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STATE OF MICHIGAN

COURT OF APPEALS

In re COTTELIT/PAYMENT, Minors.

UNPUBLISHED
March 18, 2021

No. 354423
Chippewa Circuit Court
Family Division
LC No. 17-014568-NA

Before: BORRELLO, P.J., and BECKERING and SWARTZLE, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to CC and the twins, JP and JP, under MCL 712A.19b(3)(c)(*i*) (failure to rectify the conditions that led to the adjudication), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood that children will be harmed if returned to parent). The children are enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians. Because the children are Native American, this case also involves the application 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*. See *In re England*, 314 Mich App 245, 250; 887 NW2d 10 (2016). Respondent expressly concedes on appeal that he failed to rectify the substance abuse and anger issues that led to the adjudication in this matter and that petitioner established one or more of the statutory grounds supporting termination of respondent's parental rights. We therefore need not directly address the trial court's statutory grounds determination in this appeal. Instead, respondent's appellate issues are limited to a procedural argument under ICWA, a challenge to the trial court's findings regarding the "harm" requirement of the ICWA, and a challenge to the trial court's best-interest determination. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Respondent and the mother of the children had a relationship that was riddled with substance abuse, domestic violence, and police involvement. Mother testified that the domestic violence that occurred between her and respondent was usually related to alcohol or other substance abuse. Incidents of domestic violence occurred in the presence of CC, including one incident where respondent punched mother in the eye while she was holding CC. CC was present during other incidents of domestic violence between the couple as well. Respondent's substance

abuse primarily involved prescription medications, and he would get extremely angry and throw things when under the influence of these substances. Mother indicated that respondent had a prescription for Suboxone and that he would share the Suboxone with her because she did not have a prescription.

The children were first removed from mother's care shortly after the twins were born in February 2017 allegedly testing positive for Suboxone. Respondent's relationship with mother ended when mother was incarcerated in May 2017 for a drug-related conviction. At some point after this time and during the pendency of the child protective proceedings, respondent married someone else. Respondent's wife contacted mother while mother was incarcerated and made negative comments about the children. All three children were removed from respondent's custody in August 2017 after an amended petition alleged that police responded to respondent's home twice in one day when respondent, who was heavily intoxicated, reported that Suboxone and other drugs had been stolen from his residence. Respondent gave varying statements to police about where the stolen Suboxone had been located, at times saying that the Suboxone was stored on a shelf in the living room and at other times saying that the Suboxone was in a sock in his bedroom. Respondent was adjudicated on the basis of his admission to petition allegations involving his history of substance abuse issues involving alcohol and opioids, his diagnosed alcohol dependence and opioid dependence, and difficulty controlling his anger. Respondent further admitted that these issues affected his ability to parent his children such that his home was an unfit place for the children to live.

As the case progressed for almost three years, respondent failed to make any meaningful progress in addressing his substance abuse and anger issues. His relationship with his new wife was also plagued by domestic violence. At the time of the termination hearing, respondent was incarcerated due to assault charges stemming from an incident in which respondent, who was under the influence of substances, struck a stranger over the head with a table while in a restaurant. The children had been returned to the care of their mother in March 2020. Mother is not a party to this appeal.

II. LEGAL BACKGROUND: ICWA AND MIFPA

"The ICWA and the MIFPA each establish various substantive and procedural protections for when an Indian child is involved in a child protective proceeding." *In re England*, 314 Mich App at 251. In termination proceedings specifically, "the ICWA and the MIFPA require a dual burden of proof" necessitating both a "finding that at least one state statutory ground for termination was proven by clear and convincing evidence" *and* "findings in compliance with [the] ICWA [and the MIFPA] before terminating parental rights." *Id*. at 253 (quotation marks and citations omitted; alterations in original). The additional protections provided by the ICWA and MIFPA include an "essentially identical" requirement that there be proof beyond a reasonable doubt that the child would be harmed by continued parental custody in order to justify terminating parental rights. *Id*. at 259; see also 25 USC 1912(f); MCL 712B.15(4).

III. QUALIFIED EXPERT WITNESS TESTIMONY

Respondent first argues on appeal that the trial court clearly erred by giving "significant weight" to the testimony of qualified expert witness Amanda Gill. Respondent contends that the

trial court should not have given any weight to her credibility or expert opinion because she did not meet with the children or family in this case.

25 USC 1912(f) provides:

> No termination of parental rights may be ordered in such proceeding in the absence of 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.

MCL 712B.15(4) similarly provides:

> No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness as described in section 17, that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child.

MCL 712B.17 provides:

> (1) If the testimony of a qualified expert witness is required, the court shall accept either of the following in the following order of preference:
>
> (a) A member of the Indian child's tribe, or witness approved by the Indian child's tribe, who is recognized by the tribal community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices.
>
> (b) A person with knowledge, skill, experience, training, or education and who can speak to the Indian child's tribe and its customs and how the tribal customs pertain to family organization and child rearing practices.
>
> (2) A party to a child custody proceeding may present his or her own qualified expert witness to rebut the testimony of the petitioner's qualified expert witness.

During the termination hearing in this case, Gill testified that she is an enrolled member of the Sault Ste. Marie Tribe of Chippewa Indians, has been appointed by the tribe to provide qualified expert witness testimony at removal and termination hearings, and has testified in that capacity approximately 70 times. Gill testified that she was familiar with the child-rearing practices and family organization customs of the tribe and was authorized to testify on the tribe's behalf regarding those matters. She was employed with Anishnaabek Community and Family Services (ACFS), which is a tribal social service agency. Outside of her own personal knowledge of her tribal culture, she had also participated in multiple cultural, ICWA, and MIFPA trainings. Respondent's counsel stipulated to Gill's qualification as an expert witness.

Gill testified that she was very familiar with the case and attended hearings in the case prior to the transfer of the case to ACFS.[1] She also reviewed the files and reports in the case. On cross-examination by respondent's counsel, Gill testified that she had not met with the children or family in this case.

On appeal, respondent seemingly argues that Gill was required to meet with the children and the family and that her failure to do so renders her testimony without any evidentiary weight. For this proposition, respondent relies solely on a portion of the guidelines for implementing the ICWA published by the U.S. Department of the Interior Bureau of Indian Affairs. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 56; 874 NW2d 205 (2015) (quotation marks and citation omitted). Specifically, respondent cites guidance related to the implementation of 25 CFR 23.122 (2020).

Section 23.122 provides:

> (a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.
>
> (b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.
>
> (c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

The guideline for the above regulation that respondent cites on appeal provides as follows:

> **Familiarity with the child.** It is also recommended that the qualified expert witness be someone familiar with that particular child. If the expert makes contact with the parents, observes interactions between the parent(s) and child, and meets with extended family members in the child's life, the expert will be able to provide a more complete picture to the court. [Bureau of Indian Affairs, Guidelines for Implementing the Indian Child Welfare Act, G.2, 81 Fed Reg 96476 (December 30, 2016) (BIA Guidelines).]

This guideline contains no *requirement* that the qualified expert meet with the child or family. Additionally, the guidelines specifically state, "While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children." BIA Guidelines, *Purpose of These Guidelines*. Gill

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[1] Gill testified that she was not the social worker in this particular case.

testified that she was familiar with the case through her review of the files and reports, as well as her attendance at various hearings in the matter. Respondent has not demonstrated that any error occurred by permitting Gill to testify as a qualified expert without her having interviewed the child or family. *In re Payne/Pumphrey/Fortson*, 311 Mich App at 56. To the extent that Gill's credibility could have been impacted by the fact that she did not meet personally with the children or family, this is a matter to which we defer to the trier of fact in its superior position to make such judgments regarding witness credibility. *Shann v Shann*, 293 Mich App 302, 305, 307; 809 NW2d 435 (2011).

IV. FINDING UNDER 25 USC 1912(f) AND MCL 712B.15(4)

Next, respondent argues that there was no direct evidence of a causal connection between the conditions in the home (which were respondent's anger and substance-abuse issues) and any harm suffered by the children such that the trial court erred by finding beyond a reasonable doubt that respondent's continued custody of the children would likely result in serious emotional or physical damage to the children. See 25 USC 1912(f); MCL 712B.15(4). Respondent supports this argument by relying on 25 CFR 23.121(c) and (d) (2020). This regulation provides in relevant part as follows:

> (b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
>
> (c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the child-custody proceeding.
>
> (d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child. [25 CRF 23.121.]

This Court reviews de novo issues involving application and interpretation of the ICWA, and we review a trial court's underlying factual findings for clear error. *In re Payne/Pumphrey/Fortson*, 311 Mich App at 56. "A decision is clearly erroneous if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Id*. at 56-57.

In this case, respondent acknowledges that there was evidence that he had a history of abusive and intimidating conduct toward his partners and that this domestic violence had occurred in front of at least one of the children. There was also evidence of an incident where respondent threw a large rock at one of the children during a supervised parenting time session. Gill testified

that domestic violence in front of children and substance abuse of the severity that occurred in this case, where respondent was "acting like he's a, a bird,"[2] presented a likelihood of emotional or physical harm to the children. Furthermore, there was testimony that the twins had not been in respondent's care and custody for approximately three years, that he had failed to rectify his substance abuse issues throughout the case, and that he was currently incarcerated as the result of an incident where he committed a physical assault with a table while he was intoxicated that injured two individuals.

