

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 28, 2012

In the Matter of ALVAREZ, Minors.

No. 304669
Wayne Circuit Court
Family Division
LC No. 09-489269

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Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from a trial court order terminating their parental rights to the children pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). We affirm.

The children came within the lower court's temporary custody in August 2009 because of neglect, respondents' mental instability, and their admitted substance abuse. In November 2009, the court found that it had jurisdiction over the children and ordered respondents to comply with their treatment plans. Respondents' parental rights were terminated in June 2011 after petitioner made court ordered reunification efforts for some 19 months.

I. DOCKET NO. 304669

Respondent mother claims that the trial court committed multiple violations of the Indian Child Welfare Act of 1978 (ICWA), 25 USC 1901 *et seq.*, warranting invalidation of the lower court's termination proceedings. She did not raise her claims in the lower court; therefore, they are unreserved. *In re SD*, 236 Mich App 240, 243 n 2; 599 NW2d 772 (1999). However, because respondent mother primarily argues a question of law for which the necessary facts are contained in the record, we will address the merits of her argument. *Id.*

Issues regarding the interpretation and application of the ICWA present questions of law that this Court reviews de novo. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009).

Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). Reversal of an unpreserved error is warranted only where it “seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceeding[s.]” *Id.* at 9, quoting *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999) (quotations and citation omitted).

Although the ICWA does not displace state child custody laws in proceedings involving Indian children, it does impose certain mandatory procedural and substantive safeguards. *Miss Band of Choctaw Indians v Holyfield*, 490 US 30, 35-37; 109 S Ct 1597; 104 L Ed 2d 29 (1989); *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996). Under MCR 3.965(B)(2), a court must “inquire if the child or either parent is a member of an Indian tribe[.]” and if so, “must determine the identity of the child’s tribe[.]” If it is determined that a child may be an Indian child, the trial court must give notice of the proceedings to the Indian tribe and of their rights of intervention. 25 USC 1912(a). Under 25 USC 1911(c), Indian tribes have the right to intervene at any time during the proceedings. See MCR 3.905(D); MCR 3.965(B)(2).

In this case, contrary to respondent mother’s claim that the ICWA was utterly ignored, the trial court made proper inquiry and provided proper notice as required under MCR 3.965(B)(2) and 25 USC 1912. The record reveals that at the preliminary hearing in August 2009, the trial court asked respondent mother if she had Indian heritage to which she answered in the affirmative. After petitioner had begun its inquiry into the appropriate tribe’s identity, the trial court reminded petitioner of its notice obligations under the ICWA while the inquiry was pending. Petitioner notified the Department of the Interior and sent notices to the Delaware Nation and the Delaware Tribe of Oklahoma, the appropriate tribes as designated by the Department of the Interior. The trial court adjourned the adjudicative hearing to give the tribes time to receive the notices and respond within 10 days or request 20 additional days to prepare. 25 USC 1912(a). The Delaware Tribe of Oklahoma received their notification on October 20, 2009, and the Delaware Nation received their notice on October 19, 2009. The adjudicative trial was held on November 5, 2009 — more than 20 days after the notices were received by the two tribes. Both tribes had more than the prescribed 10 days to respond, but neither responded nor requested an additional 20 days to prepare for the hearing.

The trial court did not err when it went forward with the child protective proceedings. Once notice is provided to the appropriate tribe under the ICWA, it is for the tribe to determine if the minor child qualifies as an “Indian child.” *In re Morris*, 491 Mich 81, ___ ; ___ NW2d ___ (Docket Nos. 142759 & 143673, decided May 4, 2012), slip op, pp 13-14; 25 USC 1903(4); MCR 3.002(5). If proper notice is given and a tribe fails to either respond or intervene in the matter, the burden shifts to the parents to show that ICWA still applies. *In re TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001) overruled on other grounds *In re Morris*, 491 Mich at ___ (slip op at 35). In this case, proper notice was made and neither tribe responded. Therefore, at this point in the proceedings, and absent any other evidence, the children were not “Indian children” and thus were not entitled to additional safeguards under the ICWA. Moreover, respondent mother did not object to continuation of any of the proceedings. She agreed to the dispositional order and minimally participated in her court-ordered treatment plan. She never took any action to show that ICWA applied even when she had the assistance of an American Indian Services case manager during this stage of the proceedings. After the tribes

failed to respond and respondent mother failed to take action to show that the ICWA applied, the trial court properly went forward with the proceedings.

However, respondent mother and the children were entitled to the benefits of the ICWA at the termination hearing. Even though the tribes failed to respond to the 2009 notice, petitioner again notified the tribes in March 2011 of the termination hearing. This time, the tribes responded that the children were eligible for membership in the Delaware Nation. Once a child is determined to be an “Indian child,” an order terminating parental rights must meet the higher evidentiary standard of proof beyond a reasonable doubt, which must be supported by qualified expert testimony “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). The expert witness must have “knowledge about the child-rearing practices of the Indian child’s tribe.” MCR 3.967(D). Further, petitioner must establish “that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” *Id.*

In this case, the trial court applied the heightened evidentiary standards as required by the ICWA and the Michigan court rules. Respondent mother’s claim that the trial court applied an incorrect standard of proof is not supported by the record. At the September 2009 hearing, at an early stage of the proceedings, the trial court remarked, “I can’t take admissions today until the ICWA issue is resolved because I have to take admissions by a specific standard of proof and I don’t yet know what that standard of proof is.” By this statement the court was simply noting that the issue of whether the children qualified as Indian children under the ICWA was still unknown and thus it was too early to determine the applicable evidentiary standard. Indeed, the court ultimately and accurately stated the standard in its decision:

This Court has to find that continued custody of the child with the parents or Indian custodian is likely *to result in serious emotional or physical damage* to the child and I need to make that finding *beyond a reasonable doubt* by a *qualified expert* and the qualified expert was stipulated to by the parties as a professional with a substantial educational experience in his or her field. In addition to that finding, I need to find *clear and convincing evidence* with a statutory basis under state law, I need to find that there were *active efforts* at remedial services and rehabilitation programs to prevent the break-up of the family pursuant to *In re Krefit*[,] 148 Mich App 682[, 689-690; 384 NW2d 843] (1986) and I have to find that it’s in the best interest of the children. [Emphasis added.]

Respondent mother’s argument to the contrary is without merit.

Also flawed is respondent mother’s argument that the trial court did not comply with MCR 3.967(D) or 25 USC 1912(e) because the court failed to follow proper procedures by not utilizing the testimony of a qualified expert at the removal hearing during the early stages of the case. As already noted, until the tribes provided notice that the children were eligible for membership in the tribe, the children were not “Indian children” within the meaning of MCR 3.967(D) or 25 USC 1912(e). See *Morris*, 491 Mich at ___ (slip op at 13-14). Without that

determination, there was no requirement that a qualified expert testify. MCR 3.967(D); 25 USC 1912(e). Thus, the trial court was not required to consider testimony from a qualified expert witness until the tribal determination was made, which occurred in 2011, well after the children's initial removal.

At the termination hearing, the trial court satisfied the requirements of MCR 3.967(D) and 25 USC 1912(e) by considering the testimony of an expert witness, Vicky Sousa, who testified that respondents' continued custody would likely result in serious emotional or physical damage to the children and that it was in the children's best interests to terminate respondents' parental rights. Sousa, an attorney, had represented the Delaware Tribe of Indians and served as a guardian ad litem for children of American Indian descent for more than six years. She was qualified as "[a] lay expert witness having substantial experience with the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe" and as "[a] professional person having substantial education and experience in the area of his or her specialty." *In re Krefl*, 148 Mich App at 689-690, quoting 44 Fed Reg 67593, § D.4(b). Additionally, the parties stipulated to Sousa's expert qualifications.¹

Additionally, respondent mother, in arguing that there was insufficient proof of serious emotional or physical damage to the children, erroneously focuses solely on the sufficiency of the qualified expert's testimony. The clear language of 25 USC 1912(f), along with the applicable court rules, does not require a termination decision to be based solely on expert testimony to the exclusion of other proofs. Here, the termination decision was based on the expert testimony along with an extensive lower court record. The trial court did not plainly err in finding, based on all the evidence and beyond a reasonable doubt, that the conditions in the home, namely respondent mother's substance abuse, inadequate housing and financial instability, were likely to result in serious emotional or physical damage to the children.

The trial court also properly determined that petitioner provided "active efforts" as required by the ICWA. Before terminating parental rights to an Indian child, the court must find, by clear and convincing evidence, that petitioner made active efforts "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC 1912(d); *In re JL*, 483 Mich at 318-319. "[A]ctive efforts' require more than the 'reasonable efforts' required under state law[]" and

¹ Respondent mother also contends that the commentary to 25 USC 1912(e) required the lower court to find that it was dangerous for the children to remain with or be returned to their mother, and that the lower court's failure to do so requires this Court to invalidate the termination proceeding under 25 USC 1914 with regard to her as the Indian custodian. Respondent mother takes a portion of the commentary out of context, as the purpose of the commentary is to caution courts from terminating parental rights to an Indian child by merely acting upon cultural bias and nonconformance with stereotypes, which was clearly not present in this case.

require affirmative, as opposed to passive, undertakings. *In re JL*, 483 Mich at 321 (citations omitted).

Passive efforts are where a plan is drawn up and the client must develop his or her own resources toward bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child. [*JL*, 483 Mich at 321, quoting *In re Roe*, 281 Mich App 88, 107; 764 NW2d 789 (2008) abrogated in part on other grounds *JL*, 483 Mich at 325-326.]

Petitioner made “active efforts” to reunify the children with respondent mother, with those efforts including parenting classes, parenting time, and referrals for psychological and psychiatric evaluations. Caseworkers made numerous appointments for respondent mother with various providers of psychological, psychiatric, and individual counseling, as well as substance abuse services. She was offered bus tickets to assist with transportation and received individual therapy in the home for her convenience. When respondent mother missed meetings, the counselors attempted to visit the home, but she was not home. Petitioner also referred respondent mother to a substance abuse assessment and substance abuse treatment, and she completed two substance abuse programs – one a three-day detoxification program in November 2010 and the other an intensive outpatient program in January 2011. At times, the caseworker drove respondent mother to supervised visits, and all caseworkers closely monitored respondent mother’s progress. The trial court also monitored respondent mother’s progress for one year before considering permanent custody. The court attempted to help respondent mother to apply for Medicaid and other government services. Additionally, funding was provided to respondent mother for these services. Hence, respondent mother’s argument that petitioner did not make active efforts towards reunification is baseless.

Respondent mother also argues that the trial court did not carefully assess the timing of services and their relevance to her current situation as required in *In re JL*, 483 Mich at 327. Respondent mother notes that she had two periods of substantial compliance marked by an award of unsupervised parenting time in May 2010 and February 2011. However, on August 25, 2010, the trial court directed petitioner to commence concurrent planning. On November 9, 2010, the trial court ordered petitioner to file a permanent custody petition. Respondent mother argues that, from November 2010 through February 2011, she was “quite compliant” with her treatment plan and the only concern at that time was adequate housing. Thus, respondent mother contends, petitioner cannot now assert that there was a thorough contemporaneous assessment of services because petitioner pursued termination during periods of respondent mother’s compliance.

Respondent mother misconstrues *In re JL*. In that case the Court addressed whether services provided in the past and the parent’s response to those services were enough to meet the statutory threshold of current “active efforts.” The Court stated that trial courts were to “carefully assess the timing of the services provided to the parent. Services provided too long ago to be relevant to a parent’s current circumstances do not establish by clear and convincing

evidence that active efforts have been made. . . .” *In re JL*, 483 Mich at 324. The Court concluded that the timing and nature of the services provided must be evaluated against the parent’s current situation. Contrary to respondent mother’s interpretation, the Court in *In re JL* held that, in certain circumstances, active efforts do not need to be contemporaneous with protective proceedings, declining to “hold that active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding.” *Id.* at 325. Further, the Court stated, “[w]e decline to read the word ‘current’ into 25 USC 1912(d). This statutory language does not impose a strict temporal component for the ‘active efforts’ requirement.” *Id.* at 324. Rather, the Court noted that “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 so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding.” *Id.* at 325.

In any event, the trial court did undertake a thorough, contemporaneous assessment of the services provided to respondent mother and her response to those services. The trial court timely assessed respondent mother’s current situation and needs at regularly scheduled dispositional through review hearings and reviews of updated treatment plans. After the children had been in care for a year and respondent mother inconsistently responded to offered services, the trial court properly directed petitioner to concurrently plan for family reunification or termination. The record is clear that as part of that concurrent plan affirmative reunification efforts continued until the termination hearing. Although respondent mother had short periods of compliance or partial compliance, during most of the time the children were in the court’s custody she did not substantially or even partly comply with her court-ordered treatment plan. She continued to use drugs and refused to treat her bipolar disorder. Additionally, at the time of the termination hearing, she had just acquired independent housing, but her ability to maintain that housing was uncertain because she lacked a legal income source. The trial court did not plainly err when it found that there were active efforts to provide remedial and rehabilitative programs and services to prevent the breakup of this Indian family.

II. DOCKET NO. 304670

Respondent father argues that there was insufficient evidence to terminate his parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j), and that termination was not in the children’s best interests. We hold that the trial court did not clearly err in finding that statutory grounds were sufficiently established to terminate respondent father’s parental rights, and that it was in the best-interests of the children to do so.

This Court will affirm a termination of parental rights when one statutory ground for termination has been proven by clear and convincing evidence. *In re CR*, 250 Mich App 185, 207; 646 NW2d 506 (2002). Orders terminating parental rights are reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91 (opinion by CORRIGAN, J.), 126 n 1 (concurring opinion by YOUNG, J.); 763 NW2d 587 (2009); MCR 3.977(K). Clear error exists “if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). A trial court may consider evidence on the whole record in making its best-interest determination. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court’s best-interest determination is reviewed for clear error. *Id.*

On appeal, petitioner concedes that the record does not support termination of respondent father's parental rights under MCL 712A.19b(3)(c)(ii). However, the trial court did not clearly err in finding that the other three statutory grounds were established by clear and convincing evidence. The conditions that led to petitioner's intervention with regard to respondent father were his chronic substance abuse, inadequate parenting, and emotional instability, which manifested in his neglect of the children. Termination was proper under MCL 712A.19b(3)(c)(i) because more than 182 days had passed and respondent father did not rectify his substance abuse issues and address his mental health issues. The children were removed from respondents' care in August 2009 because respondents abused drugs and left the children, dirty and hungry, with a homeless stranger. Respondent father also had a history of suicide attempts and had attempted suicide shortly before the children were removed from the home.

Petitioner provided respondent father with essentially the same reunification services that were given to respondent mother. He was initially referred for services in November 2009. Respondent father completed a 10-day inpatient drug treatment program in December 2010 but never went to the outpatient program because of an arrest. Even after his release from jail in early 2011, he failed to follow through with any substance abuse treatment referrals. During the pendency of the lower court proceedings, respondent father provided only three drug screens. He tested positive for marijuana in September 2010, and he acknowledged that he used cocaine since the children's removal. Even though his last two drug screens were negative, they were six months before the termination hearing. Respondent father had mental health problems for which he refused evaluations and treatment, and he did not provide requested documentation of his claimed mental health treatment from Community Care Services. He did not participate in individual counseling. Respondent father took anti-psychotic or anti-anxiety medications, but he did not know his own diagnoses. The evidence clearly showed that, after some 19 months of reunification services, the conditions that led to the children's removal persisted.

Termination was also proper under MCL 712A.19b(3)(g) and (j). Respondent father did not obtain or maintain sobriety and mental stability. Also, he did not have a suitable home or a sufficient legal income source. The evidence supported the trial court's finding that respondent father was unable to provide the children with proper care or custody, and he was not likely to do so within a reasonable period of time. *In re Miller*, 182 Mich App 70, 83; 451 NW2d 576 (1990).

Respondent father contends that petitioner's efforts to reunite him with the children were unreasonable. Although some courts have held that the ICWA generally requires that active efforts be made to prevent the breakup of an "Indian family" before the state may seek to terminate the parental rights to an Indian child, even when one of the parents is non-Indian, *CJ v Dep't of Health & Social Servs*, 18 P3d 1214, 1217 n 10 (Alas, 2001); *KN v State*, 856 P2d 468, 474 n 8 (Alas, 1993), this Court has determined that active efforts are not required under the ICWA before termination of a non-Indian parent's rights if the family has already broken up by the time termination proceedings were initiated, *In re SD*, 236 Mich App 240, 244; 599 NW2d 772 (1999). Here, as in *In re SD*, there was no disruption in the "Indian family" that would necessitate the application of § 1912(d)'s requirement of "active efforts" at reunification as to respondent father, as the family had broken up long before the termination proceedings were initiated. Also, respondent father, like the father in *In re SD*, did not financially support his children for nearly two years before the termination proceedings. Thus, it cannot be successfully

argued that petitioner's actions contributed in any way to the "breakup" of this family because such a "breakup" had already occurred. See *id.* at 244-245.

We hold that the trial court did not clearly err in finding that petitioner made reasonable reunification efforts. Although respondent father contends that petitioner mishandled his case, in part because of caseworker staffing changes, respondent father admitted at the termination hearing that he had been given many opportunities yet failed to follow his court-ordered treatment plan. He also testified that there was no reason for the trial court to believe that in the future he would do things differently based on his past conduct. There is no clear error warranting reversal in the trial court's decision concerning respondent father's treatment plan and reunification efforts.

The trial court also did not clearly err in finding that terminating respondent father's parental rights was in the children's best interests. MCL 712A.19b(5). Respondent father emphasizes that there was a strong parent-child bond and that he acted appropriately during parenting time and never did anything to harm his children, all of which may be true. However, the trial court correctly concluded that this bond did not overcome the risks to the children from respondent father's homelessness, lack of success during the proceedings, and his inability to maintain sobriety and mental stability. "If a parent cannot or will not meet . . . [his] irreducible minimum parental responsibilities, the needs of the child must prevail over the . . . [rights] of the parent." *In re Terry*, 240 Mich App 14, 28; 610 NW2d 563 (2000) (quotations and citation omitted).

After almost two years of being in care, the children needed stability and permanency, which respondent father could not provide. This Court has firmly stated that children should not languish indefinitely in foster care because the Legislature has determined that parental rights should be terminated if the conditions that necessitated jurisdiction have not been rectified within a reasonable period of time. *In re Dahms*, 187 Mich App 644, 647; 468 NW2d 315 (1991). Reviewing the whole record, the trial court did not clearly err in finding that the children's best interests were served by terminating respondent father's parental rights.

Affirmed.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan