STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JADEN TAYLOR LEE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CHERYL LYNN LEE,

Respondent-Appellant,

and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,

Intervening Respondent-Appellee.

UNPUBLISHED
October 16, 2008

No. 283038
Mackinac Circuit Court
Family Division
LC No. 00-005132-NA

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Respondent Cheryl Lee appeals by right from the order terminating her parental rights to the minor child Jaden Lee pursuant to MCL 712A.19b(3)(*i*) and the Indian Child Welfare Act (ICWA), 25 USC 1912 *et seq*. We affirm.

I. Basic Facts And Procedural History

Cheryl Lee was 16 years old and in foster care when she gave birth to Jaden Lee in 1999. Both Cheryl Lee and Jaden Lee are duly enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians. Jaden Lee was first removed from Cheryl Lee's care in 2000 when he was one year old based on allegations of neglect. Petitioner Department of Human Services (DHS) and tribal agencies provided Cheryl Lee with many services, but Cheryl Lee made no significant improvement. In 2001 and 2004, she gave birth to two other children who are not subjects of this case. Meanwhile, Jaden Lee's case was transferred to the Sault Ste. Marie Chippewa Tribal Court (Tribal Court), where it was closed in 2002 when Jaden Lee was placed with his paternal grandmother, Lois Plank, under a limited guardianship.

In 2003, Cheryl Lee successfully obtained physical custody of Jaden Lee. But in 2004, Jaden Lee and his two half-siblings were removed from Cheryl Lee's care, again based on

allegations of neglect. The catalysts for this petition were claims that Cheryl Lee's second child was found unsupervised outside on a road where she had almost been hit by a car, and that the family home was dirty and unsafe. Jaden Lee was again placed with his paternal grandmother, and in November 2004, Jaden Lee's father, Tony Plank, obtained full custody of Jaden Lee. Cheryl Lee had visitation rights.

Services were provided to Cheryl Lee in an attempt to keep her united with her two other children. However, after the two other children were observed in the middle of the street unsupervised until 11:00 p.m. while Cheryl Lee yelled profanities at them, they were again removed from her care in August 2005. And in 2006, the Tribal Court terminated Cheryl Lee's rights to those two children on the basis of neglect.

A fourth child born to Cheryl Lee in 2006 was also removed from her care, and, in January 2007, the Tribal Court terminated Cheryl Lee's rights to that child because of the prior terminations.

Cheryl Lee successfully sought unsupervised visitation with Jaden Lee in May 2007. But in July 2007, DHS filed a petition seeking termination of her rights on the basis of the prior terminations. A supplemental termination petition filed in August 2007 alleged that Cheryl Lee had received numerous services from a variety of agencies for over six years. Specifically, the supplemental petition alleged:

> Cultuarlly [sic] appropriate services were provided to Cheryl Lee for over six years, including Prevention, CPS, and Wraparound Services through Mackinac County; Protective Services, foster care services, and prevention through the SSM Tribe; CPS services through Chippewa County[; and] DHS and CPS services through the Children's Aid in Canada. Cheryl has also participated in the Families First Program three times, Wraparound and Family Continuity through the SSM Tribe, Parenting Classes twice with SSM Tribe, once through SF/SC, and once through the Indian Outreach Program. Although these services were offered and somewhat complied with at times, Cheryl continued to abuse and neglect her children, which led to her rights being terminated.

In August 2007, a hearing was held on Cheryl Lee's motion for reinstatement of her visitation rights. Jill Thompson, a worker with the tribe's Binogii Placement Agency, testified on behalf of petitioner. Thompson stated that she first worked with Cheryl Lee in 2002 in the capacity of a Family Continuity caseworker, which required Thompson to supervise visitations and assist Cheryl Lee in the development of her parenting skills. In 2003, Thompson stopped being a Family Continuity caseworker and became a foster care worker. Her casework included the foster care cases involving all four of Cheryl Lee's children. According to Thompson, Cheryl Lee had her good days and her bad days, and the danger in granting her visitation rights was that, if visitation occurred on one of Cheryl Lee's bad days, the child could be negatively affected depending on which other adult was present. On cross-examination, Thompson explained that, on a good day, Cheryl Lee could properly care for the children but that history suggested she was not able to do that on a bad day. Thompson admitted that the Chippewa Indian Tribe never received any negative reports about Cheryl Lee's visitations at Lois Plank's house. Thompson also confirmed that it had been a year and a half (i.e., early 2006) since she had last worked professionally with Cheryl Lee or been to Cheryl Lee's home, but Thompson

opined that Cheryl Lee's fetal alcohol syndrome (FAS) diagnosis and borderline intellectual functioning rendered her incapable of being a full-time parent.

The trial court took the matter under advisement and, a week later, it incorporated a mediation agreement in which the parties agreed to the reinstatement of Cheryl Lee's visitation rights at the sole discretion of Lois Plank.

At the subsequent termination hearing, Regina Frazier testified on behalf of petitioner. Frazier stated that her first contact with Cheryl Lee had been in 1998 when Frazier provided Wraparound services to Cheryl Lee, who was a delinquent and a victim of abuse and neglect. After Jaden Lee's birth in 1999, Frazier provided Wraparound services to Cheryl Lee as a parent, and such services continued on an on-and-off basis through 2002. Frazier stated that Wraparound services typically lasted six months to one year, and the reason they lasted four years in Cheryl Lee's case was because of the changing circumstances and the desire to provide Cheryl Lee with every opportunity for services. Frazier testified that Cheryl Lee was sometimes compliant with the services but never officially completed the Wraparound program, which ended in 2002 when Cheryl Lee moved to the Sault and the Sault Tribe assumed responsibility for Cheryl Lee's case. Frazier had since changed jobs and was now a Children's Protective Services (CPS) worker. She was the CPS worker who investigated a referral received in July 2007 involving Cheryl Lee. Frazier did not provide services to Cheryl Lee in July 2007 or afterwards because an automatic termination petition was ultimately filed due to Cheryl Lee's prior terminations, and it was policy not to provide services or visitation under those circumstances. Lastly, Frazier opined that it was not in the child's best interests to be reunited with Cheryl Lee.

Frazier further described DHS efforts to provide Cheryl Lee with services especially geared towards behavioral issues and teen parents. In addition, different methods of teaching Cheryl Lee were attempted in the hope that something would work. However, Cheryl Lee refused to cooperate (for example, Cheryl Lee claimed she had no transportation to get to counseling, and Cheryl Lee refused to do home-based therapy), and compliance with services was never achieved, let alone any benefit gained. On questioning by the court, Frazier explained the extensive services provided through Wraparound. In addition, assistance was provided with parenting skills, budgeting, prevention services, and Families First; referrals were made; and weekly meetings were held at the family home to discuss parenting issues, household chores, and safety considerations for Jaden Lee. Despite all these efforts, Cheryl Lee never seemed to understand the lessons. For example, Frazier recalled witnessing an incident after weeks of working with Cheryl Lee where Cheryl Lee screamed at Jaden Lee to eat his ravioli or some such food item when the child was too young to even ingest regular milk. In addition, the house remained filthy, with broken glass everywhere.

Penny Clark testified that she worked for the tribe's Anishnabek Community and Family Services. Clark worked with Cheryl Lee from 2002 through 2004 as a Wraparound coordinator and case manager. In 2002, Wraparound attempted to keep Cheryl Lee and her second child united in the home by assisting with budgeting, as well as helping Cheryl Lee to sign up for services, arrange for a payee, and apply for Social Security disability benefits, a Family Independence program grant, and the Women, Infants, and Children program. Clark said that Cheryl Lee received Social Security disability benefits for having borderline intelligence and an explosive personality disorder. According to Clark, Cheryl Lee also had a history of other

mental health disorders and believed that she suffered from FAS. Clark said that she greatly enjoyed working with Cheryl Lee, who had her ups and downs and could be moody and impulsive. During the time Clark worked with Cheryl Lee, Cheryl Lee gave birth to her third child. Clark said Cheryl Lee experienced even more difficulties caring for two children than she had caring for one. After Wraparound ended in 2004, Clark worked with Cheryl Lee in the Family Continuity program, which entailed weekly visits. In Cheryl Lee's case, Clark spent a great deal of time at Cheryl Lee's house, which was frequently unsanitary and unsafe for a child. When Clark closed the case in 2005, she did not believe Cheryl Lee had made significant improvement or gained very much since Clark had had to keep repeating the same lessons and Cheryl Lee had failed to follow through. Clark said that she provided all the services available when she worked as a Wraparound worker. Clark expressed concern about Cheryl Lee's ability to manage her home and resources, and care for herself and the children. Clark opined that a boy who was Jaden Lee's age would not be able to effectively care for himself. Clark believed Cheryl Lee's problems were caused by a lack of ability rather than a lack of maturity. Clark stated that she and her agency tried to "think outside the box" in tailoring services to assist Cheryl Lee. Clark elaborated on the services received by Cheryl Lee and said they included Families First, visits from the health department, home-based counseling, and home-based nutritional counseling.

Jill Thompson testified, focusing on the phase in this case when the July 24, 2004 foster care case was opened. At this time, Jaden Lee was five years old and living with Cheryl Lee, her boyfriend, and the child's half-siblings. Services were provided to remedy Cheryl Lee's lack of supervision of the children and the unsafe and unsanitary condition of the home; however, those services were unsuccessful so the children were removed from the home. The following month, Cheryl Lee worked diligently so that the two other children were returned to the home. Services were provided and consisted of Families First, mental health counseling, parenting classes, and a psychological assessment. Thompson said that Cheryl Lee had problems handling the children, especially after she and her boyfriend broke up shortly after the children were returned to the home. Thompson said that Cheryl Lee was never employed outside the home, had a tendency to become involved in inappropriate romantic relationships, completed one set of parenting classes in 2002 but did not complete the second Nurturing Parenting program, and had problems managing her finances. Thompson's work with Cheryl Lee stopped in August 2005 when the two other children were placed into a guardianship with a relative. During her work with Cheryl Lee, Thompson did not see any improvement. Thompson had not provided services to Cheryl Lee since August 2005 and, in her opinion, it was not in Jaden Lee's best interests to be reunited with Cheryl Lee. Thompson further opined that she could judge Cheryl Lee's current ability to manage children and a house based on how things were before.

The trial court recognized Melissa VanLuven as an expert on Indian welfare. She also was a supervisor of Penny Clark and Jill Thompson and, therefore, was familiar with the instant case. VanLuven stated the Sault Ste. Marie Tribe of Chippewa Indians expected the parents of the tribe to provide for their children's needs and also provide appropriate supervision, discipline, and care for their children. In VanLuven's opinion, Cheryl Lee's parenting was inconsistent with the typical parenting practice of other tribal parents, and that it was likely Jaden Lee would suffer serious emotional or physical damage should Cheryl Lee gain custody of him. Lastly, VanLuven stated that she was satisfied that active and reasonable efforts designed to prevent the breakup of Cheryl Lee and Jaden Lee had been provided. VanLuven stated that she

felt qualified to deduce how Cheryl Lee would respond to current services had they been provided, based on VanLuven's thorough knowledge about Cheryl Lee's prior lack of progress with services. VanLuven further opined that Cheryl Lee was a "minimally adequate parent" on an inconsistent basis.

In December 2007, the trial court terminated Cheryl Lee's parental rights based on the prior terminations. Cheryl Lee now appeals.

II. State Law Determinations

A. Prior Terminations

(1) Standard Of Review

To terminate parental rights, the trial court must find that the petitioner has proven at least one of the statutory grounds for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). We review for clear error a trial court's decision terminating parental rights. MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 355-357; 612 NW2d 407 (2000); *Sours*, *supra* at 633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 455 NW2d 161 (1989).

(2) Clear and Convincing Evidence

The trial court did not clearly err in its determination that clear and convincing evidence established the statutory ground for termination set forth in MCL 712A.19b(3)(*i*). It was undisputed that Cheryl Lee's rights to other children had been terminated in prior proceedings based on neglect, and the evidence was overwhelming that prior attempts to rehabilitate Cheryl Lee had been unsuccessful. Although Cheryl Lee's counselor testified about Cheryl Lee's improvements, his field of expertise was substance abuse, which only became a problem for Cheryl Lee later in the process and had not been a focus of the prior rehabilitation efforts of DHS and the tribal agencies.

B. Best Interests

(1) Standard Of Review

Once a petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights, unless the trial court finds from evidence on the whole record that termination is clearly not in the child's best

interests. MCL 712A.19b(5)[1]; *Trejo*, *supra* at 350. There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available. *Trejo*, *supra* at 354. We review the trial court's decision regarding the child's best interests for clear error. *Id*. at 356-357.

(2) Evidence Of Record

Although the entire record substantiates that Jaden Lee and Cheryl Lee loved one another and enjoyed spending time together, it also showed Cheryl Lee's persistent inability to provide for her children's care and safety. And, even though Jaden Lee had lived on and off with Cheryl Lee when he was younger, he had not been in her physical custody since 2004, and they had seen one another during visitations only. Jaden Lee needed permanency. Therefore, the trial court properly found that termination was not clearly against Jaden Lee's best interests.

III. ICWA Determinations

A. Active Efforts

Because this case involves an Indian child, *both* a state ground for termination of parental rights and the ICWA standards had to be established. *In re SD*, 236 Mich App 240, 246; 599 NW2d 772 (1999). Subsection 1912(d) of the ICWA requires that a party seeking to terminate parental rights to an Indian child under state law must demonstrate "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). This Court reviews de novo questions of law, such as the proper interpretation of the ICWA. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

Pointing to the fact that no services have been provided to unite Cheryl Lee and Jaden Lee since 2004 (or 2005, if the efforts aimed at uniting Cheryl Lee with the other children are considered), Cheryl Lee argues that since DHS failed to provide *current* active efforts, the ICWA was violated. We disagree.

We first note that the proper standard of proof for determinations under § 1912(d) of the ICWA is proof by clear and convincing evidence. *In re Roe*, ___ Mich App ___; ___ NW2d ___ (Sept. 25, 2008), slip op p 7. Therefore, the trial court erred to the extent that it assessed the prior efforts under a beyond-a-reasonable doubt standard. However, this error was not reversible error because evidence satisfying the higher (beyond-a-reasonable doubt) burden of proof would clearly satisfy the lesser standard (clear and convincing evidence).

[1] MCL 712A.19b(5) was amended, effective July 11, 2008. 2007 PA 199. The amended version now requires that the trial court order termination if "the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests." However, in this case decided before the recent amendment, we continue to use the language of the prior version of the statute.

Further, contrary to Cheryl Lee's argument on appeal, this Court has recently held that "taking into account the extent of the Department's efforts and their cultural relevance," *id*. at slip op p 12, "formal and informal services provided *prior* to the current proceedings may meet the 'active efforts' requirement of § 1912(d) of the ICWA, *id*. at slip op pp 7-8 (emphasis in original). Therefore, "where there is clear and convincing evidence that the provision of additional services would be futile, that finding can meet the requirements of § 1912(d)." *Id*. at slip op p 8.

In its ruling to terminate Cheryl Lee's rights, the trial court stated as follows:

> [T]he Court must determine if the requirements of MCR 3.980(D) have been met. MCR 3.980(D) provides:
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> > "In addition to the required findings under MCR 3.977, the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent of Indian custodian will likely result in serious emotional or physical damage to the child."[2]
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> The Petitioner called Melissa [VanLuven] and the parties stipulated that she was an expert witness in tribal culture. Ms. [VanLuven] supervised the caseworkers who worked on Respondent's case. Ms. [VanLuven]'s testimony was that custody of the child with the mother would likely result in serious emotional or physical damage to the child. Respondent points out that the witness had not personally worked with Respondent and gained her knowledge only from review of the files and speaking with others involved with Respondent's case.
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> Respondent also argues throughout that neither the tribe nor the department have provided any services to Respondent for approximately three years. The Petitioner relies upon the previous services from which the Respondent did not benefit and the placement of the child with Respondent father. Ms. Thompson testified that in hindsight it was a mistake not to proceed with termination with regards to Jaden when the other terminations were being sought. Thus, due to the circumstances created by the placement with the father and the filing of a petition requesting termination at the initial disposition, neither the tribe nor the department were in a position to provide services to Respondent.
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> The Petitioner argues that numerous services provided in the past failed to improve Respondent's parenting skills to the point where the children could be safe if they resided with her. As an example of this, Petitioner points to the children playing unsupervised in the street after Respondent had attended

[2] The language of MCR 3.980(D) mirrors the language of ICWA subsection 1912(f).

> parenting classes and one of the workers even having provided latches for the doors to prevent the children from getting out into the street and playing unsupervised. Respondent then counters with the argument that Respondent has matured since those times, Jaden is older and would not require as much minute to minute attention and the fact that she completed substance abuse counseling.
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> * * *
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> [T]he Court believes the testimony of the caseworkers who worked with Respondent in the past to be compelling on the issue of Respondent's ability to benefit from the services provided. This testimony was supported by specific examples of Respondent being unable to apply principles she was taught during those services.
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> * * *
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> The Court is mindful of Respondent's argument that the Respondent has matured and that Jaden is older and does not require as much minute to minute parenting as younger children would. However, simply growing older does not equal an advance in maturity level. This is evidenced somewhat by Respondent's recent conviction for operating a motor vehicle while impaired. While Respondent did participate and benefit from substance abuse counseling, the counseling itself was a result or consequence of the drinking and driving related conviction which required her participation. Further, while older children do not have the same care needs as younger children, in many ways parenting at this level can be even more demanding as children enter the pre-teen and teen years. Thus, the failure to benefit from the services offered previously combined with the recent conviction is another indicator to the Court that custody with Respondent Mother would likely cause serious emotional or physical injury to the child.

The trial court then summarized that its findings were based on:

> 1) the previous services and lack of benefit from same which raises the likelihood of some form of serious physical injury; 2) the length of time the child has been residing outside the Respondent's home and the emotional damage that would result in requiring a reunification plan; 3) the testimony presented that Respondent's lack of benefit was not due to Respondent's lack of maturity, but rather lack of ability; and 4) Respondent's most recent conduct of operating a motor vehicle while impaired due to alcohol.

It cannot be disputed that the trial court's analysis quoted above does not contain the words, "active efforts," and, indeed, does not even mention the relevant statutory ICWA provisions. However, based on our review of the trial court's ruling and the record as a whole, we conclude that the trial court clearly and carefully considered the efforts made to rehabilitate Cheryl Lee sufficient to satisfy the § 1912(d) active efforts requirement. We note that given the trial court's extensive analysis, this case is distinguishable from *In re Roe*, *supra*, in which the

trial court merely "mentioned that there 'had been a case service plan' and that 'efforts to rehabilitate the [mother] were unsuccessful.'" *Id*. at slip op p 5.

In this case, it was clearly and convincingly established that DHS and the tribal agencies made many varied and repeated efforts to provide services to Cheryl Lee in an attempt to keep her united with Jaden Lee. Cheryl Lee's argument therefore fails because the evidence overwhelmingly established her past and persistent inability to improve her parenting skills or make any significant progress in addressing her problems. Because of the intractable nature of Cheryl Lee's inability to learn appropriate parenting techniques, any additional efforts to rehabilitate Cheryl Lee would have been largely futile.

Therefore, the trial court did not clearly err when it found that efforts had been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts had been unsuccessful.

B. Serious Emotional Or Physical Damage

Subsection 1912(f) of the ICWA requires a determination by the trial court that petitioner proved beyond a reasonable doubt that the respondent's continued custody of the minor child is "likely to result in serious emotional or physical damage to the child." 25 USC § 1912(f). In making this finding in this case, the trial court cited Cheryl Lee's failure to benefit from services, the likelihood that Jaden Lee would suffer emotional harm if required to reunite with Cheryl Lee (with whom he had spent little actual time), and recent examples where Cheryl Lee demonstrated immature decision-making processes. Cheryl Lee disputes this determination and argues that her behavior as a teenager did not reflect her current parenting skills and that she actually had spent significant time with Jaden Lee due to alternating custody arrangements and consistent visitations. However, as stated, under the well-established doctrine of anticipatory neglect, how a parent treats one child is probative, though not determinative, of how that parent will treat another, *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001), and past behavior is a strong indicator of future performance. Therefore, the trial court did not clearly err in relying upon Cheryl Lee's history as one (but not the sole) factor when evaluating this issue. We conclude from our own review of Cheryl Lee's history and the other evidence, including the tribal expert's testimony, that the trial court did not clearly err in its determination of this issue.

IV. Right To Jury Trial

Cheryl Lee argues that the denial of her right to a jury trial deprived her of her due process rights. The determination whether proper procedure was followed in a child protective proceeding presents a question of law subject to de novo review. *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2001).

In this case, both Cheryl Lee and Tony Plank were named in the 2007 supplemental termination petition; therefore, she was a named respondent before the trial court assumed jurisdiction through the plea of Tony Plank. The trial court denied Cheryl Lee's request for a jury trial and held a termination hearing on Cheryl Lee's rights where only legally admissible evidence was considered. Such procedures were constitutionally adequate and, as such, Cheryl Lee was afforded due process. *Id*. at 202-205. In addition, the denial of Cheryl Lee's request for a jury trial did not conflict with court rules since MCR 3.972 provides that a trial must be held

within certain time periods but does not guarantee each respondent a separate jury trial, and MCR 3.965(B)(6) requires only that the trial court advise a respondent of the right to trial on the allegations in the petition and does not require a court to hold a jury trial for every respondent named in a petition.

Additionally, we note that because Cheryl Lee was named in both the July 9, 2007 petition and the August 20, 2007 supplemental petition, and Tony Plank did not enter his plea until October 2007, the "one-parent problem" that Judge Whitbeck cautioned against in his concurring opinion in *In re Irwin*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 2001 (Docket No. 229012), is not at issue in this case.

We affirm.

/s/ Jane E. Markey
/s/ William C. Whitbeck