Opinion

Chief Appellate Judge:
Karl Weber

Appellate Judges:
Richard A. Mastaw
Janine Gable
Donelda Harper
Cheryl Nolan

Filed on November 14, 2005

UNITED STATES OF AMERICA

SAULT STE. MARIE CHIPPEWA TRIBAL COURT

APPELLATE DIVISION

In the matter of, C.S.D.

, a minor,

Appellate Court Case No. APP-04-01
Tribal Court Case No. CW-03-30

________________________/

PER CURIAM. This is a child custody case in which the Tribal Court, after hearings on a Petition To Terminate Placement and Return Child To Parent, found that the factors in the Michigan Child Custody Act favored Petitioner-Appellee, C.D., and granted him custody.

FACTS AND PROCEEDINGS

C.D. and S.S. (formally S.D.), were married on December 1, 1994. The daughter of SS, KY gave birth to CD on October 11, 1995. CD, SS and KY all lived in the same household in Pennsylvania. KY moved out of the home in 1997. Pursuant to a Stipulation between CO, SS and KY the Court of Common

Pleas of Lackawanna County, Pennsylvania, entered an order on April 25, 1997, granting CO and SS custody of the child, CO, and found CO to be the father of CO. On December 15, 1999, the same Court entered a new order granting sole custody to SS

In 1999 SS moved to Michigan and divorced CO on November 20, 2000, in the Chippewa County Circuit Court. There is no provision in the Judgment of Divorce relating to custody of CO Since January 2000, SS has resided on Tribal Trust Lands with CO. SS married CS on September 27, 2003.

A Petition To Terminate Placement and Return Child To Parent, was filed by CO on October 17, 2003. The Tribal Court entered an Interim Custody Order on October 17, 2003, that granted CO temporary custody of CO On October 20, 2003, the Tribal Court entered a new order that granted custody to SS pending a hearing on the Petition set for November 18, 2003, that was adjourned to December 17, 2003. The order also determined that the Tribal Court had jurisdiction since the custody matter involved a Tribal Child on Tribal Land. The tribal court, stated it would defer jurisdiction to the Lackawanna County Court if that Court decided to exercise continuing jurisdiction. The tribal judge ordered the court clerk to transmit the court file to the Lackawanna County Court, and if that court failed to accept jurisdiction within fourteen (14) days, the Tribal Court would proceed with the custody case. No formal reply was received from the Pennsylvania Court. The tribal judge stated during the custody hearing that she had a telephone conversation with Judge Harhut from that Court, who indicated that since all the parties were in Michigan, the Tribal Court was a more convenient forum to hear the Petition.

The tribal court noted it had personal jurisdiction pursuant to Tribal Code Chapter 30.202, subject matter jurisdiction pursuant to Section 30.209 (2) (c), and proceeded with the custody matter. On December 17, 2003, at the conclusion of the hearing on the Petition, the tribal court ordered that CO be returned to CO SS appealed alleging lack of subject matter jurisdiction, abuse of discretion, error of law, and insufficient evidence to support decision.

On September 28, 2004, the Appellate Court entered an Order To Remand For Further Findings Of Fact, citing insufficient evidence to support the decision of the Tribal Court, directed the tribal court to enter an Order for psychological assessment of CO and further directed the tribal court to address Appellee's Motion For Re-consideration that was presented to the Appellate Court.

On January 7, 2005, on Remand, the tribal court issued it's final Custody Order. The order stated that the psychological evaluation of CO filed by Dr. DM was sufficient, the Court had both subject matter and personal jurisdiction to decide the custody matter, and that pursuant to the Michigan Child Custody Act, it was in the best interest of the minor child that custody be awarded to CO. SS appealed again on the same basis of her previous appeal.

JURISDICTION

The relevant sections of the Tribal Code, Chapter 30 titled "Child Welfare Code" state;

Section 30.101 <u>Preamble.</u>

This Chapter constitutes the law of the Sault Ste. Marie Tribe of Chippewa Indians on matters related to the care, custody and control of minor members, and children of members of Sault Ste. Marie Tribe of Chippewa Indians. It may be cited as the Sault Ste. Marie Tribal Child Welfare Code Tribal Code Chapter 30.

Section 30.102 Purpose.

The Child Welfare Code shall be liberally interpreted and construed to fulfill the following expressed purposes:

(1) To provide for the welfare, care and protection of the children and families within the jurisdiction of the Sault Ste. Marie Tribe of Chippewa Indians.

.....

(5) To preserve and strengthen the child's cultural and ethnic identity whenever possible.

Section 30.205 Tribal Interest.

Because of the vital interest of the Tribe in its children and those children who may become members of the Tribe, the statutes, regulations, public policies, customs and common law of the Tribe shall control in any proceeding involving a child who is a member of the Tribe.

Section 30.209 Jurisdiction – Subject Matter.

(1) The Tribal Court shall also have jurisdiction of all proceedings, otherwise within the jurisdiction of the Tribal Court, in which the following relief is sought:

(2) ......
......

(c) A determination of custody, other than in divorce, or appointment of a custodian or guardian for a child.

Sub-section (2) (c) excludes proceedings only in "divorce, or appointment of a custodian or guardian for a child," and includes all other custody proceedings. We read the above statutes together and find legislative intent to confer jurisdiction in the tribal court of the matter presently before the court. We also find that the tribal court had original and exclusive jurisdiction separate from the Pennsylvania proceeding, since the minor child is a tribal member, residing on tribal lands.

CUSTODY

Chapter 81.105 of the Tribal Code requires the tribal court to apply Michigan Law in the absence of applicable Tribal or Federal Law. The tribal court applied the Michigan Child Custody Act, MCL 722.23, for determination of custody. The Act states; "The best interest of the child", controls custody disputes and defines "best interest of the child" as follows:

"[B]est interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the Court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the Court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Standards of review in child custody cases are set forth in MCL 722.28 Sec. 8, which states in part:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all Orders and Judgments of the Circuit Court shall be affirmed on appeal unless the Trial Judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

In Fletcher V. Fletcher, 447 Mich. 871 (1994) the Michigan Supreme Court adopted these standards of review, and stated at p. 877:

> The three standards of review enumerated in Sec. 8 of the Custody Act are part of the Legislature's comprehensive effort to promote the best interests and welfare of children. By incorporating standards of review into the act, the Legislature apparently recognized that in custody cases the proceedings themselves may jeopardize a child's welfare. Because we believe that standards set forth in Sec. 8 reasonably minimize the possibility of unwarranted and disruptive changes in custody, while at the same time enabling Courts to pursue suitable custody arrangements, we adopt those standards....

With regard to the great weight standard, the Court stated at 878-9 that:

> .... The great weight standard of review allows a meaningful yet deferential review by the Court of Appeals. A more deferential standard, such as "insufficient evidence" or "supported by competent, material, and substantial evidence," could effectively immunize the Trial Judge's fact finding in contravention of a child's best interests....
>
> The great weight of the evidence standard applies to all findings of fact. Thus, a Trial Court's findings on each factor should be affirmed unless the evidence "clearly preponderate[s] in the opposite direction." *Murchie, Supra* at 558.

As to "Abuse of Discretion," the Court further noted at p. 879-81 that:

> Under the Child Custody Act, discretionary rulings are reviewed under a "palpable abuse of discretion" standard.
>
> ...In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise

of reason but rather of passion or bias." (Quoting Spalding V. Spalding, 355 Mich. 382, 1959)

The third standard of review is "clear legal error". The Court stated the definition at p. 881:

> "When a Court incorrectly chooses, interprets, or applies the law, it commits legal error that the Appellate Court is bound to correct."

The Michigan Supreme Court recognized that "stricter standards" would effectively grant Trial Courts unfettered discretion over child custody matters and potentially jeopardize a child's best interest. The Tribal Appellate Court adopts the standards of review for child custody cases announced in Fletcher, *Supra.*

At the conclusion of testimony, the Court applied the factors listed in the Child Custody Act for determination of custody. The Court found that factor (f), the Moral Fitness of the parties involved, favored CD The Court noted that CS husband of SS tested positive for marijuana when given a urine test by an ACFS Case Worker during a Court ordered home study. Further, CS takes medication because of his mental health and that the Court was concerned about mixing legal and illegal drugs and being with the child. These findings are more suitably applied under other factors of the Act.

The Court also noted that both CD and CS each have criminal histories, and that the Court was not persuaded that SS was unaware of this. Mere knowledge of crimes, in the instant case, is no evidence of moral culpability or lack of moral fitness. Her moral fitness cannot be less than that of CD who has committed crimes. We find clear legal error on a major issue in application of factor (f), and remand to the Tribal Court for re-evaluation of this factor.

The Court further found that the parties were equal as to factor (i), the reasonable preference of the child. The Court stated that CO is a special needs child, but there was no finding that the child was unable to express a preference. To the contrary, the Court found from a transcript of an interview with the child that the child "is okay living with her father or her grandmother." The Court expressed concern that the child was aware that all parties were present at the hearing. The child was present at the courthouse and of sufficient age to express a preference. The Court was free to interview the child in camera, Molloy V. Molloy, 466 Mich. 852 (2002), and was not required to disclose the child's preference, Fletcher V. Fletcher, 200 Mich. App. (1993), reversed on other grounds, 447 Mich. 871 (1994). Michigan law favors a personal interview with the child to determine reasonable preference of the child. Bowers V. Bowers, 190 Mich. App. 51 (1991), Stringer V. Vincent, 161 Mich. App. 429 (1987). We find clear legal error on a major issue, and remand to the Tribal Court for re-evaluation of factor (i).

The Court also found factor (j), the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent child relationship between the child and the other parent or child and the parents, to be equal. In the Court's original decision on December 17, 2003, the Court stated: ....the burden of persuasion is on CO to persuade the Court that it is in C best interest that she be placed with her father and that the original custody order entered in Pennsylvania be modified." The Court found that SD was willing to continue the father's role. The Court also said: "....The Court has not been persuaded by MS. S that MR. D is not interested in continuing her relationship between C and her grandmother." It was the duty of CO to prove that he would facilitate a close and continuing relationship between the child and grandmother. The Court shifted the burden of persuasion from CO to SS to prove these facts. We find clear legal error on a major issue and remand to the Tribal Court for re-evaluation of factor (j).

We affirm the tribal court's conclusion on factors (a), (b), (c), (d), (e), (g), (h), and (k), of the Child Custody Act.

GRANDPARENTING TIME

The tribal court stated that there was no Tribal or Michigan law that allowed the Court to award grandparenting time. The tribal court was correct. At the time the tribal court issued its decision, there was no grandparenting time statute in effect. In Troxel V. Granville, 530 US 57 (2000), the United States Supreme Court held a Washington State grandparent visitation statute unconstitutional, as applied, since the statute was "breathtakingly overbroad". Based on Troxel, *Supra,* the Michigan Supreme Court held in Derose V. Derose, 469 Mich. 320 (2003), the Michigan grandparenting time statute unconstitutional. In response, the Michigan Legislature enacted MCL 722.27b, effective January 5, 2005. MCL 722.27b cures the defects of the previous statute. It contains a presumption that a fit parent's decision to deny grandparenting time does not create a substantial risk of harm to the child's mental, physical, or emotional health. To rebut this presumption, a grandparent must prove by a preponderance of evidence that such denial would create these risks. If an Appellate Court found the grandparents burden of proof unconstitutional, the burden of proof becomes clear and convincing evidence. The statute also requires the Court to consider the "best interest of the child" and lists nine factors for determination of that issue. Acts of the legislature are presumed constitutional. Thomas Estate V. Consumers Power, 394 Mich. 459 (1975). We direct the tribal court to hold a hearing for determination of grandparenting time in accordance with the Michigan statute within forty-five (45) days of receipt of this Opinion.

There is testimony in the trial record from CS that he has been diagnosed with several mental disorders that require medication, and that he smokes marijuana . He was also convicted of Domestic Violence against SS In light of these facts, and pursuant

to our authority under MCR 7.316, we direct that any custody or grandparenting time order entered in favor of SS be conditioned upon random drug screens of CS by competent authority, upon request, and that CS consent to a psychological assessment to determine appropriateness of contact with the minor child, CD. We acknowledge that CS is not a party to these proceedings and the Court has no jurisdiction over him in the instant case. However, since CD may reside or visit in the same household with CS the Court does have jurisdiction and a duty to impose conditions to protect the minor child from potential risks. CS is free to decline a request for random drug screens or psychological assessment. The tribal court is instructed that evidence of intent to refuse, or refusal of random drug screens or psychological assessment, shall be considered in any proceeding for custody, grandparenting time, or revocation of either, under applicable statutes. The tribal court is authorized to impose any other condition that it deems appropriate.

On remand, the Court should consider "up-to-date information,.... and any other changes in circumstances arising since the Trial Court's original custody order", Fletcher, *Supra*. Lastly, Custody Orders are modifiable. Therefore, KY was not a necessary party to the proceeding, and may bring an action in her own name. We find that the balance of the issues raised on appeal to be without merit. Nothing in this Opinion shall be construed that the Tribal Appellate Court has a preference as to which party should be awarded custody of the minor child, CD

We affirm the tribal court's determination of jurisdiction, remand for re-evaluation of factors (f), (i), and (j), and direct further disposition consistent with this Opinion. We do not retain jurisdiction.