STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 25, 2013

In the Matter of K. THIBEAULT, Minor.

No. 313295
Ionia Circuit Court
Family Division
LC No. 2012-000114-NA

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Respondents-father appeals as of right an order terminating his parental rights to the minor child KT under MCL 712A.19b(3)(j). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Respondent was the father of infant twins, ET and KT. ET died from head injuries that he sustained while in the sole care and custody of respondent. Respondent told Child Protective Services (CPS) and medical personnel that ET accidentally fell from a couch onto the carpeted floor of respondent's home. Dr. Stephen Guertin treated ET on the night of the injury and determined that ET died from non-accidental injuries that were inconsistent with respondent's version of events. In addition, although KT appeared to be healthy, Dr. Guertin examined KT and discovered that KT had a fractured shin.

Laurie Noall of CPS performed an investigation into ET's death. Noall formed the opinion that respondent was responsible for ET's injuries and that the mother of the twins (mother) was responsible for KT's injury. On March 26, 2012, the Department of Human Services (DHS) (petitioner) filed a petition to remove KT and to terminate respondent's and mother's respective parental rights to KT. The petition alleged that both ET and KT suffered non-accidental injuries that were indicative of abuse and neglect. At a preliminary hearing, Noall testified that she was concerned that KT would be at a risk of physical harm if returned to his parents. Noall requested that the trial court suspend both parents' parenting time and place KT in the custody of his maternal great-grandmother.

The trial court adjourned the preliminary hearing to allow both parties to obtain appointed counsel and ordered that KT be placed with DHS for care and supervision. Before adjourning the hearing, the trial court asked both parents whether KT was a member of a Native American tribe. Respondent stated that he was a member of the Mackinac Bands of Ottawa and

Chippewa Indians, but he stated that the tribe was not recognized. The trial court instructed respondent to inform CPS of his tribal status.

Thereafter, Noall sent a notice of proceedings to the Bureau of Indian Affairs (BIA). The BIA responded, indicating that there was not a federally recognized Mackinac Bands of Ottawa and Chippewa Indians, and that the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., therefore did not apply.

Meanwhile, respondent moved for a court-appointed expert witness, arguing that a medical expert was needed in order to determine the cause of ET's and KT's injuries. At a motion hearing, respondent's counsel argued that an independent expert was necessary because the case was complex and because the treating physician was biased. Specifically, counsel argued that the treating physician reached a conclusion regarding abuse before the autopsy had been performed and had previously testified in child abuse cases. Counsel also claimed to have read an article from WebMD indicating that it was impossible to determine the timing of a subdural hematoma. The trial court denied respondent's request for an expert, but indicated that it would revisit the issue if respondent could "demonstrate that there's bias or prejudice shown on the part of any of the treating physicians or any other expert, for that matter, or if they can demonstrate that any independent expert that they might choose is actually going to testify in their favor. . . ." Several weeks later, the trial court denied respondent's second motion for an expert essentially on the same grounds.

On October 3, 2012, the trial court held an adjudication trial. At the adjudication trial, the children's babysitter testified that both children appeared fine when she cared for them hours before ET died in respondent's care. Petitioner presented several expert medical witnesses at the trial. Dr. Kiora Adam, an ophthalmologist, examined ET's retinas and testified that she observed retinal hemorrhages in ET's eyes and that the hemorrhaging was "highly suggestive of Shaken Baby Syndrome." She explained that it was very rare for a child to suffer similar symptoms from accidental head injuries. Guertin testified and explained that, in his opinion both children were abused based on the evidence of subdural and retinal hemorrhaging. Similarly, Dr. John Bechinski, the forensic pathologist who performed ET's autopsy, testified that ET's injuries were caused by "non-accidental head trauma." Finally, Dr. Rudolph Castellani, an expert in neuropathology, testified that he examined ET's brain and eyes. He concluded that he observed evidence of head trauma that occurred "not long prior to death." Castellani testified that in order to produce the internal injuries that caused ET's death, "you're talking about a very severe, violent injury," that would not have been caused by a fall from a couch onto a carpeted floor.

