

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JONATHAN ALLEN
MAYBERRY, JR., Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JONATHAN ALLEN MAYBERRY, SR.,

Respondent-Appellant,

and

KAPRICE ROUSSEAU,

Respondent.

UNPUBLISHED

March 31, 2009

No. 284690

Genesee Circuit Court

Family Division

LC No. 05-120561-NA

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(a)(ii), (c)(i), (c)(ii), (g), (h), and (j). We affirm.

We review for clear error the trial court's finding that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). Once the petitioner established a statutory ground for termination by clear and convincing evidence, the trial court was obligated to order termination of respondent's parental rights, unless the court found from evidence on the whole record that termination was clearly not in the child's best interests. Former MCL 712A.19b(5); *Trejo*, *supra* at 353. We also review the court's best-interests determination for clear error. *Id.* at 356-357.

The conditions that led to adjudication included respondent's inability to care for the minor child. For most of the proceedings, respondent was either imprisoned or staying with his mother, whose home was inappropriate for the minor child. Between the time that the minor child became a temporary ward of the court and the termination hearing, respondent was incarcerated, serving a sentence of two to 20 years. Even before his imprisonment, respondent

did not participate in the services that were required of him and did not attend some of the hearings. He entered into a parent-agency agreement initially but failed to follow through on the requirements, other than obtaining a psychological assessment. He did not obtain an “IARC” assessment, participate in individual counseling, complete parenting classes, participate in drug abuse treatment, complete drug screens (having missed some and tested positive on some), or obtain appropriate employment and housing. The foster care worker testified that respondent did not keep in contact with petitioner and did not seek custody of the minor child for at least one 91-day period. Given this evidence, the trial court did not clearly err when it found the evidence clear and convincing with respect to MCL 712A.19b(3)(a)(ii), (c)(i), (c)(ii), (g), and (j).¹

The trial court also did not err in its best-interests determination. While the trial court acknowledged that respondent cared about his son, there was no evidence to support a finding that termination was not in the child’s best interests. The minor child was five years old at the time of the termination trial. Respondent had been incarcerated for over a year and a half and his earliest “out” date would not be for another six months. He faced the possibility of an additional 18 years’ incarceration. He had not substantially complied with his parent-agency agreement, and it would take a significant period of time after he was released before he could possibly provide appropriate care and custody for the minor child. Clearly, the minor child needed permanence and stability in his life, which respondent was not able to provide.

Respondent also argues that the trial court erred when it did not allow him the opportunity to present proofs that the minor child was of Indian heritage and that the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, applied to the proceedings. Whether the trial court satisfied the requirements of the ICWA is a legal question that we review *de novo*. *In re NEGP*, 245 Mich App 126, 130; 626 NW2d 921 (2001).

When a termination proceeding involves an “Indian child,” both the ICWA and the state standards for termination of parental rights must be followed. *In re SD*, 236 Mich App 240, 246; 599 NW2d 772 (1999). An Indian child is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) . . . eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe” 25 USC 1903(4). Whether the minor child is an Indian child subject to the ICWA is a question for the tribe to decide. See *In re Fried*, 266 Mich App 535, 540; 702 NW2d 192 (2005), and *In re TM*, 245 Mich App 181, 191-192; 628 NW2d 570 (2001). 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. See *In re IEM*, 233 Mich App 438, 446-447; 592 NW2d 751 (1999).

In this case, the trial court record shows that notice was given to the Grand Traverse Band of Ottawa and Chippewa Indians, the Muscogee (Creek) Nation, and the Midwest Bureau of Indian Affairs, requesting written verification of the tribal status of the minor child. Responses to these notices were received from the tribes. The Grand Traverse Band of Ottawa and Chippewa Indians noted that the minor child was a non-member and ineligible for Ottawa-

¹ Respondent does not challenge the trial court’s reliance on MCL 712A.19b(3)(h) in terminating his parental rights.

Chippewa Indian status. The Muscogee (Creek) Nation stated that the tribal records were examined and the minor child was not considered an Indian child in relationship to the Muscogee (Creek) Nation as defined in the ICWA. These determinations were conclusive. See *In re Fried*, *supra* at 540, *In re TM*, *supra* 191-192, and 44 Fed Reg 67584 (1979).

Respondent's attorney alleged below that the child might be affiliated with a different tribe from those mentioned above – the Cherokee tribe – and he requested a hearing on this issue. The trial court declined to hold such a hearing. We conclude that, under the specific circumstances of this case, a reversal or remand is unwarranted. First, in the relevant petition and affidavit filed in the lower court, respondent's attorney merely indicated the existence of a possible Cherokee affiliation "upon information and belief" – no additional basis for the alleged affiliation was provided.² Second, the argument respondent makes on appeal is similarly non-specific and does not focus on the Cherokee tribe. Instead, respondent refers to "Indian heritage" in general and states that "[t]he Court accepted letters . . . as proof certain that the [child was] not of Indian heritage."³ He states that a hearing is necessary to "enable [respondent] to establish . . . Indian [h]eritage." Under these circumstances, and given the letters on file, we conclude that respondent is merely speculating regarding a tribal affiliation and that a reversal or remand is not warranted.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Patrick M. Meter

² Respondent *later* (at the termination hearing) attempted to make an offer of proof regarding the issue but the trial court declined to allow this, stating that it had already ruled with respect to the possibility of a tribal affiliation.

³ As noted above, the received letters were conclusive with respect to the Ottawa, Chippewa, and Muscogee (Creek) tribes. We also note that whether a child is of "Indian heritage" is not the dispositive question; it is certainly possible that a person could be of "Indian heritage" and still not meet the pertinent definition of an "Indian child."