

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of LAIRD/SANDERS, Minors.

UNPUBLISHED
January 28, 2014

No. 315895
Jackson Circuit Court
Family Division
LC No. 11-002828-NA

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Respondent father appeals by right the order of disposition regarding the female minor child, B.S.¹ Respondent father also seeks to appeal the circuit court's "Order Approving Removal of Indian Children" and a separate order following dispositional review. Both of these latter orders are dated April 10, 2013.² Although these latter two orders do not appear to be appealable by right under MCR 3.993(A), we exercise our discretion to treat respondent's appeal as a granted application for leave to appeal those orders, as well as an appeal of right for the order pertaining to the female child B.S. See *Wardell v Hincka*, 297 Mich App 127, 133 n 1; 822 NW2d 278 (2012). In addition, for the reasons discussed in this opinion, we conclude that respondent father has standing to pursue this appeal.

On the merits of the appeal, we conclude that the circuit court correctly found clear and convincing evidence that petitioner made the requisite active efforts to prevent the breakup of the Indian family, that these efforts proved unsuccessful, and that continued custody of the children

¹ Mother pleaded no contest to the allegations against her, and the circuit court took jurisdiction over the children on the basis of the mother's plea. The mother is not a party to this appeal. In a separate appeal now pending before our Supreme Court, respondent father has challenged the circuit court's exercise of jurisdiction, specifically, "whether the application of the one-parent doctrine violates the due process or equal protection rights of unadjudicated parents." *In re Sanders*, 493 Mich 959; 828 NW2d 391 (2013). We do not address the one-parent doctrine in this appeal.

² The latter orders pertain to three male minor children, Bl.S, P.S., and C.S. Respondent father is not the father of Bl.S. At oral argument, respondent father's counsel acknowledged that the circuit court's orders pertaining to Bl.S. are not at issue in this appeal.

by mother was likely to result in serious emotional or physical damage to the children. Accordingly, we affirm all three of the orders on appeal.

I. FACTS AND PROCEDURAL HISTORY

For purposes of this appeal, the parties agree that the three children at issue are Indian children, affiliated through their mother with the Larsen Bay Tribe in Alaska. The two male children, P.S. and C.S., have been the subject of child protection proceedings since September 2011, shortly after C.S. was born. In February 2012, their mother pleaded no contest to allegations against her, and the circuit court found statutory grounds to exercise jurisdiction over the children. The female child, B.S., was born in July 2012, and has been the subject of child protection proceedings from the time she was one month old. It appears from the record that the children lived primarily with their mother, who struggled with substance abuse. It also appears that prior to August 2012, mother had obtained personal protection orders against respondent father. In November 2012, the circuit court took jurisdiction over B.S. on the basis of mother's plea.

On April 3, 2013, the circuit court held a review hearing to take expert testimony from members of the Larsen Bay Tribe on the issue of whether active efforts had been made to provide remedial services to mother to prevent the break-up of an Indian family, consistent with MCR 3.967. Larson Bay Tribal Council President Maryellen Nelson testified by telephone at the hearing as an expert in the child-rearing practices of the Larsen Bay Tribe. Nelson opined that petitioner had provided mother with active efforts and remedial services. Nelson also opined that the efforts had not been successful, and that continued custody of the children by mother could result in serious emotional or physical harm to the children. Nelson went on to state that the children were unsafe in mother's care because of mother's substance abuse and her lack of compliance with the case management plan.

Nelson further testified that allowing the children to remain with mother posed a risk of serious emotional harm or psychological damage. She opined that there was an unstable home environment, because of mother's substance abuse, her failure to follow the case services plan, and the domestic assaults between mother and respondent father. Nelson testified that she based her opinion on all of the materials and records that had been produced in this case.

Following Nelson's testimony, the trial court gave the parties the opportunity to argue whether the requirements of MCR 3.967 had been fulfilled. Mother's counsel agreed that "all of the parts of the court rule were addressed" by Nelson's testimony. Respondent father's counsel argued, for many of the same reasons he does on appeal, that Nelson's testimony did not satisfy the requirements of MCR 3.967.

Thereafter, the circuit court found that petitioner had established the requirements of MCR 3.967, and that the children's removal had been justified.

II. STANDING

A. STANDARD OF REVIEW

Petitioner³ argues that respondent father lacks standing to challenge the circuit court's compliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and that respondent also lacks standing to challenge the compliance with the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.* The circuit court did not address the issue of standing. However, standing is an issue of law, and this Court may rule *de novo* on the issue if the record contains the facts necessary to determine standing. *Wayne Co Retirement Sys v Wayne Co*, 301 Mich App 1, 59; 836 NW2d 279 (2013).

B. ANALYSIS

ICWA and MIFPA both contain provisions that grant standing to a parent of an Indian child. 25 USC 1914; MCL 712B.39. All parties to this appeal agree, at least for purposes of this appeal, that the children at issue are Indian children within the meaning of the applicable statutes.

ICWA provides a “powerful collateral remedy” for alleging violations of the ICWA provisions and grants “standing to the Indian child, the parents and the Indian custodians of the Indian child, and the Indian child’s tribe.” *In re Morris*, 491 Mich 81, 101, 101-102 n 12; 815 NW2d 62 (2012), citing 25 USC 1914. The remedy provision, set forth in 25 USC 1914, provides as follows:

[a]ny Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Meanwhile, a “foster care placement” under ICWA is:

any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.] [25 USC 1903(1)(i).]

In this case, the circuit court’s exercise of jurisdiction over the children was a “foster care placement” under ICWA because the children were removed and respondent father and mother were unable to have the children returned upon demand. See 25 USC 1903(1)(i). Therefore, because the case involved a foster care placement, respondent father, as a parent of Indian children, has standing to challenge the circuit court’s ruling under ICWA. See 25 USC 1914; *In re Morris*, 491 Mich at 101-102 n 12.

³ Petitioner and the Lawyer-guardian ad litem filed a joint brief on appeal. For ease of reference we refer to both parties collectively as “petitioner.”

Similarly, respondent father has standing to allege a violation of MIFPA with regard to the children. In order to ensure compliance with the procedures set forth in MIFPA, MCL 712B.39 provides:

[a]ny Indian child who is the subject of an action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody an Indian child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of sections 7, 9, 11, 13, 15, 21, 23, 25, 27, and 29 of this chapter.

As used in the MIFPA statute, the term “parent” is defined, in pertinent part, as “any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom.” MCL 712B.3(s). As used in MIFPA, a “foster care placement” is:

Any action removing an Indian child from his or her parent or Indian custodian, and where the parent or Indian custodian cannot have the child returned upon demand but parental rights have not been terminated, for temporary placement in, and not limited to . . . [a] [f]oster home or institution. [MCL 712B.3(b)(i).]

Accordingly, MCL 712B.39 grants respondent father, the parent of Indian children, standing to “petition any court of competent jurisdiction” to challenge the removal of the children under MIFPA.⁴

III. INDIAN CHILD WELFARE PROVISIONS

A. STANDARD OF REVIEW

On appeal, respondent-father challenges the circuit court’s dispositional orders removing the children from the mother’s home. Respondent-father contends that petitioner failed to comply with the provisions of ICWA, and with the similar provisions of the MIFPA. We review de novo the interpretation and application of these provisions. See *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). We review for clear error the circuit court’s factual findings underlying the application of the provisions. *In re Morris*, 300 Mich App 95, 104; 832 NW2d 419 (2013).

⁴ In this appeal, the parties have not directly addressed whether respondent father ever had “custody” of the children, or whether respondent father is part of an “Indian family” within the meaning of ICWA or MIFPA. For purposes of this appeal only, we assume that respondent father was a parent from whose custody the Indian children were removed, within the meaning of 25 USC 1914 and MCL 712B.39. We further assume that mother, respondent father, and the children comprise an “Indian family” within the meaning of ICWA and MIFPA. Cf. *In re SD*, 236 Mich App 240, 244; 599 NW2d 772 (1999) (holding that no “active efforts” were required when the family had already been broken up at the time the proceedings began); *Adoptive Couple v Baby Girl*, ___ US ___; 133 S Ct 2552, 2563-2564; 186 L Ed 2d 729 (2013) (same).

B. ANALYSIS

Respondent father contends that petitioner failed to make active efforts to prevent the breakup of the Indian family. He specifically argues that the remedial services offered by petitioner were not designed to remedy any particular harm and were not designed to prevent the breakup of the Indian family. He acknowledges that an expert witness from the tribe testified that active efforts were made and remedial services were offered. Respondent father argues, however, that the expert did not sufficiently explain how the services were intended to prevent the breakup of the Indian family. Respondent further contends that the services were offered too late to support removal of the children.

Both ICWA and MIFPA establish standards with which the circuit court and petitioner must comply in child custody proceedings. Pertinent to the issues raised on this appeal, ICWA provides that:

Any party seeking to effect a foster care placement of, or 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.

* * *

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, 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 USC 1912(d) and(e).]

Similarly, MIFPA provides that:

An Indian child may be removed from a parent or Indian custodian, placed into a foster care placement, or, for an Indian child already taken into protective custody, remain removed from a parent or Indian custodian pending further proceedings, only upon clear and convincing evidence, that includes testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and 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. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. [MCL 712B.15(2).]

Thus, both ICWA and MIFPA require that the circuit court must find, by clear and convincing evidence, on the basis of testimony of an expert witness, that: (1) active efforts were made to provide remedial services and programs designed to prevent the breakup of the family; (2) that those efforts were unsuccessful; and (3) that the continued custody of the child by the

parent is likely to result in serious emotional or physical harm. See 25 USC 1912(d) and (e); MCL 712B.15(2).

1. ACTIVE EFFORTS UNDER ICWA

“[T]he crux of the ‘active efforts’ requirement is undertaking affirmative, as opposed to passive, efforts” *In re JL*, 483 Mich at 321 (interpreting ICWA). The “active efforts” requirement is met “where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own.” *Id.*, quoting *In re Roe*, 281 Mich App 88, 107; 764 NW2d 789 (2008), abrogated in part on other grounds *In re JL*, 483 Mich 300 (quotation omitted). “Active efforts” need not be current efforts; however, efforts in the distant past that were provided too long ago to be relevant to a parent’s current circumstances do not satisfy the “active efforts” requirement. *In re JL*, 483 Mich at 324-325. Further, “active efforts” need not always be provided in relation to the child who is subject to the current termination proceeding. *Id.* at 325. Instead, “the question is whether the efforts made and the services provided in connection with the parent’s other children are relevant to the parent’s current situation and abilities” *Id.* Finally, only one expert need testify as to “active efforts” and likely harm, *In re Elliott*, 218 Mich App 196, 207, 554 NW2d 32 (1996), and the expert’s testimony can be based on reports that were produced by petitioner, *In re JL*, 483 Mich at 330.

In this case, the circuit court did not err when it found, by clear and convincing evidence, that petitioner made the requisite “active efforts” and that those efforts were unsuccessful. Initially, and contrary to respondent father’s assertions, the circuit court made the requisite findings of fact regarding whether petitioner made active efforts in its April 10, 2013 Order Approving Removal of Indian Children. And, contrary to respondent father’s argument, the circuit court did not err by making its factual findings in its April 10, 2013 written order, rather than expressly making all of its factual findings on the record at the April 3, 2013 hearing. See MCR 2.517(A)(3) (providing that where the circuit court acts as the finder of fact, the circuit court may state its findings of fact “on the record or include them in a written opinion.”).

Similarly, the circuit court’s finding as to whether petitioner made the requisite active efforts under ICWA was not clearly erroneous. As recognized by the circuit court in the April 10, 2013 order, petitioner’s active efforts included substance abuse assessments, substance abuse counseling, including AA and NA, drug testing, a psychological assessment, mental health services, domestic violence counseling, and parenting classes. Many of these efforts, including drug testing and two different substance abuse counseling services, occurred before the initial removal date in September 2011. These services continued throughout the proceedings. Furthermore, the record reveals that petitioner’s efforts with regard to the services were not passive. The record reveals that petitioner actively provided these services to mother and modified parts of the services plan at mother’s request. Because the record reveals that petitioner attempted to help mother address her issues, rather than simply telling mother to resolve her issues on her own, the circuit court did not clearly err in finding that there was clear and convincing evidence that petitioner made active, rather than passive, efforts to prevent the breakup of the family. See *In re JL*, 483 Mich at 321, 328-329 (explaining that active efforts require petitioner to assist the respondent, rather than requiring the respondent to comply with the case services plan on her own).

2. ACTIVE EFFORTS UNDER MIFPA

The next issue is whether petitioner's efforts satisfied the "active efforts" requirement under MIFPA. MCL 712B.15 requires that petitioner make "active efforts" before removing a child from his parent or parent's care. The only significant difference between MIFPA and ICWA is that under MIFPA, the term "active efforts" is expressly defined in MCL 712B.3(a) and includes "reasonable efforts" as that term is used in 42 USC 670 to 679(c), as well as "doing or addressing all" of 12 services listed in the statute.⁵ By contrast, ICWA does not expressly include any of the active efforts that are listed under MIFPA. See 25 USC 1912(d-e).

The requirements set forth in *In re JL*, 483 Mich at 321, that petitioner's active efforts take into account social and cultural conditions, as well as Indian social services, and that petitioner's efforts use available resources, including the child's extended family and tribe, are reflected in the various tasks that comprise the definition of "active efforts" under MIFPA. See MCL 712B.3(a)(i) (requiring petitioner to engage extended family members and tribe members); (a)(iv) (requiring petitioner to request that representatives of the child's tribe with "substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community" assist in developing a services plan); and (a)(vii) (requiring petitioner to consult with members of the child's extended family to assure cultural connections and provide family structure).

Petitioner's efforts satisfied the "active efforts" requirement as the term is defined by MIFPA under MCL 712B.3(a)(i). For instance, MCL 712B.3(a)(i) and (iv) and (ix)'s requirements that petitioner engage the parents through utilization of appropriate services and in collaboration with the parent's Native American Tribe, and that the tribe assist in developing a case plan, were satisfied because Nelson testified that petitioner contacted the tribe and worked with the tribe regarding the services that were to be offered in this case. Additionally, concerning the tribe's involvement under MIFPA, MCL 712B.3(a)(vi) was satisfied because a representative of the tribe participated via telephone throughout the proceedings, and the circuit court solicited advice from the tribal representative.

With regard to the services offered in this case, all of the requirements of MCL 712B.3(a) concerning services were satisfied by petitioner's efforts in this case. Initially, MCL 712B.3(a)(ii)'s requirement that the services be designed to help the parent overcome her barriers

⁵ Under the current version of the court rules, MCR 3.002(1) incorporates MIFPA's expanded definition of "active efforts," and MCR 3.967(D) incorporates the definition by reference when referring to the "active efforts" petitioner must undertake. MCR 3.002 and 3.967 were amended on March 20, 2013, and the amendment was to take immediate effect, pending public comment and a public hearing. In an order dated October 2, 2013, our Supreme Court retained the amendments to MCR 3.002 and 3.967. The pertinent hearing in this case occurred on April 10, 2013. Although the circuit court cited MCR 3.967 at the April 3, 2013 hearing, it is unclear from the record whether the circuit court used the amended version of the court rules that incorporated MIFPA's expanded definition of "active efforts," or whether the circuit court used the former version of the court rules that did not include such a definition. It appears, however, that the circuit court relied on the former version of the Court Rule. For purposes of this appeal, we conclude that MIFPA was applicable to the April 2013 orders at issue here.

to compliance was satisfied because, as discussed above, petitioner identified services for mother and adjusted some of those services in order to facilitate mother's compliance. Further, MCL 712B.3(a)(xi), which requires that petitioner monitor mother's progress, was satisfied because petitioner compiled several reports documenting mother's progress in this case. And, given that the services were specifically designed to address mother's needs, the requirement found in MCL 712B.3(a)(v) that petitioner complete a comprehensive assessment of the situation was satisfied. Lastly, concerning the nature of the services, MCL 712B.3(a)(xii), was not applicable in this case. MCL 712B.3(a)(xii) requires petitioner to provide "a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family." Here, this requirement was not applicable because there were no allegations that the requisite services for addressing mother's needs were not available.

Concerning the various requirements for family placement under MIFPA's definition of "active efforts," the circuit court considered several family placements for the children, and there is no indication in the record that petitioner lacked diligence in its efforts to find family members for placement, contrary to MCL 712B.3(a)(iii). And, because petitioner sought family members for placement, the requirement contained in MCL 712B.3(a)(vi), that petitioner contact extended family members to provide family structure and support for the child, was satisfied in this case.

Lastly, petitioner complied with the two remaining examples of "active efforts" as the term is defined under MIFPA. MCL 712B.3(a)(viii) requires, in pertinent part, that petitioner make "arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan" Here, there was no allegation, either on appeal or before the circuit court, that any actions taken by petitioner were not done "in the most natural setting." And, concerning MCL 712B.3(a)(x), which requires petitioner to make extra efforts with regard to services "for members of the Indian child's family with special needs," there is no indication in the record, nor does respondent father allege on appeal, that any members of the family had special needs.

3. EFFORTS UNSUCCESSFUL AND CONTINUED CUSTODY BY PARENT LIKELY TO RESULT IN HARM

Respondent father next contends that petitioner failed to establish that continued custody by mother was likely to result in serious emotional or physical damage to the children. He argues that there was no evidence to indicate that the children would risk serious harm; he maintains that petitioner relied solely on mother's substance abuse as proof of the risk of harm to the children. Respondent father maintains that evidence of a parent's substance abuse does not establish that children will suffer serious emotional or physical damage.

We disagree. The circuit court did not clearly err when it found that petitioner's active efforts were unsuccessful, nor did it clearly err in finding that the continued custody of the children by mother was likely to result in serious emotional or physical damage to the children. With regard to petitioner's active efforts being unsuccessful, the record reveals that at times mother failed to comply with all of the requisite substance abuse services, and that, although she had some negative drug screens, she also tested positive for various controlled substances during these proceedings. Mother's continued substance abuse demonstrated that petitioner's active efforts at curtailing her drug use were unsuccessful. Further, mother's drug use presented a risk of harm to the children if they were returned to her care. See *In re Conley*, 216 Mich App 41,

44; 549 NW2d 353 (1996) (finding a risk of harm existed because of the respondent's prolonged substance abuse issues). Additionally, mother failed to comply with the case services plan, and the failure to substantially comply with a court-ordered case service plan is evidence that return of the child to the parent may cause a substantial risk of harm to the child. See generally MCR 3.976(E)(2); MCL 712A.19a(5). Accordingly, the circuit court did not clearly err when it found that mother's continued custody of the children was likely to result in serious emotional or physical damage to the children.

Respondent father argues that the circuit court erred by relying on Nelson's testimony that mother's drug use was likely to result in serious emotional or physical harm to the children. He contends that drug use alone is not sufficient to prove the likelihood of harm under 25 USC 1912(e) and MCL 712B.15(2). Respondent father's argument is unfounded. Here, the record reveals that at least one of the children was actually physically harmed by mother's substance abuse, in that the child tested positive for a controlled substance at birth. The evidence of mother's repeated failure to comply with the case services plan as it pertained to substance abuse showed that the children were likely to be harmed in her care. Consequently, the circuit court did not clearly err in finding that the continued custody of the children by mother was likely to result in serious emotional or physical damage to the children.

Lastly, respondent father contends that the circuit court's findings of fact with regard to whether the continued custody of the children by mother was likely to result in harm were too brief to satisfy 25 USC 1912(e) or MCL 712B.15(2). We disagree. The circuit court's findings, albeit brief, were sufficient to inform respondent father of the grounds for the orders and to allow appellate review.

IV. CONCLUSION

For purposes of this appeal only, we conclude that respondent father has standing to challenge the circuit court's compliance with the Indian child welfare statutes. We find no clear error in the circuit court's factual findings, and we find no error warranting reversal in the circuit court's application of the controlling statutes.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell