

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KYLIE MICHELLE CORDELL,
MAURICE WILLIAM CORDELL, and GAVIN
JUSTIN CORDELL, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

HOLLY ANNE LEMONDE,

Respondent,

and

SPENCER CORDELL,

Respondent-Appellant.

In the Matter of KYLIE MICHELLE CORDELL,
MAURICE WILLIAM CORDELL, and GAVIN
JUSTIN CORDELL, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

HOLLY ANNE LEMONDE,

UNPUBLISHED

May 15, 2008

No. 281805

Oakland Circuit Court

Family Division

LC No. 04-699331-NA

No. 281806

Oakland Circuit Court

Family Division

LC No. 04-699331-NA

Respondent-Appellant,

and

SPENCER CORDELL,

Respondent.

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Respondents appeal as of right from the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (c)(i), (g), and (j). For the reasons set forth in this opinion, we conditionally affirm and remand for further proceedings.

We first address respondents' arguments that a statutory ground for termination was not established by clear and convincing evidence. We review the trial court's findings of fact for clear error. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 351; 612 NW2d 407 (2000); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence for both respondents. The children were removed from respondents' custody in 2004, because both respondents physically abused respondent Lemonde's oldest son, by physically beating him and burning him numerous times with cigarettes as a form of discipline. Respondents were afforded more than two years to demonstrate their parental fitness, during which time they received numerous services, including parenting classes and therapy, but they failed to benefit from those services and failed to develop insight into either the events that led to the children's removal, or how to control or appropriately discipline the children. In December 2006 or January 2007, respondent Cordell disciplined another child by holding him upside down and throwing him onto a couch. A psychologist who evaluated both respondents opined that it was not possible to maintain the children's safety while in respondents' care, and that no additional services were available that would significantly improve the situation. Additionally, the foster care worker assigned to the children and parents since 2005 testified as follows:

At this point and time we've provided many services to both parents; they have been compliant with all the services that we have recommended. At this point and time I don't feel that either of the parents are able to appropriately parent any of the children. I base that on what they've demonstrated at visitation, CPA referrals that have been made indicating that both parents use spanking as discipline even after taking parent education classes, going through therapy and just overall I don't – I don't know if they can adequately – well, for the mother, I don't know if she can protect the children if the children's behaviors escalate. And the mother also has indicated that she doesn't – she doesn't necessarily feel

that she's comfortable with the children being with the father and she's indicated that from day one and that's in one of the CPA referrals that I've received. So based on that I don't think that in a reasonable amount of time that either parent would be able to take on the responsibility of having the children in their home.

Review of the entire record establishes that the evidence presented established the statutory grounds for termination by clear and convincing evidence.

Both respondents also argue that termination of their parental rights was contrary to the children's best interests.

Once a statutory ground for termination has been proven, "the court shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5). This means that "[o]nce a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo, supra* at 354.

The children had been in foster care for over three years. As previously indicated, the children were physically abused while in respondents' custody, and respondents failed to benefit from services. The children's behavior improved while in foster care, but when visitation was ordered the children began exhibiting extreme behavior, including nightmares, reversal of toilet training, and aggression. A psychologist who examined the children opined that they would not be further harmed if respondents' parental rights were terminated. Thus, the evidence did not clearly show that termination of respondents' parental rights would not be in the children's best interests.

Lastly, both respondents argue that the trial court failed to comply with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* The ICWA applies to state proceedings to remove Indian children from their family, and provides that a tribal court has a right to intervene. *In re TM*, 245 Mich App 181, 186; 628 NW2d 570 (2001). In particular, 25 USC 1912(a) provides:

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.

The ICWA does not apply unless the child is an Indian child as defined by the act, 25 USC 1903(4), and that decision is for the tribe to make. *In re Fried*, 266 Mich App 535, 539-540; 702 NW2d 192 (2005). If the ICWA is applicable, termination of parental rights may not be ordered "in the absence of a determination, supported by evidence beyond a reasonable doubt, including the 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 USC 1912(f); see also MCR 3.980(D).

At the initial preliminary hearing, both respondents informed the trial court that they were of American Indian heritage, with the Cherokee tribe. After the hearing, the trial court entered an order indicating that the children were members or eligible for membership in the Cherokee Indian tribe or band. Despite this order, there is no indication in the record that efforts were made to notify the applicable Cherokee tribe of the proceedings, or that any determination was ever made that the ICWA did not apply.¹

The notice provisions of the ICWA are “mandatory, regardless of how late in the proceedings a child’s possible Indian heritage is uncovered.” *In re TM, supra* at 188 (citation omitted). Once the possibility of Indian heritage is raised, notice is required even where the respondents are not enrolled in any tribe and cannot provide any sort of membership verification. *In re IEM*, 233 Mich App 438, 445; 592 NW2d 751 (1999). In this case, the record does not indicate that there was compliance with the ICWA notice requirements.

However, failure to comply with the ICWA notice requirements does not necessarily require reversal. *In re TM, supra* at 187. Rather, if a respondent’s parental rights are otherwise properly terminated, a court may “conditionally affirm the [trial] court’s termination order, but remand so that the court and the [petitioner] may provide proper notice to any interested tribe.” *In re IEM, supra* at 450. As this Court explained in *In re IEM*,

[i]f the tribe does not seek to intervene, or after intervention the trial court still concludes that the ICWA does not apply, the original orders will stand. If the trial court does conclude that the ICWA applies, further proceedings consistent with the Act will be necessary. [*Id.*]

Having concluded that respondents’ parental rights were otherwise properly terminated in this case, but there being no indication that the ICWA notice requirements were complied with, we conditionally affirm the trial court’s termination decision in accordance with *In re IEM, supra*.

We conditionally affirm the order terminating respondents’ parental rights, but remand for the purpose of providing proper notice to the appropriate tribe in accordance with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

¹ We note that appellee’s brief concedes this point and as a consequence requests that this Court conditionally affirm the order terminating respondents’ parental rights, but remand for the purpose of providing proper notice to the appropriate tribe in accordance with this opinion.