ACFS foster care caseworker Heather Pavlat provided extensive testimony about respondent's continuing substance abuse throughout the case. Respondent refused to comply with urine drug screens that were intended to test for alcohol, refused to allow Pavlat to count his prescription pills, and kept Suboxone strips in his wallet. Respondent's prescribed medications fluctuated, but he did not keep his medication in the proper prescription bottles that would have allowed Pavlat to verify his compliance with his prescriptions. Respondent dismissed any suggestion that he had a substance abuse problem, and he never took a meaningful part in substance abuse treatment. Pavlat indicated that respondent had not made any meaningful progress in addressing his substance abuse.

With respect to respondent's anger issues, Pavlat testified that two case aids had to supervise respondent's parenting visits, rather than only one aid as was typical, because the case aids were afraid to be alone with respondent due to his tendency to have angry outbursts. Pavlat indicated that respondent had not progressed in rectifying his violent tendencies or anger issues.

Based on our review of the record, we are not left with a definite conviction that a mistake was made, and we conclude that the trial court did not clearly err by finding beyond a reasonable doubt that the children were likely to suffer serious emotional or physical damage if in respondent's custody. *In re Payne/Pumphrey/Fortson*, 311 Mich App at 56.

To the extent respondent argues that the trial court could not consider his substance abuse because it is a factor listed in 25 CRF 23.121(d), we reject this argument because the trial court did not base its decision solely on the mere fact that respondent abused substances. Instead, the trial court considered the effect of respondent's substance abuse on his ability to parent his children, including that substance abuse exacerbated his abusive behavior and that he had an established continuing pattern of domestic violence to which CC had been a witness. We also reject respondent's attempt to characterize his acts of domestic violence and abusive behavior as "non-conforming social behavior." Respondent had committed acts of domestic violence and abused substances in front of CC, yet he did not adequately address these issues during the pendency of the case. Respondent has not demonstrated that the trial court's findings were inconsistent with 25 CFR 23.121. Contrary to respondent's assertions, the trial court did not improperly focus solely on some isolated negative trait possessed by respondent but instead considered whether respondent's substance abuse and anger issues presented a likely risk of serious emotional or physical damage to the children. 25 USC 1912(f); MCL 712B.15(4).

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[2] This appears to be a reference to testimony about a video of respondent while he was intoxicated.

V. BEST INTERESTS

Lastly, respondent challenges the trial court's best-interest determination. "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*, 297 Mich App 35, 40; 823 NW2d 144 (2012). This is true in all termination proceedings, including those involving ICWA and MIFPA. *In re England*, 314 Mich App at 253. The trial court's best-interest determination is reviewed for clear error. *In re Olive/Metts*, 297 Mich App at 40. When considering best interests, the focus is on the child, not the parent. *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *Id*. at 90.

The trial court should weigh all of the available evidence to determine the child's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). In assessing a child's best interests, a trial court may consider such factors as a "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." *Olive/Metts*, 297 Mich App at 41-42 (citations 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. A court may also consider whether it is likely "that the child could be returned to her parents' home within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012).

Respondent does not offer any cogent argument with respect to his suggestion that this Court find that four of the best-interest factors set forth in *White*, 303 Mich App at 713, weighed in his favor and against a finding that it was in the best interests of the children to terminate his parental rights. Nonetheless, the record does not support respondent's suggestion that the factors of parenting ability, the advantages of another home over the parent's home, and visitation history weigh in his favor.[3] Even assuming that the children were bonded to respondent as respondent claims, the parent-child bond is only one factor for the trial court to consider. See *Olive/Metts*, 297 Mich App at 41. Here, the trial court's findings supported its determination that termination of respondent's parental rights was in the best interests of the children. Respondent did not comply with his service plan and did not benefit from services aimed at addressing his issues of substance abuse, anger, and domestic violence. His visitation history was sporadic, he failed to successfully parent all three children simultaneously during parenting time, and he had a demonstrated lack of empathy toward the children. The children were placed with their mother and, given the history of domestic violence in the relationship, the court found termination of respondent's parental rights would provide the children with a better opportunity for a safe, secure, and stable future. At the time of the termination hearing, respondent was incarcerated because of an incident that involved the same issues that caused the removal of the children—substance abuse, anger, and violence.

[3] Respondent's statement that incarceration alone cannot be the sole basis for termination, and his citation to *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), is misplaced because the mere fact of respondent's incarceration was not the basis for termination in this case.

Respondent on appeal focuses only on facts that he believes favor his position, but he ignores the impact of his unaddressed substance abuse and anger issues on his ability to parent his children.

Based on our review of the record, we are not left with a definite and firm conviction that the trial court made a mistake by concluding that a preponderance of the evidence established that termination was in the children's best interests. *In re Payne/Pumphrey/Fortson*, 311 Mich App at 56. Thus, respondent has not shown clear error. *In re Olive/Metts*, 297 Mich App at 40.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Brock A. Swartzle