rendering its oral opinion. The trial court actually quoted the statutory language on which it relied.

However, the trial court failed to articulate a best interests finding regarding KP and DF at the termination hearing or in its subsequent termination orders. "[T]he court must state its findings and conclusions regarding any best interest evidence on the record or in writing." *In re Trejo Minors*, 462 Mich 341, 356; 612 NW2d 407 (2000). See also MCL 712A.19b(1) ("The court shall state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated."); MCR 3.977(I)(1) ("The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient."). Accordingly, in Docket No. 318105, we affirm the trial court's finding of statutory grounds to terminate respondent-mother's parental rights to KP and DF, but vacate the trial court's best interests determination concerning KP and DF and remand for the trial court to state its findings of fact and conclusions of law on the record or in writing concerning the best interests of KP and DF.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause