STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 10, 2012

In the Matter of L. M. GROCHOWALSKI, Minor.

No. 306367
Kent Circuit Court
Family Division
LC No. 09-050577-NA

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). For the reasons stated in this opinion, we conditionally reverse and remand for further proceedings consistent with this opinion.

I. FACTS & PROCEEDINGS

Children's Protective Services (CPS) filed a petition requesting that the trial court take jurisdiction over the minor child and remove him from respondent's home in February 2009.[1] On February 18, 2009, a preliminary hearing regarding the petition was held, and respondent informed the referee that she and the minor child may have Native American heritage. The hearing was adjourned for investigation of respondent's claim, but the minor child was removed from respondent's home. The preliminary hearing was resumed on February 25, 2009, and a Department of Human Services (DHS) employee testified that notification was sent to the Bureau of Indian Affairs in compliance with the Indian Child Welfare Act ICWA), but that DHS had been unable to verify any Native American affiliation or membership with a federally recognized tribe. The referee ruled that the ICWA was not triggered at that time, and after

[1] For a majority of the proceedings in the trial court this matter involved respondent's two young sons by different fathers. However, respondent voluntarily released her parental rights to one of the minor children on June 16, 2010; accordingly, that child is not part of this appeal. Further, the parental rights of both fathers of the minor children were also terminated, and are not part of this appeal.

hearing testimony from a CPS employee, concluded that probable cause existed to support one or more of the allegations in the petition.

Respondent contested the petition, and an adjudication hearing was held in April 2009. After hearing testimony from several witnesses, the petition was amended to conform to the proofs. The amended petition alleged in relevant part that respondent failed to maintain a stable environment for herself and her children and provided inconsistent and inadequate care for her children, including missed medical appointments. It also alleged that she was homeless and living in her car with her violent, drug-addicted husband. The trial court found that in light of the amendments, petitioner proved the allegations by a preponderance of the evidence and took jurisdiction over the minor child.

A dispositional hearing was held immediately after the adjudication hearing on April 27, 2009. After hearing testimony, the trial court ordered that the minor child be made a temporary ward of the court, and set a review hearing date in three months. The order of adjudication/disposition entered after the April 27, 2009 hearing indicated that jurisdiction was exercised based on failure to provide support, education, medical, or other necessary care for health and morals, substantial risk of harm to mental wellbeing, and an unfit home environment by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian. Thereafter review hearings were held approximately every three months.

On July 13, 2011, more than two years after the original petition, DHS filed a supplemental petition requesting the termination of both respondent's and the minor child's father's parental rights.[2] The petition alleged that the statutory grounds set forth in MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j) were present. Specifically, the petition alleged that respondent continued to struggle with anger issues, domestic violence, parenting, and substance abuse. On August 17, 2011, the trial court held a brief dispositional review hearing during which it continued the minor child as a temporary ward of the court.

The termination hearing began on August 23, 2011, and continued on August 24, 2011. The testimony demonstrated that respondent was routinely hostile or defensive when interacting with service providers, often acting defensively or getting angry and leaving the room or hanging up the telephone. The evidence also demonstrated that she continued to involve herself in violent relationships. Further, the evidence indicated that her parenting skills continued to be problematic. Respondent was unable to identify her weaknesses and failed to benefit from one-on-one instruction. The minor child continued to struggle with anger problems and respondent failed to react appropriately in response to the minor child's actions. The evidence also suggested that respondent continued to struggle with substance abuse, including use of alcohol and cocaine.

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[2] The minor child's father was present at the termination hearing, but ultimately did not contest the termination of his parental rights.

At the conclusion of the testimony, the trial court took the matter under advisement. The trial court filed its written opinion on September 2, 2011, terminating respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). A termination order was issued on the same day. Respondent now appeals as of right.

II. STATUTORY GROUNDS & CHILD'S BEST INTERESTS

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); MCR 3.977(H)(3)(a); *In re Sours*, 459 Mich 624, 632; 593 NW2d 520 (1999). "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, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). A trial court may consider evidence on the whole record in making its best-interest determination. *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000).

We review for clear error the trial court's factual findings, its decision regarding the child's best interests, and its decision to terminate parental rights. MCR 3.977(K); *In re Trejo*, 462 Mich at 356-357; *In re Sours*, 459 Mich 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). In reviewing for clear error, we give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); MCR 3.902(A); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

On appeal, respondent first argues that the trial court erred in concluding that a statutory basis existed for terminating her parental rights.

In this case, the trial court terminated respondent's parental rights based on MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j), which provide:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The 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.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

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(j) 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.

The trial court first determined that there was clear and convincing evidence to prove that the 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. MCL 712A.19b(3)(c)(*i*). In this case, the conditions leading to the child's adjudication were parenting skills, emotional stability, and domestic relations. Although more than two years elapsed between the authorization of the initial petition and the commencement of the termination hearing, these concerns persisted.

With regard to parenting skills, significant issues remained unresolved. Respondent attended parenting classes in the summer of 2009, but testified that the course was not helpful because it focused on older children. Respondent did not seek out another parenting course any time over the next two years, but respondent worked with a parenting educator at the majority of her parenting time visits. After observing visits and working one-on-one with respondent, the parenting time educator expressed concerns about respondent's parenting skills especially with regard to her ability to engage the minor child, discipline him, and follow through with redirection. The parenting educator provided respondent with literature discussing parenting strategies and regularly made verbal suggestions about how respondent could handle specific situations. Respondent ignored the advice and chaotic visits continued. There was testimony that respondent laughed off or even rewarded the minor child's bad behavior.

The record is clear that respondent did not believe her parenting needed improvement. This was unsettling because the record is equally clear that the minor child had significant anger and behavioral issues and recurrently acted out during parenting time by yelling, kicking, and running out of the room. The minor child also exhibited these behaviors at school. Respondent never demonstrated that she could effectively parent during parenting time and angrily resisted constructive criticism and continued to blame others.

Respondent also failed to deal with her emotional stability issues. Respondent participated in a psychological evaluation and was diagnosed with adjustment disorder with mixed emotional features, including both depression and anxiety, and prominent dependent personality traits. The psychologist stated that her diagnosis could be temporary if she was "motivated to recognize those traits and then make some changes" and recommended that respondent follow through with the parent-agency agreement. But respondent was resistant to engaging in her parent-agency agreement and testified that, while she did participate in some services, she did not believe that her caseworker gave her the services she needed. Respondent testified that her caseworker did not communicate with her, and that she did not receive any help.

The record belies these claims. Respondent's caseworkers repeatedly provided referrals for various services to respondent over the course of the case. However, respondent was resistant and either did not participate or only superficially participated without receiving any real benefit.

Additionally, respondent continued to display anger management issues despite the fact that she completed anger management classes and had been participating in individual counseling. Respondent was regularly hostile to service providers and had been confrontational with caseworkers in front of the minor child during visits. Respondent's anger issues were also indicated by her multiple run-ins with the police.

With regard to domestic relations, since the inception of this case respondent struggled with domestic violence. Despite services, respondent had not yet learned how to choose healthy relationships with stable partners. Evidence showed that respondent had domestic violence in her relationships with three men before and during the pendency of this case. Respondent admitted there was domestic violence in her relationship with the minor child's father. During their marriage in the early stages of this case, respondent had bruises on her upper arms and face. The minor child's father was also prone to angry outbursts, was a crack addict, and was incarcerated during this case. Most recently, respondent was involved with another man who was also incarcerated at the time of the termination hearing. Respondent and this second man had police intervention for domestic violence issues in both October and November 2010. The incident in November 2010 involved a physical altercation between respondent and the new man at her apartment in which he grabbed respondent by the neck and shoved her against a wall and then respondent stabbed him in the left upper chest with a steak knife and fled the scene. Respondent took out a personal protection order against him in February 2011. But the following month, respondent was involved in another domestic incident involving the same person after spending the day with him.

Even though respondent denied any domestic violence in her relationships, the agency referred respondent to the YWCA for domestic violence services. However, because respondent denied being part of a violent relationship, she was denied services. Despite the obvious repetition in her choice of unsuitable partners, and the cost of those dangerous and violent relationships to her and the minor child, there was no evidence that respondent recognized there was a problem or changed her behavior.

In light of these facts, we conclude that clear and convincing evidence substantiated the trial court's finding that the parenting skills, emotional stability, and domestic relations issues that led to the minor child's removal from respondent's custody continued to exist at termination, and her failure to make progress over the pendency of this case supported the trial court's conclusion that there was no reasonable likelihood that respondent would be able to rectify those difficulties within a reasonable time given the child's age. MCL 712A.19b(3)(c)(*i*).

Because only one statutory ground for termination need be proven, *In re CR*, 250 Mich App 185, 207; 646 NW2d 506 (2002), any error in relying on § 19b(3)(c)(*ii*), (g), and (j), as additional grounds for termination was harmless. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000). Nevertheless, there was also clear and convincing evidence to establish the additional statutory grounds for termination.

In regard to § 19b(3)(c)(*ii*), there was evidence that respondent struggled with substance abuse. Respondent completed a substance abuse assessment in October 2010, and was diagnosed with being in early remission of both alcohol and cannabis abuse. However, respondent later admitted that she lied during her drug assessment and admitted using cocaine in August 2010. Thereafter, respondent tested positive for cocaine in a urine screen on December 22, 2010. Respondent also failed to complete assigned drug screens on February 24, 2011, and April 29, 2011, and missed screens are deemed positive. Respondent denied the use of alcohol, and initially testified that she attended AA/NA weekly, but then changed her testimony and stated that she went "off and on." Respondent used alcohol within the year before the termination hearing because it was involved in the various contacts between respondent and police. Because of respondent's history of lies with regard to her substance abuse, respondent's self-reporting that she was sober is suspect. The clear and convincing evidence of respondent's lying about her substance abuse issues and failure to make progress in addressing the issues supported the trial court's conclusion that there was no reasonable likelihood that respondent would be able to rectify this condition within a reasonable time given the child's age. MCL 712A.19b(3)(c)(*ii*).

In regard to § 19b(3)(g), the trial court did not err in concluding that there was clear and convincing evidence of respondent's inability to achieve noteworthy progress in any of her courses of treatment. Despite multiple referrals over two and a half years, respondent failed to take her parent-agency agreement seriously and try to benefit from treatment. Instead, respondent acted defensively, never accepted responsibility for her situation, and continued to blame others. Review periods came and went and respondent either could not or would not engage in therapy and instead chose to accuse her caseworker of attacking her. Because respondent refused to sincerely engage in services, she failed to remedy her parenting skills, emotional, domestic relations, and substance abuse issues. As a result, respondent's lifestyle choices – including the partners she chose and the violent episodes and the substance abuse that followed – did not demonstrate that she could put the needs of her child before her own and provide a safe, stable, and suitable home for him. In sum, respondent had failed to give the child proper care and custody, and no reasonable expectation existed that respondent would be able do so within a reasonable time. MCL 712A.19b(3)(g).

The evidence also showed a likelihood of harm to the child if he were returned to respondent's care. MCL 712A.19b(3)(j). Although as respondent points out on appeal, she completed a class designed to improve her parenting skills, attended parenting time, sought out therapy, and there was no testimony that respondent had ever physically harmed the minor child, this statutory section is directed to the "conduct or capacity" of the parent and the likelihood of harm that could befall a child if returned to the parent's care. Respondent did not benefit from the numerous services referred to her that were intended to address her deficits. Respondent never believed she needed help and thought she knew better than multiple trained professionals that had the safety and well-being of her child as their focus. Apparently, respondent did not recognize these significant concerns as barriers to successful parenting. In other words, respondent did not have insight into her own issues, could not acknowledge her problem areas, and was not willing to take responsibility for her situation, even when the custody of her child was at stake. Also respondent did not demonstrate that she was capable of properly caring for the minor child considering his angry outbursts, uncontrolled temper, and tantrums. Respondent also left unproven whether she could choose healthy relationships. Accordingly, the trial court's

conclusion that MCL 712A.19b(3)(j) was proved by clear and convincing evidence was not clear error.

Respondent also argues that the trial court erred in concluding that termination of respondent's parental rights was in the child's best interests.

The evidence demonstrated that the minor child was almost six years old at the time of the termination order. He was already working on his behavioral problems in therapy and needed to be brought up in an environment that was healthy, stable, and permanent. While it is undisputed that respondent loved the minor child, her caseworker did not observe a parent/child bond between them. Respondent visited the minor child regularly but struggled with managing his behavior. Despite receiving opportunities to participate in multiple services, respondent still labored with the same problems that had precipitated the child's initial removal from her custody, along with the additional issue of substance abuse. Respondent did not demonstrate that she could put the needs of her child before her own and provide a safe home for him and manage his care on a daily basis. Because of respondent's lack of progress and the child's need for permanency, stability, and predictability, there is no clear error in the trial court's finding that termination of respondent's parental rights served the child's best interests.

III. INDIAN CHILD WELFARE ACT

On appeal, respondent contends that petitioner failed to comply with the notice provisions of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. Specifically, respondent argues that there was "ample indication from the record" that the minor child "could be eligible for membership in an Indian tribe." Respondent maintains that "[a]lthough there was limited information indicating that notices were sent to the Bureau of Indian Affairs, no testimony or evidence was developed to determine whether the petitioner or the court sought further detailed information regarding [respondent's] tribal affiliations." Accordingly, respondent argues that "the obvious failure to comply with the notice provisions of the Indian Child Welfare Act," requires that the order terminating respondent's parental rights be reversed.

Generally, whether the trial court failed to satisfy a notice requirement of the ICWA is a question of law, which we review de novo. *In re TM*, 245 Mich App 181, 185; 628 NW2d 570 (2001), citing *In re IEM*, 233 Mich App 438, 443; 592 NW2d 751 (1999). However, respondent's claims on appeal were not raised in the lower court proceedings, and are accordingly not properly preserved for appeal. We review unpreserved claims of error using the plain error standard. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004). The party alleging that the trial court erred must demonstrate that an error occurred, the error was plain or obvious, and the error affected a substantial right. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The failure to comply with the notice provisions of the ICWA may be grounds for invalidating state proceedings to terminate the parental rights to an Indian child. *In re TM*, 245 Mich App at 185. The ICWA defines an "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). The ICWA contains a notice provision to ensure that Indian tribes may exercise their right to

intervene in state actions to remove Indian children from their families. *In re TM*, 245 Mich App at 186. The notice provision provides, in pertinent part:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary [of the Interior] in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [25 USC 1912(a).]

In this case, respondent alleged that she had Native American heritage and may be eligible for membership in either the Cherokee or Chippewa tribes at the first preliminary hearing concerning the petition. Respondent stated that she had filled out the paperwork to become a registered member two months earlier but she had not received a response from either tribe. The referee adjourned the hearing to investigate respondent's claim.

When the preliminary hearing resumed, Grace Boda, a DHS employee whose job it is to ensure compliance with the ICWA, testified regarding the actions taken by DHS in response to respondent's claim that she and the minor child may have Native American heritage. Boda testified that there was "no proof or written documentation that this child or the mother is actually a member of a tribe." Boda further testified that DHS is required to follow the ICWA, and that in compliance with the ICWA, she "sent notification to the Bureau of Indian Affairs." Boda concluded her testimony by stating that "we have not been able to verify that there is Native American affiliation or membership with a federally recognized tribe." The referee ruled that "at this point there is no American Indian heritage that is involved in this matter, and ICWA and MICWA do not get triggered at this time. In the event that that is brought later, then that will be addressed." There is no indication on the record that DHS received any response from the Bureau of Indian Affairs or any tribe.

We conclude that this case is analogous to *In re NEGP*, 245 Mich App 126; 626 NW2d 921 (2001). In that case, the possibility that the respondent had an affiliation with a Native American tribe was brought to the trial court's attention during the second day of the termination hearing. *Id.* at 129. The trial court directed the petitioner to send notice of the proceedings to the tribe with which respondent alleged affiliation and continued the proceeding. *Id.* The petitioner submitted a request to the Secretary of the Interior regarding the respondent and indicated that the minor child's tribe might be the Anishinabee tribe. *Id.* The Secretary of the Interior responded and indicated that there was no information regarding any tribal membership or affiliation. *Id.* at 129-130. No other action was taken by the trial court or petitioner in regard to the minor child's possible Native American heritage. *Id.* at 130.

On appeal, the respondent argued that the trial court erred in failing to conclusively determine whether the minor child was an "Indian child" pursuant to the ICWA. *Id.* This Court

agreed, holding that while the record clearly reflected that notice was sent by registered mail, return receipt requested, to the Secretary of Interior, the failure to also send notice in like manner to the alleged tribe constituted a violation of the ICWA's notice requirements. *Id.* at 131. Despite the fact that the respondent did not have actual evidence of membership in the Anishinabee tribe, it was made known that the child was possibly a member of that tribe, and the petitioner was required to send notice to the tribe in addition to the Secretary of Interior. *Id.* at 131-132. This Court concluded that the "lower court record contains no proof that petitioner either sent the tribe the required notice, return receipt requested, or that the tribe responded to any notice." *Id.* at 132. Further, this Court stated that because the petitioner never indicated that it could not determine the location of the tribe, it was required to notify the tribe itself and could not simply rely on notice to the Secretary of Interior. *Id.* Accordingly, this Court concluded that the petitioner failed to comply with the requirements of 25 USC § 1912(a). *Id.*

This Court noted that the ICWA does not apply to proceedings where the child involved is not an "Indian child," but explained that the determination regarding whether a minor child is an "Indian child" is one that must be made by the tribe itself. *Id.* at 133. Accordingly, the fact that respondent could not prove that he or the minor child were members of the Anishinabee tribe during the proceedings did not excuse the petitioner from compliance with the notice provisions of the ICWA. On remand, this Court instructed petitioner to provide proper notice to the Anishinabee tribe. *Id.*

Similarly, in the instant case, respondent informed the trial court that she may be a member of either the Cherokee or Chippewa tribe. Because respondent identified a specific tribe, petitioner was required, pursuant to the ICWA, 25 USC § 1912(a), to send notice by registered mail with return receipt requested to each tribe. The record in this case demonstrates only that some form of notice[3] was sent to the Bureau of Indian Affairs. There is nothing in the record to support the conclusion that either tribe was sent the required notice. Accordingly, we remand to the trial court so that petitioner can provide proper notice to the Cherokee and Chippewa tribes, and the record can be clarified regarding whether the notice sent to the Bureau of Indian Affairs complied with the ICWA's requirement that notice be sent by registered mail, return receipt requested. See *In re Gordon*, __ Mich __; __ NW2d __ (filed May 4, 2012), slip op at 2 (holding that the trial court must maintain a documentary record including, at minimum, the original or a copy of each actual notice personally served or sent via registered mail and the original or a copy of the return receipt or other proof of service showing delivery of the notice).

[3] It is not clear from the record whether the notice sent to the Bureau of Indian Affairs was by registered mail, return receipt requested.

We conditionally reverse the trial court's order terminating respondent's parental rights, and remand for the purpose of providing proper notice to any interested Indian tribe pursuant to the ICWA. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Joel P. Hoekstra