SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

IN THE MATTER OF,

ASG and EG, *two minor children*

Lower Court Case No(s). CW-12-05 and CW-12-06

Decided February 13, 2017

BEFORE: DIETZ, FINCH, HAUTAMAKI, and WARNER Appellate Judges.

ORDER GRANTING LEAVE TO APPEAL

Decided by the majority consisting of Dietz, Finch, Hautamaki and Warner. Wichtman dissenting.

On December 30, 2016, the Appellant filed an *Application for Leave to Appeal* ("Application") the Tribal Court's September 1, 2016 *Order & Opinion (Terminating Respondent Father's Parental Rights)* ("Order & Opinion"). The Application was accompanied by an Affidavit drafted by legal counsel and signed by the Appellant attesting to his belief that his former attorney filed an appeal on his behalf. As discussed below, the majority hereby grants Appellant's Application.

APPLICABLE LAW

Chapter 82 "establish the procedures by which appeals are taken...." STC§ 82.101. "The Court of Appeals shall have the exclusive jurisdiction to review the decision of the Tribal Court..." STC § 82.110. "An appeal is properly before the Court of Appeals if it concerns: (1) a final judgment or order of the Tribal Court[.]" STC § 82.8211(1). The timeframe to appeal such a decision is defined by Tribal law. STC § 82.113(1). Generally, untimely appeals deprive the Court of Appeals of subject matter jurisdiction. STC § 82.113(4) However, an exception exists to the jurisdictional bar in which "[t]he Court of Appeals may, at its discretion, grant leave to appeal from any order or judgment upon the showing by the appellant, supported by affidavit, that there is merit in the ground for appeal and that the late filing was not due to the appellant's negligence." STC § 82.113(5)

DISCUSSION

This Court has repeatedly recognized the importance of parental rights and the gravity of termination of the same on the parent/child relationship and the tribal community. *In the Matter*

of SD and JD, APP 06-04, 5 (January 9, 2009)("Parents have a significant interest in the companionship, care; custody and management of their children…"); *In Re JB*, APP 09-03, 4 (May 25, 2010)(termination of parental rights is to only be used as a last resort); *In the Matter of AS and RR*, APP 12-01/02 (October 12, 2012)("Tribal Code speaks about the importance of reunification of families whenever possible."); See also STC § 30.501.

Given the finality of a decision to terminate parental rights, the majority gives great weight to the fact that the Appellant's affidavit avers that:

9. Immediately after the issuance of the Order of 1 September 2016, [his] trial counsel told [him] that he would appeal [his] case.

10. [His attorney] later told [him] that the appeal was prepared and that he would file it later in the week.

11. [His attorney] later told [him] that he had actually filed an appeal of the Order of 1 September 2016.

12. When [he] learned from a court clerk that no appeal had been filed, [he] immediately took action to retain replacement counsel and file the instant documents.

Appellant's Affidavit ¶¶ 9-12.

An attorney's word is a powerful thing. The majority finds that the Appellant clearly relied on statements made by his attorney. Any delay in the filing of Appellant's Appeal is relatively minor given the severity of terminating parental rights. And, if there is any truth given his reliance, the majority believes he deserves an appeal given termination is such a severe result.

ORDER

This Court hereby grant the Appellant's Application for Leave to Appeal. Appellant is directed to file his Notice of Appeal stating the basis for the same within thirty (30) days.

IT IS SO ORDERED.

JUDGE WICHTMAN, dissenting.

The majority appropriately recognizes the gravity of the September 1, 2016 *Order & Opinion (Terminating Respondent Father's Parental Rights)* ("Order & Opinion") on the parental rights of the Appellant. I suspect that this case and this Appellant, both having previously been the subject of an appeal, accounts for the specificity of the statutory basis for the Order and Opinion. *In the Matter of A.S.-F./E.G.*, APP 14-03-04 (February 20, 2015). However, the statutory timeframe for the Appellant to appeal has run. And, while the Tribal Code allows

the Court of Appeals, in its discretion, to grant late filings, I respectfully disagree with the majority that the Appellant has made the requisite showing through his Affidavit or his Application for Leave to Appeal to persuade this Court to do so.

STC § 82.113(5) provides that "[t]he Court of Appeals may, at its discretion, grant leave to appeal from any order or judgment upon the showing by the appellant, supported by affidavit, that there is merit in the ground for appeal and that the late filing was not due to the appellant's negligence."

While the majority rightfully attributed great weight to the Appellant's reliance on his attorneys alleged statements to overcome a finding of negligence in the filing of a late appeal, in my opinion his failure to also address "the merit in the ground for appeal" requires denial of his Application for Leave to Appeal. I read STC S 82.113(5) to require the Appellant to make a showing of two things: (1) the merit in the ground for appeal *and* (2) the absence of negligence of the Appellant. (emphasis added). Perhaps the Appellant's setting forth examples of services completed and alternatives to termination previously addressed by the Tribal Court are averments that speak to the merits. But without any statement regarding clear error of the Tribal Court regarding the same, the purpose of those statements is unclear to me.

The Appellant, and his children, have been under the jurisdiction of the Court for over five years. The Appellant has had the benefit of not one, not two, but three trials in which his right and fitness to parent his children were at issue. The Appellant was represented by legal counsel through each trial and successfully appealed the Tribal Court's May 24, 2014 *Order & Opinion (Terminating Respondent Father's Parental Rights)* which resulted in this Court's rejection of the "one parent doctrine" aligning this Courts jurisprudence with the Michigan Supreme Court's decision in *In Re Sanders*, 495 Mich 394 (2014). Furthermore, the Order and Opinion is clear that "the attorney of record for the respondent father is dismissed forthwith" reflecting that the Appellant had reason to know that his court-appointed attorney would not file an appeal on his behalf. In short, the Appellant is well aware of the required timeframes and procedures necessary had he wished to file a timely appeal. He simply did not.

Because the Appellant failed to timely file his appeal and because the Appellant failed to make a showing of the "merit in the ground for appeal" I respectfully disagree with the majority's decision to grant his Application for Leave to Appeal. In my humble opinion, the Appellant's Application for Leave to Appeal should be denied.