At the conclusion of the adjudication trial, the jury found that statutory grounds existed to exercise jurisdiction over KT. On October 11, 2012, the trial court entered an adjudication order reflecting that finding. The trial court further held that reasonable reunification efforts should not be made and ordered that KT was to continue in his placement with DHS for care and supervision.

Thereafter, on November 2, 2012, the trial court held a dispositional and termination hearing. Mother testified that she believed that termination of respondent's parental rights was in KT's best interests "[b]ecause my son died in his care. Clearly he wasn't parenting him as he should. He caused these injuries. I would worry that if he were to parent [KT] that something

would happen to [KT]." KT's great-grandmother also testified that she believed that termination of respondent's parental rights was in KT's best interest "[b]ecause of what happened to [ET]." Pamela Dunckel, an infant mental health specialist who provided treatment for KT, testified that she believed that termination of respondent's parental rights would be in KT's best interest. However, Dunckel testified that mother had made a lot of progress and she did not believe that termination of mother's parental rights was in KT's best interest. Numerous witnesses who knew respondent testified that he was a good father and was not violent.

The trial court concluded that petitioner had not presented clear and convincing evidence to establish a statutory ground for termination of mother's parental rights. However, the court concluded that there was clear and convincing evidence to show that respondent was responsible for ET's death and therefore there was a reasonable likelihood that KT would be harmed if returned to respondent's care. Accordingly, termination was proper under MCL 712A.19b(3)(j). The court then found that termination was in KT's best interests. The trial court entered a written order terminating respondent's parental rights to KT on November 2, 2012. This appeal ensued.

II. ANALYSIS

Respondent first contends that the trial court erred in denying his request for an expert witness. A trial court's denial of a motion requesting the appointment of an expert witness is reviewed for an abuse of discretion. *In re Bell*, 138 Mich App 184, 187-188; 360 NW2d 868 (1984). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009) (quotation and citation omitted). A motion seeking a court-appointed expert witness must be accompanied by a showing that the appointment of an independent expert is necessary. *In re Bell*, 138 Mich App at 187-188. A respondent may accomplish this by a showing that the petitioner's expert was biased or prejudiced against the respondent or by disputing with particularity the expert's opinions. *Id.* In addition, the respondent must show that an independent expert would testify favorably to the respondent. *Id.*

In this case, respondent filed two motions seeking the appointment of an expert medical witness, both of which relied on the primary assertion that Guertin was biased against respondent. The trial court denied both of respondent's motions, noting that the motions were premature given the then-pending autopsy report and that respondent failed to demonstrate that Guertin was biased, that Guertin's opinion was inaccurate, or that an independent expert would testify in favor of respondent. The record does not support respondent's contention with respect to bias. The mere fact that Guertin formed an opinion regarding ET's injuries before the completion of the autopsy report is not sufficient indicia of bias. The record established that Guertin had significant experience evaluating suspected victims of child abuse. Moreover, as the trial court noted, Guertin was ET's treating physician and this "wasn't a forum shopping situation where [DHS] sat around and said . . . we got to get a doctor that is going to be pro DHS or that is going to be biased in our favor, or anything like that." Furthermore, each of the three other experts who evaluated ET reached conclusions consistent with that of Guertin. Thus, we do not find that respondent sufficiently disputed the accuracy of Guertin's opinions or demonstrated that an independent expert would testify favorably to respondent. *Id.* Respondent

has not shown that the trial court's denial of his motions fell "outside the range of reasonable and principled outcomes." *In re MKK*, 286 Mich App at 564.

Respondent argues that *In re Bell* "was wrongly decided" because MRE 706 "places the burden squarely on [the] party opposing the appointment of the expert." However, respondent does not provide any authority to support this contention and the plain language of MRE 706(a) does not support his contention. Although MRE 706(a) provides that a trial court "may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed," absent the entry of a show cause order, the rule does not place the burden of proof on an opposing party to show why an expert should not be appointed. Moreover, MRE 706(a) grants the trial court discretion to appoint expert witnesses. See *In re Bell*, 138 Mich App at 187; see also *In re Morris*, 491 Mich at 105 (finding that the use of the term "may" indicates "a permissive standard"). In both *In re Bell* and the present case, the trial court did not enter a show cause order under MRE 706(a). Therefore, respondent has not shown that the *In re Bell* Court—or the trial court in the present case—erred by not placing the burden on the petitioner to show why an expert should not be appointed.

