STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ARNOLD/GRACE, Minors.

UNPUBLISHED
April 15, 2014

No. 318604
Isabella Circuit Court
Family Division
LC No. 11-000095-NA

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Respondent mother appeals as of right from an order terminating her parental rights to the minor children. The two minor children are Indian children as defined by MCR 3.002(12) due to their heritage and membership in the Cherokee Nation. On appeal, respondent challenges the trial court's finding of statutory grounds under MCL 712A.19b(3)(c)(*i*) (failure to rectify the conditions that led to adjudication) and (3)(g) (inability to provide proper care and custody) to terminate her parental rights, as well as the court's decision that termination was in the best interests of the minor children. For the following reasons, we affirm.

I. BACKGROUND

On September 14, 2011, the court initially removed the minor children from respondent's care. The court assumed jurisdiction over the children when respondent specifically admitted to all of the amended allegations attached to the adjudication order, including the following: (1) she had been diagnosed with an unspecified mood disorder and with a major depressive disorder; (2) she failed to comply with her court-ordered participation with the Assertive Community Treatment (ACT) program through Community Mental Health (CMH); (3) although she was placed in adult foster care, respondent was not fully compliant with the program requirements; (4) she was, at that time, incarcerated for violating her probation, which stemmed from two criminal convictions for domestic violence and for attempted fleeing and eluding, fourth degree; and (5) she had been given a seven day demand notice from her landlord for failing to pay rent and utilities.

Respondent initially showed a willingness to participate in services. Petitioner, believing that the children could safely be returned to respondent if provided a sufficient "safety net" of support services, reunified the children with respondent after the dispositional hearing on January 10, 2012. Nevertheless, the court ordered respondent to comply with petitioner's service recommendations as contained in the Initial Service Plan (ISP), which indicated that respondent

had the following barriers to reunification: (1) emotional and mental instability; (2) domestic violence and uncontrolled aggression; (3) poor communication skills; and (4) inadequate housing. But the foster-care workers later testified that they made treating respondent's mental instability their primary goal, as they believed that her history of problems all stemmed from her mental health problems.

Respondent's first foster-care worker, Ryan Griffus, testified that respondent's mental health deteriorated soon after the court reunified the children with her. Although the children remained placed with respondent for approximately six months, the court again removed the children from respondent's care for: (1) improperly supervising the children; (2) failing to feed the children; (3) engaging in domestic violence in front of the children, which resulted in her incarceration; and (4) failing to protect her children from exposure to domestic violence and child molestation, although this latter allegation was never substantiated. The children were placed with respondent's brother, Brandon Grace, who was a member of the Cherokee Nation. The qualified expert witness and representative of the Cherokee Nation, Glenn McCoy, testified that Brandon Grace was an appropriate caretaker who met all the placement requirements mandated by the federal Indian Child Welfare Act, 25 USC 1901 *et seq*. (ICWA), and the tribe. Due to her lack of progress with services, the court suspended respondent's visitation on January 17, 2013. Petitioner filed a petition to terminate respondent's parental rights on April 2, 2013.

During the trial, petitioner presented several witnesses who testified that respondent's mental health and parenting capacity were actually worse toward the end of the case than when the court initially assumed jurisdiction over the children. Griffus and foster-care worker Kelly Powell testified that during the course of the case respondent: (1) became unwilling to participate in services; (2) continued to lash out aggressively and explosively toward her service providers; (3) deflected any blame and responsibility for her current circumstances onto everyone else in her life, including Brandon Grace; (4) never took responsibility for her own actions; and (5) tested positive for alcohol and marijuana while pregnant with her newborn child, who is not a party to these proceedings.

Psychiatrist Angela Pinheiro testified that she diagnosed respondent with having borderline personality disorder with antisocial traits. She explained that this condition cannot be cured. Although Pinheiro indicated that it might be possible for respondent to show some improvement in her behaviors after at least a year in treatment with Dialectical Behavior Therapy (DBT), she opined that respondent's prognosis for recovery was very low due to her chronic unwillingness to comply with treatment and her propensity to deny reality and deflect blame and responsibility. Many of respondent's treatment providers and the foster-care workers testified that respondent had not shown improvement even while regularly taking her medications, as she continued to verbally attack and blame everyone else for her circumstances. And while Powell conceded that respondent had recently started participating actively in her treatment in the DBT program, she opined that respondent was likely only complying in order to obtain a favorable outcome in these proceedings, as respondent would be demonstrating improvement in the other areas of her life if her progress were genuine. Ultimately, none of her treatment providers could recommend reunification because respondent had not made any substantial, long-term progress in her mental health.

After reviewing the evidence of record, the court found, beyond a reasonable doubt,[1] that statutory grounds existed to terminate respondent's parental rights under MCL 712A.19b(3)(c)(*i*) and (3)(g). The court also found, by clear and convincing evidence, that terminating respondent's parental rights to the minor children was in their best interests, stating that Brandon Grace is willing only to adopt the children, and would not accept either long-term foster care or guardianships. Regarding the requirement of the ICWA and the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*. (MIFPA), the court found, by clear and convincing evidence, that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of this Indian family, and that said efforts have been proven unsuccessful." It also found, beyond a reasonable doubt, that "the continued custody of these children by the parent is likely to result in serious emotional or physical damage to the children."

II. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and determination that statutory grounds exist to terminate a respondent's parental rights. MCR 3.977(E)(3) and (K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous when "the reviewing court is left with a definite and firm conviction that a mistake has been made." *SSC Ass'n Ltd Partnership v Gen Retirement Sys of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). The construction and application of statutes, such as the ICWA and MIFPA, present questions of law that are reviewed de novo. *Empson-Laviolette v Crago*, 280 Mich App 620, 624; 760 NW2d 793 (2008).

III. STATUTORY GROUNDS FOR TERMINATION

The court found that petitioner proved the following statutory grounds in MCL 712A.19b(3):

> (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.
>
> * * *

[1] The court should have used the clear and convincing evidence standard of proof. But because the beyond a reasonable doubt standard is higher than clear and convincing evidence, the court's error was harmless. MCR 2.613(A).

> (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.

Petitioner bore the burden of establishing that at least one of the above statutory grounds for termination by clear and convincing evidence. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). Clear and convincing evidence creates in the mind of the fact-finder "a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009) (quotation marks and citation omitted).

MCL 712A.19B(3)(C)(*I*)

The initial conditions that led to adjudication were: (1) respondent's severe mental health problems; (2) respondent's unwillingness to comply with the recommendations of her mental health and service providers; (3) respondent's incarceration; (4) respondent's aggression and issues of domestic violence; and (5) respondent's inadequate housing for the children. Since adjudication, respondent has only rectified her inadequate housing. But the record undisputedly established that respondent failed to rectify the other conditions that led to adjudication. Respondent was arrested and incarcerated for alcohol or drug related activities three times between November 2012 and January 2013. Petitioner removed the children from respondent, after temporarily reunifying them with her, in part due to her engaging in domestic violence in front of the children with her aunt and her live-in boyfriend. Moreover, she continued to act aggressively toward her service providers and therapists throughout this case, and she continued to deflect the blame and responsibility for her life circumstances onto them.

Respondent's primary problem, her unstable and dangerous mental health, continued to exist at the time of trial. Respondent was diagnosed by various mental health providers with borderline personality disorder with antisocial traits, major depression with suicidal traits, and schizoaffective disorder. Her psychiatrist testified that respondent's personality disorders were lifelong conditions, and that she could learn to overcome them only if she were highly motivated and dedicated to changing her behaviors. But she also testified that, at best, it will take a minimum of one to two years of treatment to begin to improve. However, respondent testified that she doubted that she was correctly diagnosed by her mental health providers. In light of respondent's low probability of recovery and the long duration that her recovery would take, the court did not err in finding that respondent's conditions that led to adjudication continued to exist at termination, and that there was no reasonable likelihood that she would rectify those conditions within a reasonable amount of time.

MCL 712A.19B(3)(G)

Respondent next contends that the court erred in finding that petitioner proved the statutory ground in subsection (3)(g) with clear and convincing evidence. A parent's failure to comply with the required services in the parent-agency agreement may be used as evidence of

his or her failure to provide proper care and custody for the children. See *In re JK*, 468 Mich at 214. Moreover, a respondent is required by law to demonstrate benefit from any services provided. See *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005), superseded in part on other grounds as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009) (noting that an order to participate in reunification services necessarily entails an obligation to benefit from said services).

The court did not clearly err in finding that petitioner proved the statutory ground in subsection (3)(g) with clear and convincing evidence. The foster-care workers testified that respondent's primary parenting barrier was her mental health problems, and that their efforts at reunification were designed to address that principal barrier. There was evidence that respondent told her treatment providers while hospitalized that she had thoughts of harming herself and her children. The foster-care workers testified that respondent received mental health treatment from a number of providers, including the following: (1) the ACT team through CMH; (2) the DBT team through CMH; (3) Wraparound; (4) counseling; (5) treatment at the ACT and DBT programs; and (6) psychological evaluations and treatment. Although the record establishes that respondent marginally participated in her services, petitioner's witnesses testified that her participation was spotty, inconsistent, and noncompliant with the recommendations made. Thus, respondent failed to substantially comply with her treatment plan.

More importantly, the record thoroughly supported the trial court's conclusion that respondent failed to benefit from her services. The foster-care workers and mental health providers consistently testified that respondent made no long-term progress in achieving mental and emotional stability over the course of this case, and any marginal progress that she demonstrated was short-lived. Several witnesses testified that respondent was actually in worse condition by the time of the termination hearing than when the court initially removed the children, as respondent appeared to be far more compliant and willing to participate at the beginning of these proceedings. She continued to make poor choices, evidenced by the fact that she tested positive for marijuana and alcohol several times when she knew that she was pregnant with her newborn child.

The court did not commit clear error in finding that respondent, without regard to her intent, failed to provide proper care and custody for her children, and that she would be unable to do so within a reasonable amount of time.

IV. BEST INTERESTS

Once petitioner establishes a statutory ground under MCL 712A.19b(3) to terminate a parent's parental rights, the trial court must terminate the parent's parental rights if it finds that termination is in the best interests of the children. MCL 712A.19b(5); MCR 3.977(H)(3); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). "[W]hether termination of parental rights is in the best interests of the child[ren] must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The court must weigh all evidence in the whole record to determine whether termination of parental rights is in the best interests of the children. *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The court should consider the parent's capacity to care for children, as well as the children's "need

for permanency, stability, and finality." *In re Olive/Metts Minors*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

The court did not err in finding by a preponderance of the evidence that termination of respondent's parental rights was in the best interests of the minor children. As noted earlier, the foster-care workers and mental health care providers testified that respondent made no progress in improving her dangerous and unstable mental health conditions. Thus, if reunified with respondent, the children could be subject to the same neglectful conduct to which they were previously exposed, including regular exposure to domestic violence, malnutrition, substance abuse, rapid changes in residence, and potential homelessness. Such an environment is unstable, lacks permanency, and provides little physical or emotional security for the children. Simply put, respondent failed to demonstrate that she is capable of consistently meeting the needs of her children.

Moreover, the record overwhelmingly establishes that the children's existing placement with Brandon Grace, respondent's brother, is safe, stable, and loving. See *In re Foster*, 285 Mich App 630, 634-635; 776 NW2d 415 (2009) (noting that "consider[ing] the advantages of a foster home" is "appropriate in a best-interests determination"). And Glenn McCoy, representative of the Cherokee Nation, testified that respondent's parental rights should be terminated because doing so was in the best interests of the children, asserting that: (1) providing respondent with additional time and services would be futile in light of the ample time and services that she had already received in this case; (2) the children deserve a permanent and stable placement, which respondent cannot provide for the children; and (3) the children should not have to wait in a temporary placement for another one to two years until respondent can improve her behaviors through the DBT therapy.

When children are placed with relatives, the court is required to evaluate the propriety of termination in lieu of other potential goals, such as a guardianship with the relative. *In re Olive/Metts Minors*, 297 Mich App at 43. The court stated that termination was in the best interests of the children because Brandon Grace was not interested in a long term foster care or guardianship arrangement. The court's best-interest determination was not clearly erroneous.

Finally, we note that the trial court did not commit clear error in finding that petitioner satisfied all the additional requirements in the ICWA and MIFPA to terminate respondent's parental rights to her Indian children. It is undisputed that the children qualify as Indian children under the ICWA and MIFPA due to their heritage and membership in the Cherokee Nation. 25 USC 1903(4); MCL 712B.3(k). Both the ICWA and MIFPA impose two additional requirements when the court seeks to terminate a respondent's parental rights to an Indian Child. First, these statutes require the court to find, "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." 25 USC 1912(f); MCL 712B.15(4). The MIFPA specifies that the record evidence must include "at least one qualified expert witness as described in section 17[.]" MCL 712B.15(4). Respondent did not object to McCoy's qualification as an expert witness on the Cherokee Nation.

The court did not clearly err in finding, beyond a reasonable doubt, that the continued custody of the children by respondent would likely result in serious emotional or physical damage to the child. McCoy opined that, after considering all the testimony that he heard throughout the termination hearing, the children would suffer serious emotional or physical damage if returned to respondent's care. He also stated that his position was that of the Cherokee Nation tribe, indicating that the tribe primarily considers the well-being of the children, including their emotional and physical needs, when forming an opinion on a potential termination of parental rights.

These statutes additionally require the petitioner to satisfy the court that "active efforts have been made 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); see also MCL 712B.15(3). In the context of the active efforts determination in a termination of parental rights proceeding, § 15B(3) provides:

> A party seeking a termination of parental rights to an Indian child under state law must demonstrate to the court's satisfaction that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the active efforts were unsuccessful.

Although the ICWA does not specifically define "active efforts," the MIFPA has defined active efforts as follows:

> (a) "Active efforts" means actions to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following:
>
> (*i*) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.
>
> (*ii*) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services.
>
> (*iii*) Conducting or causing to be conducted a diligent search for extended family members for placement.
>
> (*iv*) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practice within the tribal community to evaluate the circumstances of the Indian child's family and to assist in developing a case plan that uses the

resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances.

(*v*) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home.

(*vi*) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding.

(*vii*) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child.

(*viii*) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction.

(*ix*) Offering and employing all available family preservation strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe.

(*x*) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively assisting the Indian child's family or offering active assistance in accessing those resources.

(*xi*) Monitoring client progress and client participation in services.

(*xii*) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family. [MCL 712B.3.]

According to the court rules, our courts must use this definition when seeking to terminate a respondent's parental rights to an Indian child. MCR 3.977(G)(1) (defining "active efforts" in reference to its definition in MCR 3.002); MCR 3.002(1) (defining "active efforts" identically to its statutory definition in MCL 712B.3).

The court did not clearly err in finding that petitioner made active efforts, as defined by statute, and that those efforts were unsuccessful at rehabilitating respondent. Although the facts are not argued in any detail by respondent, the record is replete with evidence establishing the services and support that petitioner provided to respondent over the course of the case. Griffus testified that petitioner provided the following services to respondent during his tenure as the assigned foster care worker: (1) Indian Outreach services; (2) Wraparound; (3) a DHS Home Maker; (4) an unsuccessful reunification; (5) Families First; (6) family assistance; (7) transportation assistance; (8) housing assistance; (9) the tribal domestic violence shelter; (10) court hearings; (11) CPS investigations; (12) drug screens; (13) financial and material assistance; (14) employment assistance; (15) ACT services and team meetings through CMH; and (16) an Indian Outreach worker from the DHS. Powell testified that, after she assumed case responsibility, petitioner provided respondent with the following services: (1) ACT team; (2) counseling services from Kim Seidel; (3) Indian Outreach services; (4) Addiction Solutions (referred following respondent's probation violation); (5) Wraparound; (6) parenting classes; (7) Home Maker; (8) drug screens; (9) transportation assistance; (10) employment assistance; and (11) support from a DBT team. Both foster-care workers testified that they personally provided transportation for respondent so that she could participate in services. They also testified that they made multiple referrals for respondent until they practically could not provide any additional services due to resource exhaustion, as respondent's inconsistent and aggressive conduct had alienated her from several service providers. McCoy opined that, in light of these intensive services, petitioner clearly made active efforts to reunify the Indian family and rehabilitate respondent. Hence, the trial court's findings were not clearly erroneous, and it did not otherwise err in its conclusions.

Affirmed.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan