STATE OF MICHIGAN

COURT OF APPEALS

In re PORPHIR, Minors.

UNPUBLISHED
October 15, 2020

Nos. 352219; 352220
Berrien Circuit Court
Family Division
LC No. 2018-000058-NA

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother and respondent-father appeal as of right the trial court's order terminating their respective parental rights to the minor children under MCL 712A.19b(3)(c)(*i*) and (j). For the reasons stated in this opinion, we conditionally reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

The Department of Health and Human Services (DHHS) petitioned for the removal of the minor children DP and BP from the care and custody of respondents because both had substance abuse problems and housing issues. Respondent-mother admitted that she used marijuana, and she tested positive for methamphetamine. Respondent-father tested positive for a variety of illegal substances. After condemnation of respondents' home, they moved into a motel. Respondents both struggled to provide the children food. Respondent-father received disability benefits and respondent-mother worked 40 hours a week as a server, but despite their combined incomes they struggled to cover both rent at the motel and food.

The trial court authorized the amended petition, and the children were removed from the home and placed in foster care following a preliminary hearing. During the hearing the trial court inquired regarding possible Native American heritage. Respondent-father indicated that he might have such heritage and the trial court ordered the DHHS to investigate the matter. At the pretrial hearing, respondents each entered pleas of no contest.

Respondent-mother participated in parenting time and the Families First and Supportive Visitation programs. Respondent-mother visited DP following his placement in a residential facility for his self-harming and suicidal ideation. Respondent-mother, however, continued to test

positive for methamphetamine, and she waited almost a year before starting her counseling and substance abuse services. She was also hospitalized for alcohol abuse. Further, respondent-mother lost her serving job and obtained a job that paid her less. Respondent-father struggled with his parenting visits and failed to fully comply with his service plan. At one point, he left respondent-mother and moved to Florida, but his plans there fell through and he returned to Michigan. At the end of the case, respondents lived together in a homeless shelter. Respondent-mother continued her parenting visits with DP and BP. The visits, however, were chaotic and she could not meet the children's needs. When respondent-father attended, respondents frequently fought in front of the children. The trial court terminated both respondents' parental rights. They now appeal.

II. ANALYSIS

A. RESPONDENT-MOTHER

Respondent-mother argues first that the trial court erred in finding statutory grounds for termination of her parental rights. We disagree.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011) (citation omitted). A trial court's factual findings following a termination hearing are reviewed for clear error. *In re Gonzales/Martinez*, 310 Mich App 426, 430; 871 NW2d 868 (2015). "A finding is clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id*. at 430-431 (quotation marks and citation omitted). Whether the trial court properly selected, interpreted, and applied a statute is reviewed de novo. *Id*. at 431. If this Court holds that the trial court properly concluded that one statutory ground existed for termination, this Court need not address the additional grounds for termination. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

Termination of parental rights under MCL 712A.19b(3)(c) is proper when "182 or more days" have elapsed since the trial court issued its first dispositional order. MCL 712A.19b(3)(c). Additionally, termination of parental rights under MCL 712A.19b(3)(c)(*i*) is proper when "[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age."

In this case, clear and convincing evidence established grounds for terminating respondent-mother's parental rights under MCL 712A.19b(3)(c)(*i*). More than 182 days elapsed between the issuance of the initial disposition order and the termination of respondent-mother's parental rights. The barriers that led to adjudication, such as substance abuse, lack of adequate housing and food, inability to manage resources, emotional instability, and lack of parenting skills, all continued to exist throughout the case with no reasonable likelihood that respondent-mother would rectify them considering the children's ages. Respondent-mother never resolved her substance abuse issues. She tested positive for methamphetamine throughout this case and was hospitalized for overdosing on alcohol. She only attended two substance abuse classes, and in her initial assessment, which occurred almost a year into this case, respondent-mother revealed that she suffered from addictions to marijuana and alcohol which she used to cope with life. She also failed to resolve the housing situation which went from living in a motel to a homeless shelter. Although she held employment

throughout this case, she lost her serving job because of her substance abuse and her new job paid less than her serving job which exacerbated her financial difficulties.

Respondents' relationship also remained a barrier throughout this case. The record indicates that some domestic violence issues existed between respondents who frequently argued with each other in front of the children. A caseworker described their relationship as toxic and competitive, and at one point, respondent-father indicated that his relationship with respondent-mother was over and that he was moving to Florida to live with somebody he had "been emotionally involved with in the past." Later, however, respondents got back together.

Respondent-mother's parenting skills also remained a barrier in this case. She failed to benefit from any of the parenting-skills services that she received in this case. Her parenting visits leading up to the termination hearing were chaotic and demonstrated that she lacked the ability to handle the children.

The record also establishes that respondent-mother lacked the ability to rectify the conditions that led to adjudication within a reasonable time considering the children's ages. MCL 712A.19b(3)(c)(*i*). In this regard, we focus on how long it would take respondent-mother to rectify the barriers, as well as, how long the children "could wait for this improvement." *Matter of Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991). In this case, the record establishes that respondent-mother waited almost a year before she engaged in substance abuse services, and she never fully decided that she needed to change anything. Additionally, although she completed her parenting-skills programs, she struggled to interact properly with the children at parenting visits. The record reflects that respondent-mother failed to obtain housing, resolve her financial issues, or repair her relationship with respondent-father. The children, who were six and nine years old, needed stability and permanency to deal with the trauma and behavioral issues that they developed as a result of respondent-mother's care.

The trial court did not err in finding that clear and convincing evidence established statutory grounds for termination under MCL 712A.19b(3)(c)(*i*). Because the trial court correctly determined that one statutory ground existed for termination, we need not review the other statutory grounds for termination considered by the trial court. See *HRC*, 286 Mich App at 461.

Respondent-mother argues next that the trial court erred by finding that termination of her parental rights served the children's best interests. We disagree.

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW 2d 144 (2012). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." See *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court must evaluate each child's best interests individually. *Olive/Metts Minors*, 297 Mich App at 42. However, if the best interests of the individual children do not significantly differ, then the trial court need not repeat the same factual findings for each child. *In re White*, 303 Mich App 701, 715; 846 NW2d 61 (2014). The trial court should "consider such factors as the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016)

(quotation marks and citation omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *White*, 303 Mich App at 714. The focus of this determination is on the child, not the parent. *Schadler*, 315 Mich App at 411.

In this case, the trial court held that even if the children had a bond with respondent-mother, the other best-interest factors weighed in favor of termination. Specifically, the trial court found that respondent-mother had a history of domestic violence; the children needed permanency, stability, and finality; respondent-mother lacked parenting skills; and she failed to comply with or benefit from her case service plan. The trial court also found that the possibility of adoption weighed in favor of termination. The trial court's best-interest findings were supported "by a preponderance of the evidence." *Moss*, 301 Mich App at 90.

The record indicates that respondents had a history of domestic violence. Respondent-mother reported that respondent-father had been violent with her throughout the years. Additionally, BP told his therapist that respondent-father was mean to respondent-mother. As indicated above, the record reflects that respondents frequently fought in front of the children at parenting times, and their relationship was described as toxic and competitive.

The record also supports the trial court's finding that the children needed permanency, stability, and finality. See *Schadler*, 315 Mich App at 411. DP and BP's therapist diagnosed them with adjustment disorder and indicated that "with appropriate care and treatment," they could both heal. Further, both BP and DP had "some physical and cognitive needs" that needed to be addressed. The therapist stated that both children needed consistency, permanency, and regulation to address these issues.

Respondent-mother also failed to comply with the case service plan or prove that she benefited from it. She waited almost a year to complete her substance abuse assessment, and failed to engage fully to overcome her substance abuse problems. Additionally, although she completed her parenting classes and the Supportive Visitation program, she failed to show that she benefited from the program. The record establishes that she struggled to parent BP and DP. When respondent-mother's parenting times did not go well, she blamed the children.

Although respondent-mother had a bond with the children, the children's need for safety, permanency, and stability weighed in favor of termination. *In re Jones*, 316 Mich App 110, 120; 894 NW2d 54 (2016). The record indicates that respondent-mother's bond grew weaker as the case continued. The therapist reported that BP no longer wanted to live with respondent-mother and felt that she would be unable to provide him proper care. The therapist also stated that DP did not trust respondent-mother and had a poor attachment to her. Both children were aware of the advantages of not living with respondent-mother, and by the termination hearing, adoption was a possibility.

A preponderance of the evidence supported the trial court's conclusion that termination served the children's best interests. See *Moss*, 301 Mich App at 90. The trial court, therefore, did not err in this regard. See *VanDalen*, 293 Mich App at 139.

B. RESPONDENT-FATHER

Respondent-father's sole argument on appeal is that the DHHS and the trial court failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. The DHHS concedes respondent-father's claim.

Trial courts determine whether ICWA applies by first determining whether the minor child falls within ICWA's definition of "Indian child." *In re Morris*, 491 Mich 81, 99-100; 815 NW2d 62 (2012). ICWA defines "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*[.]" 25 USC 1903(4) (emphasis added). Because Indian tribes determine their membership, "when there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of the child custody proceedings, so that the tribe may advise the court of the child's membership status." *Morris*, 491 Mich at 100. See 25 USC 1912(a).

Our Supreme Court has held that "[t]he application of the requirements of 25 USC 1912(a), however, is conditioned on whether the notice requirement is even triggered by indicia of Indian heritage sufficient to give the court actual knowledge or a 'reason to know' that the child at issue is an Indian child." *Morris*, 491 Mich at 104. The Court also held "that sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC § 1912(a)." *Id*. at 108.

When a trial court fails to provide proper notice, this Court must "conditionally reverse the trial court and remand for resolution of the ICWA-notice issue." *Morris*, 491 Mich at 89. Additionally, "[o]n remand, the trial courts shall first ensure that notice is properly made to the appropriate entities." *Id*. at 123. "If the trial courts conclusively determine that ICWA does not apply to the involuntary child custody proceedings—because the children are not Indian children or because the properly noticed tribes do not respond within the allotted time—the trial courts' respective orders terminating parental rights are reinstated." *Id*. However, if "the trial courts conclude that ICWA does apply to the child custody proceedings, the trial courts' orders terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA." *Id*.

MCR 3.965(B)(2) provides that trial courts "must inquire if the child or either parent is a member of an Indian tribe." Additionally, in 2012, the Legislature enacted MIFPA, "which contain[ed] language similar to that found in 25 USC 1912(a)[.]" *Jones*, 316 Mich App at 114. For example, MCL 712B.9(1) provides that "[i]n a child custody proceeding, if the court knows or has reason to know that an Indian child is involved, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene." However, unlike ICWA, MIFPA "expressly set[s] forth a nonexclusive list of circumstances that trigger the notification mandate found in MCL 712B.9(1)[.]" *Jones*, 316 Mich App at 114. See MCL 712B.9(4).

In this case, at the preliminary hearing, respondent-father informed the trial court and the DHHS that his biological brother was a member of the Cherokee tribe. He stated that he may also

be eligible for membership. The trial court ordered the DHHS to investigate respondent-father's claim. The DHHS concedes that despite being directed by the trial court to investigate the matter no further action was taken by either the trial court or the DHHS.

The record, therefore, indicates that the trial court and the DHHS failed to comply with ICWA and MIFPA. Regarding ICWA, sufficiently reliable information "that there existed sufficient indicia of Indian heritage to require tribal notice" existed. *Morris*, 491 Mich at 109. Specifically, the trial court had "information suggesting that the child, a parent of the child, or members of a parent's family [were] tribal members[.]" *Id*. at 108 n 18. Respondent-father informed the trial court at the preliminary hearing that he might have Native American heritage because his brother was a member of the Cherokee tribe. See *Jones*, 316 Mich App at 116-117. Therefore, the notice requirements of 25 USC 1912(a) were triggered. See *id*. at 117. Further, regarding MIFPA, because the DHHS had information that suggested that the children may be Indian children and the trial court and respondent-father's counsel knew that the children may be Indian children, the notice requirements of MCL 712B.9(1) were triggered. See MCL 712B.9(4)(b) and (e); see also *Jones*, 316 Mich App at 117. However, the record in this case indicates no steps were taken to satisfy the notice requirements of 25 USC 1912(a) or MCL 712B.9(1). Therefore, conditional reversal of the order of termination respecting the children is required with remand for compliance with the notification requirements in the ICWA and MIFPA. *Jones*, 316 Mich App at 117.

Although respondent-mother did not raise this issue on appeal and we would otherwise affirm the trial court's decision, we must conditionally reverse the trial court's termination order regarding her parental rights because "a parent cannot waive a child's status as an Indian child or any right of the tribe that is guaranteed by ICWA." *Morris*, 491 Mich at 111. On remand, the trial court and the DHHS shall comply with the notification requirements in the ICWA and MIFPA.

Conditionally reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Kirsten Frank Kelly
/s/ James Robert Redford