Next, respondent argues that the trial court erred by failing to determine KT's tribal status under the ICWA and by failing to apply the appropriate standard of proof to the proceedings. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo. A court's factual findings underlying the application of legal issues are reviewed for clear error." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012) (citations omitted).

"[B]efore a state court can determine whether ICWA applies to the proceedings, the court must first make the critical determination whether the child is an 'Indian child.'" *In re Morris*, 491 Mich at 99-100. "As defined by ICWA, an 'Indian child' is '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.'" *Id*. at 100, quoting 25 USC 1903(4) (emphasis in original); see also MCR 3.002(5). "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior] because of their status as Indians . . . ." 25 USC 1903(8); see also *In re Morris*, 491 Mich at 100 n 10. "While it is for the tribe to determine whether a child is" a member of the tribe or eligible for membership, "it is for the court to determine whether the tribe is an 'Indian tribe'" under the ICWA. *In re Fried*, 266 Mich App 535, 540; 702 NW2d 192 (2005).

Here, as noted, at the March 26, 2012 preliminary hearing, the trial court asked respondent and KT's mother if there was any Indian heritage in KT's family. Respondent stated that he was a member of "the Chippewa Ottawa tribe, it's a Mackinaw [sic] Bands," but that "it's not a recognized tribe." After the hearing, petitioner made copies of respondent's tribal membership card, which stated that he was a member of the "Mackinac Bands of Ottawa and Chippewa Indians." On March 30, 2012, DHS mailed an Indian child case notification to the BIA and included a copy of respondent's tribal membership card. In a letter dated June 1, 2012, BIA informed DHS that "there is not a federally recognized Mackinac Bands of Ottawa and Chippewa. Therefore the Indian Child Welfare Act does not apply. We will take no further action on this case." In its termination order, the trial court did not check the box indicating that

KT was an Indian child. See *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999) ("A court speaks through its orders . . . .")

The Secretary of the Interior, BIA, lists 566 tribal entities that are currently "recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes," and that the Mackinac Bands of Ottawa and Chippewa Indians is not among the currently recognized tribal entities. 77 FR 47868-01 (August 10, 2012). This is consistent with BIA's June 1, 2012 letter to petitioner, as well as respondent's own statements at the preliminary hearing. Nothing in the record supports that the Mackinac Bands of Ottawa and Chippewa Indians was a federally recognized Indian tribe. Accordingly, the record before us clearly supports that KT was not an "Indian child" under the ICWA and, thus, the Act did not apply to the proceedings. 25 USC 1903(4) and (8); *In re Morris*, 491 Mich at 100, 100 n 10.

Respondent argues that the trial court had reason to believe that KT's family members were members of the Mackinac Bands of Chippewa and Ottawa Indians, which respondent argues is a distinct tribe from the Mackinac Bands of Ottawa and Chippewa Indians. Respondent provides no support for his assertion that these are distinct tribes and, again, respondent's tribal membership card stated that he was a member of the Mackinac Bands of Ottawa and Chippewa Indians. More importantly, neither tribal name appears on the list of tribal entities recognized by the BIA. 77 FR 47868-47873. Accordingly, on the record before us, we do not find that the trial court erred by not applying the ICWA to the proceedings.

Next, respondent contends that the trial court erred in finding that petitioner established one or more statutory grounds for termination. Respondent contends that the trial court erred because it applied the clear and convincing standard instead of the higher standard required under the ICWA. As explained above, the ICWA did not apply in this case and respondent's argument to the contrary is devoid of merit. Therefore, we proceed by addressing whether the trial court properly determined that petitioner established grounds for termination under MCL 712A.19b(3).

"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). "We review the trial court's determination for clear error." *Id.* "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

In this case, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(j), which provides that a court may terminate parental rights to a child if it finds by clear and convincing evidence that:

> There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

In this case, having reviewed the record, we conclude that the trial court did not clearly err in terminating respondent's rights under this provision. Here, the record supported that ET

suffered fatal injuries while in the sole care and custody of respondent. All four doctors who offered expert opinions on ET's cause of death believed that he died from non-accidental head injuries. The doctor who performed an autopsy on ET specifically testified that he was "a hundred percent positive that" ET died from non-accidental inflicted head trauma. Moreover, three of the doctors specifically testified that ET's fatal injuries were inconsistent with respondent's explanation that ET fell from a couch.

> Evidence of how a parent treats one child is evidence of how he or she may treat the other children. It is thus appropriate for a trial court to evaluate a respondent's potential risk to the other siblings by analyzing how the respondent treated another one of his or her children[.] [*In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011) (citations omitted).]

Accordingly, on the record before us, the trial court's finding that MCL 712A.19b(3)(j) provided statutory grounds for termination does not leave us with "a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459. See *In re Hudson*, 294 Mich App at 266. For the same reasons, the trial court's finding that termination was in ET's best interest does not leave us "with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459.

Finally, respondent argues that the trial court erred by applying the rules of evidence to exclude hearsay evidence that he proffered at the initial dispositional hearing. Respondent did not raise this objection below and, thus, our review is "limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

In this case, petitioner sought termination at the initial dispositional hearing. At the hearing, respondent sought to admit a medical article to rebut the medical testimony supporting that ET's fatal injuries were the result of child abuse. The trial court declined to consider the article on the basis that it constituted inadmissible hearsay. On appeal, respondent does not argue that the article was admissible under the rules of evidence. Rather, respondent argues that the rules of evidence did not apply at the initial dispositional hearing. This argument lacks merit.

Child protective proceedings consist of two distinct phases: the adjudicative phase and the dispositional phase. *In re Utrera*, 281 Mich App at 15. "The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child, i.e., whether the child comes within the statutory requirements of MCL 712A.2(b)." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). "If the court acquires jurisdiction over the child, the dispositional phase follows, at which the trial court determines 'what action, if any, will be taken on behalf of the child.'" *In re Utrera*, 281 Mich App at 16, quoting *In re AMAC*, 269 Mich App at 536-537. "Unlike the adjudicative phase, the Michigan Rules of Evidence do not generally apply at an initial dispositional hearing." *In re Utrera*, 281 Mich App at 16. However, where the petitioner seeks termination of a respondent's parental rights at the initial dispositional hearing, "MCR 3.977(E) provides that clear and convincing, *legally admissible* evidence" is required to establish a statutory ground for termination. *In re Utrera*, 281 Mich App at 17-18 (emphasis added).

MCR 3.977(E)(3), as well as our case law, supports that when termination is sought at the initial dispositional hearing, the trial court must reach its ultimate decision "on the basis of clear and convincing *legally admissible evidence* . . . that is introduced at the dispositional hearing." MCR 3.977(E)(3) (emphasis added); see *In re Utrera*, 281 Mich App at 16-18; *In re AMAC*, 269 Mich App at 537-538. Here, respondent sought to introduce evidence at the dispositional hearing to rebut the evidence that formed the statutory basis for termination. We do not find that the trial court plainly erred by concluding that the Michigan Rules of Evidence applied to both parties at the dispositional hearing. *In re Utrera*, 281 Mich App at 17-18.

In so finding, we reject respondent's claim that there is a conflict between MCR 3.973(E)(2) and MCR 3.977(E). MCR 3.973(E) applies to general dispositional hearings where termination is not being sought, whereas "MCR 3.977(E) provides the procedural requirements for terminating parental rights at an initial dispositional hearing. . . ." *In re Utrera*, 281 Mich App at 16; see also *In re AMAC*, 269 Mich App at 537. Here, as noted, petitioner sought termination at the initial dispositional hearing. Accordingly, the trial court acted properly in adhering to the requirements set forth in MCR 3.977(E).

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto