SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

IN THE MATTERS OF
GL, D.O.B. 02/14/2013,
ZL, D.O.B 05/22/2016

APP-20-03

Decided March 18, 2021

BEFORE: CAUSLEY, DIETZ, FINCH, JUMP and WICHTMAN, Appellate Judges.

ORDER AFFIRMING ORDER & OPINION TERMINATING PARENTAL RIGHTS

Wichtman on behalf of the Court, who is joined by the other Appellate Judges Causley, Dietz, Finch and Jump.

This appeal arises from an *Order & Opinion (Terminating Respondent Father's Parental Rights) ("Termination Order")* entered by the Sault Ste. Marie Tribe of Chippewa Indians Tribal Court ("Tribal Court") on June 2, 2020. Trial on the *Petition to Terminate Parental Rights of the Appellant Father* dated November 22, 2019 began on February 21, 2020 and was adjourned to March 3, 2020. (*2/21/20 Transcript* at 4). By leave of the Tribal Court, the Anishinabek Children and Family Services ("ACFS") filed a *First Amended Petition to Terminate Parental Rights* on January 28, 2020 and the termination trial resumed on March 3, 2020 in Manistique, Michigan via video conference. (*Termination Order* at p.3). The termination trial continued March 20, 2020 via video conference but was adjourned due to the unavailability of the Appellant Father through the U.S. Bureau of Prisons where he was serving a 6-month sentence to be followed by 18 months of supervised release after a parole revocation for possession of methamphetamine and cocaine. (*Id.* at p.8). Amidst a series of motions spanning March 11, 2020 through March 20, 2020, one of which was a *Motion to Withdraw, Appointment of Substitute Counsel and for Adjournment* related to counsel for the Appellant Father, the termination trial continued April 24, 2020. (*Id.)* On April 24, 2020, the Tribal Court heard and decided the motions, and despite the Appellant Father's voluntary disconnection of the video service, and, over the Appellant Father counsel's objections (after being denied his request to withdraw) to adjourn until the Appellant Father was released from the U.S. Bureau of Prison, the Tribal Court proceeded and concluded the termination trial by video.[1] (*Id.)* On June 2, 2020, the Tribal Court

[1] The Tribal Court notes in its *Termination Order* "that during the time between the two [termination] hearings, the COVID-19 pandemic struck the Tribe, the state and the nation. In response, the [Tribal] Court moved all

entered the *Termination Order* terminating Appellant's parental rights to minor children GL, D.O.B. 02/04/13 and ZL, D.O.B 5/22/16.

For the reasons spelled out below, the Tribal Court's June 2, 2020 *Termination Order* is affirmed.

Facts and Procedural History

The procedural history of this case dates back to October 27, 2016 and is thoroughly described in the *Termination Order.* The Court entered an Order of Emergency Removal of G.L. and Z.L. as well as their siblings on March 23, 2017. (*Termination Order* at p.1). At the time of removal, the Respondent Father was in the custody of the U.S. Bureau of Prisons after being sentenced to 30 months' incarceration for assault and strangulation of the mother of the minor children who are the subjects of this Appeal[2]. (*Id*. at p. 3). Having already entered an *Order of Adjudication (as to Respondent Mother)* on December 5, 2016, and after locating and properly serving the Respondent Father within the U.S. Bureau of Prisons, the Tribal Court found G.L. and Z.L to be children in need of care "whose parent, guardian or custodian is unable to provide for the children because of incarceration…and whose parent has been convicted of a crime of a nature that demonstrates the parent's unfitness to adequately parent the child" pursuant to STC§ 30.311(5)(10). July 5, 2017 *Order of Adjudication (as to Respondent Father)*. An *Order of Disposition* was entered on July 20, 2017. (*Termination Order* p. 2). The Tribal Court held *Dispositional Review* hearings as required by STC§ 30.428(1) every 90 days until the *Permanency Planning Hearing* on March 21, 2018. (*Id.)* While the Tribal Court repeatedly found that the Respondent Father made minimal progress on his court ordered case service plan and that returning the children to his care would create a substantial risk of harm to them, the Tribal Court took his incarceration into account and instead of ordering ACFS to proceed with filing a termination petition, Respondent Father was allowed more time to show progress on his case service plan to avoid termination proceedings. (*Id.)* Approximately 19 months passed, more dispositional review hearings were held, the Respondent Father was released from the U.S. Bureau of Prison's custody but, except for one review period, his progress on his case service plan was minimal or decreased. (*Id.* at 2 and 8). In September 2019, the Child Welfare Committee voted to change the permanency planning goal recommendation from reunification to termination as it related to Respondent Father and minor children G.L. and Z.L. (*Id.)* On February 3, 2020, the Respondent Father was returned to the custody of the U.S. Bureau of Prisons for a supervised release violation – possession of methamphetamine and cocaine. (*Id.)*

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proceedings to video proceedings to the extent possible" pursuant to Administrative Orders 20-01, 20-02 and 20-03. *Opinion & Order* p. 3, fn.1.

[2] On August 7, 2020, this Court affirmed the Tribal Court's November 7, 2019 *Order Terminating Respondent Mother's Parental Rights* relating to the mother of minor children GL, ZL and one other child. See *APP-19-04*, August 7, 2020.

The Respondent Father's termination trial commenced in February 2020 and concluded in April 2020 resulting in the *Termination Order*. On July 2, 2020, Respondent Father by and through his attorney timely filed an appeal of the Tribal Court's *Termination Order*. (July 2, 2020, *Notice of Appeal*). Respondent Father (hereinafter "Appellant") was appointed appellate counsel on July 30, 2020. The Appellant's *Notice of Appeal* points to STC§ 82.114 (2)(b),(c) and (e) as his basis for appeal without specificity. (July 2, 2020, *Notice of Appeal*). In addition, the Appellant alleges (1) a denial of due process related to his ability to participate in the termination trial due to the use of video conference and telephonic proceedings and an inability to present by either means on the last day of the trial; and (2) that the Appellant's pending release from prison on July 23, 2020 should give him an opportunity to reunify with his children. (*Id.*)

Appellant, Appellee and the minor children's Guardian Ad Litem timely filed briefs with this Court in accordance with the Scheduling Order issued on August 25, 2020. (*Notice of Briefing Schedule*). Oral argument in this matter was heard by this Court on November 20, 2020. Appellant Father was represented by counsel (different than counsel at termination trial and filing of *Notice of Appeal*) at oral argument. Appellee ACFS was present and represented by counsel.

Jurisdiction

Pursuant to STC § 82.109, this Court possesses exclusive jurisdiction to review the decisions of the Tribal Court. An appeal is properly before this Court if it is a final decision of the Tribal Court. STC § 82.111 or an order affecting a substantial right and which determines the action and prevents a judgment from which an appeal might be made.

Standard of Review

Child protective proceedings fall within the jurisdiction of the Tribal Court. (See STC Chapter 30; *In the Matter of JK*, APP-06-02, p.5 (January 9, 2009)). Matters on appeal involving a conclusion of law are reviewed *de novo*. (STC § 82.124(5)). All other questions on the appeal of the termination of a parent's rights are decided at the high clearly erroneous standard. STC §30.512 instructs that "[a] matter which is within the discretion of the Tribal Court shall be sustained if it is reflected in the record that the Tribal Court exercised its discretionary authority; applied the appropriate legal standard to the facts; and did not abuse its discretion." *In the Matter of JK*, APP-06-02, p.5 (January 9, 2009). A matter committed to the discretion of the Tribal Court shall not be subject to the judgment of the Court of Appeals. (STC § 82.124 (8)). In matters involving a finding of fact by the trial court, "this Court will only overturn the trial court's findings on this point if it is left with a definite and firm conviction that the trial court erred…." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians,* APP-08-02, 3 (August 4, 2008).

Discussion

The importance of parental rights and the gravity of termination of the parent/child relationship within the Tribal community is an issue this Court grapples with time and time again. "Parents' have a significant interest in the companionship, care, custody and management of their children." *In the Matter of SD and JD*, APP 06-04, 5 (January 9, 2009). "[T]ermination of parental rights is to only be used as a last resort." *In Re JB*, APP 09-03, 4 (May 25, 2010). "Tribal Code speaks about the importance of reunification of families whenever possible." *In the Matter of AS and RR, APP* 12-01/02 (October 12, 2012). "[T]he gravity and finality of termination of parental rights should require certainty regarding the factors in the law to be considered regardless of the outcome of the analysis." *In Re: ASG and EG*, APP-17-01 and APP 17-02 (October 27, 2017). *See also* STC § 30.501.

Pursuant to STC § 30.503, two steps must be analyzed by the Tribal Court to terminate a parent's rights to their child: 1) the fact-finding step, and 2) the best interest step. *In Re TCD*, APP 13-02 (July 14, 2014). Termination of parental rights is warranted if one of the statutory grounds have been established, unless the Tribal Court finds that termination is clearly not in the best interests of the child. STC § 30.503. It is determined from the record that the Tribal Court adhered to these requirements – first fact finding, then analyzing best interest.

In its June 2, 2020 *Termination Order*, the Tribal Court set forth 40 separate specific findings of fact gleaned from what appears from the record to be a two (2) day termination trial. (*Termination Order*, p. 3-8). At the termination trial, the Tribal Court heard testimony from two (2) law enforcement officers (*2/21/20 Transcript*, pp. 6-29), the Sault Tribe Foster Care Worker assigned to the case (*Id.* at pp. 32-85, *4/24/21 Transcript*, pp. 12-25), and the Child Placement Supervisor for Binojii Placement Agency (*4/24/21 Transcript*, pp. 29-51) and in addition to the *Petition to Terminate Parental Rights of the Appellant Father* dated November 22, 2019 and *First Amended Petition to Terminate Parental Rights* on January 28, 2020, admitted 2 documents into evidence. (*See 2/21/20 Transcript* at 19; and *4/24/20 Transcript* at 52). A review of the record reflects that both the Sault Tribe Foster Care Worker and the Binojii Placement Agency Child Placement Supervisor have been involved with this matter since it began and have interacted with the Appellant Father and the children on several occasions throughout its long history. (*2/21/20 Transcript* at 33; *4/24/21 Transcript* at 30).

On appeal, the Appellant Father challenges both the statutory grounds, specifically STC §§ 30.504(3), 30.504(4), and 30.504(6) on which the Tribal Court terminated the Appellant Father's Parental Rights. (*Appellants Brief*, pp. 4-8) It is important to note that STC § 30.504 contains nine (9) statutory reasons by which the Tribal Court may terminate a parent's parental rights after finding clear and convincing evidence of the existence of at least one of those reasons. (STC § 30.504). Equally important is that the *Petition to Terminate Parental Rights of the Appellant Father* dated November 22, 2019 and *First Amended Petition to Terminate Parental Rights* on January 28, 2020 sought termination of the Appellant Father's parental rights

on five (5) separate bases.[3] While the Tribal Code only requires the Tribal Court to be satisfied that the Petitioner has, by clear and convincing evidence, proven one of the statutory criteria required for termination, giving this matter the time and attention it was due, the Tribal Court painstakingly addressed all five (5) bases for termination finding in favor of the Petitioner on all five. (*Termination Order*, p. 9-14).

Now, the Appellant argues that the Tribal Court erred when it found that by clear and convincing evidence that unrectified conditions "that led [sic] the adjudication continue to exist and there is no reasonable likelihood that conditions will be rectified within a reasonable time considering the age of the child." (*Appellant's Brief*, p. 4). The Appellant points to a handful of services in which the Appellant marginally engaged from the date of initial removal in March 2017 through the filing of the November 22, 2019 *Petition to Terminate Parental Rights of the Appellant Father* as the basis for this argument despite his periods of incarceration. (*Id.* at 5-6). The Appellant further argues that in determining the continued existence of unrectified conditions pursuant to STC § 30.504 (3), the Tribal Court failed to consider that during the 13 months while not incarcerated, the Appellant Father "was able to obtain housing, employment and was working with service providers, including substance abuse treatment…." (*Id.* at 5). While the Appellant Father, as stated in his brief, may "not believe that clear and convincing evidence was presented at the termination hearing to support the [Tribal] Court's findings with respect to [STC] § [30.503(3)], this Court disagrees. In matters involving a finding of fact by the Tribal Court, "this Court will only overturn the trial court's findings on this point if it is left with a definite and firm conviction that the trial court erred…." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (August 4, 2008). Such a definite and firm conviction does not exist here, the record is replete with evidence that while the Appellant Father may have had some minimal level of success, the unrectified conditions related to his criminal activity including parole violations, possession of cocaine and methamphetamine, refusal to actively engage in his case service plan, abusive and threatening behavior, conscious omissions of information from his foster care worker and refusal of agency drug screens or lack of engagement in substance abuse therapy remain a distinct pattern of behavior of the Appellant Father. (*Termination Order*, p. 9-11).

The Tribal Court did not err when it found by clear and convincing evidence that the Appellant Father's "utter lack of engagement in services meant to address the conditions that resulted in his children being in foster care…[and] absolute unwillingness, if not inability, to accept any personal responsibility or culpability for any of his failings or noncompliance" reflect that "he is unable to rectify these conditions within a reasonable time given his children's ages." (*Id. at 11*).

Next, the Appellant Father argues that the Tribal Court erred when it found by clear and convincing evidence that the Appellant Father failed to provide proper care and custody for the

[3] STC§§ 30.504(3)(a)(b), 30.504(4), 30.504(5), 30.504(6) and 30.506(9).

minor children. (*Appellant's Brief*, p. 7). He alleges as a basis for his assertion that the Tribal Court failed to consider the fact that the "visits…generally went well and [that] Appellant was appropriate with the children during visits." (*Id.*). He further argues that his ability to obtain independent housing in October 2019, maintain a home appropriate for his children and form a bond with his children reflected his progress on his case service plan. (*Id.* at 8.) However, this argument too, fails. The Tribal Court appropriately addressed the Appellant Fathers housing situation, parenting time participation and bond with his children. (*Termination Order*, p. 12-13). The Tribal Court also addressed, that since removal in 2017, the Appellant Father spent approximately 13 months out of federal prison. *(Id.*) The Tribal Court found that during those 13 months, parenting time never progressed beyond supervised visits, that the Appellant failed to follow the requirements of his housing funding source and lost it, that the Appellant Father lacked meaningful participation in his case service plan, that the Appellant Father failed to provide a safe and stable environment for his children, and that the Appellant Father continued the behaviors exhibited throughout the case that led to the Tribal Court's jurisdiction over the minor children at the outset. (*Id.*) Again, this Court is not in the position to impose its own judgment on fact finding matters left to the Tribal Court. STC § 82.124 (8). This Court finds no clear error here.

Additionally, the Appellant Father argues that the Tribal Court erred when it found by clear and convincing evidence that the Appellant Father "made no effort toward remedying his issues or beliefs that gave rise to [the Appellant Father's] felony assault conviction in which he violently strangled the mother in front of G.L. and Z.L. (*Appellant's Brief*, p. 9). However, that is not the basis needed to support such a finding. As noted by the Tribal Court, the Appellant Father's felony conviction meets the definition of violent crime under STC Chapter 30. The conviction remains on the Appellant Father's record. It happened, that is enough. The Tribal Court did not err when it found that the Appellant's Father felony conviction satisfies the statutory requirement required to terminate his parental rights.

The Appellant Father does not challenge the Tribal Court's findings related to STC §§ 30.504(6) and 30.506(9). It is therefore undisputed that the Appellant Father has a felony conviction of the nature that proves him unfit to have custody of this minor children and that the minor children have remained in foster care for fifteen (15) of the last twenty-two (22) months prior to the filing of the termination petition. Indeed, the minor children, G.L. and Z.L have been in foster care since removal in March 2017. As previously stated, the Tribal Court need only find, by clear and convincing evidence, that one of the statutory requirements for termination under the Tribal Code to stand. It stands true then, as argued by the Appellee and Guardian Ad Litem, that even if the Appellant Father had prevailed in his arguments above, which he does not, the Tribal Court still met the statutory requirements to proceed with termination.

Finally, the Appellant Father challenges the Tribal Court's decision related to the best interest step of the termination analysis. (*Appellant's Brief*, p. 9). In a one paragraph argument, without support and little explanation, the Appellant father merely states "[t[here was no direct

questioning regarding the best interest factor analysis during the termination trial" but admits that [t]here was testimony related to some of the best interest considerations. [claiming there was] no testimony from any individual…regarding the potential impact of terminating Appellant's parental rights on the children." *(Id.*). Both the Appellee and the Guardian Ad Litem disagree arguing "the trial court is not limited to direct questioning on the best interest factors and must view all of the evidence in the record as a whole as it related to the children's best interests. (*Appellee Brief*, p. 6; *Guardian Ad Litem Brief*, p. 4).

As has been previously addressed by this Court, the Sault Tribe Code "does not specifically set forth factors for the Court to consider when determining the best interest of children." (*In Re TCD*, APP-13-20 (January 14, 2014). Given the lack of statutory basis providing direction to the Tribal Court regarding best interest factors to consider and, more importantly, the way those factors should be considered and weighted, when making a termination decision, *In Re: TCD* serves as the only guidepost under the Tribe's body of law. In that case, this Court was troubled by the lack of evidence used by the Tribal Court to support its conclusion that [the minor child's] need for permanency outweighed all other applicable factors summarily concluding that termination was in the best interest of the children. (*Id.* at 3.). This Court noted that the only discussion related to the minor child's best interests came from the Appellant's witness and his counsel. (*Id.*) This Court looked to the Tribal Code, specifically Chapter 30, for guidance related to the test to be used when determining best interest in termination matters – it first noted that STC §§ 30.501 and 30.502 instruct "that the unity of the family should be preserved…and that termination of parental rights is a last resort" positing that exploration of available alternatives before termination would be helpful to give meaning to the Tribal Code's reference to last resort. (*Id.* at 4.). This Court further posited "that some guidance on what should be considered under STC § 30.503(b) would be helpful" and proceeded to lay out expectations by which all other cases should be measured. (Id. at 6.)[4] This Court then offered examples from sister tribes which the Tribal Court may find useful – namely the Little Traverse Bay Bands of Odawa Indians and the Grand Traverse Band of Ottawa and Chippewa Indians who both defines best interest under their tribal law. (*Id.* at 7-8). Notably, *In Re: TCD*, did not direct the Tribal Court to use a particular set of factors nor did it provide instruction as to the weight to be assigned to any such factor chosen. That is not this Court's place, but rather it is a matter for the Tribe's legislative body to establish a culturally appropriate framework for the Tribal Court to follow when determining best interests related to termination matters. It is now more than seven (7) years later. The Tribal Code has not been updated to set forth specific factors that reflect the Sault Tribe's culture and values, so it is against the backdrop established by *In Re: TCD* that every termination proceeding and best interests continue to be measured.

[4] *In Re TCD* at p. 6. ("At a minimum, this Court expects that there will be a well-developed record below on what is in the best interests of the specific child(ren) at issue. This Court also expects the tribal court to consider how the requirements of Sections 30.102 and 30.501 should be weighed in a particular case.").

Thus, without legislative intervention, discretion remains with the Tribal Court regarding determining best interest factors and their assigned weights. This Court is not in the position of fact finder and is limited both by the record and its inability to do anything more than sustain matters left to the discretion of the Tribal Court so long as the record reflects "that the Tribal Court exercised its discretionary authority; applied the appropriate legal standard to the facts; and did not abuse its discretion." *In the Matter of JK*, APP-06-02, p.5 (January 9, 2009).

Here, the Tribal Court acknowledges that "the overall tenor of Chapter 30, specifically 30.102 and 30.501, is that the unity of the family should be preserved whenever possible." (*Termination Order*, p. 14). The Court also notes that "maintaining the family unit is the…position the [Tribal] Court must start from." *(Id.*). From that starting point, the record reflects that the Tribal Court worked through a series of relevant best interest factors borrowed from the laws of the Little Traverse Bay Bands of Odawa Indians and the Grand Traverse Band of Ottawa and Chippewa Indians as well as guidance issued by the Michigan State Court Administrator's Office ("SCAO"). (*Id.* at 15). The Tribal Court also considered the recommendation of the Sault Tribe Child Welfare Committee who voted in September 2019 to change the permanency planning goal recommendation from reunification to termination of Appellant Father's parental rights. (*Id.* at 8). The Tribal Court applied the evidence gleaned from the record at the termination trial to discretionary factors ultimately determining that the Petitioner had satisfied their burden proving that termination of the Appellant Father's parental rights was in the best interest of the children.

This Court notes that almost three (3) full pages of the *Termination Order* was devoted to examining and determining the best interests of the children based upon the evidence presented at trial and approximately 3 years of review hearings. The Appellant Father's assertion that "there was no direct questioning regarding the best interest factor analysis during the termination trial" is a point well-taken but not persuasive and not altogether true. Both the Sault Tribe Foster Care Worker and Binojii Placement Agency Child Placement Supervisor testified at the termination trial. In fact, their direct testimony spans 88 pages of termination trial transcript in which the Tribal Court heard testimony regarding the bond that existed between the Appellant Father and his minor children; the length of time he lived in stable satisfactory housing, the Appellant Father's moral fitness, as well as the Appellant Father's aggressive behavior, tendencies toward domestic violence, criminal history and his repeated unwillingness to change his ways for the benefit of his children. The Tribal Court's analysis of the SCAO factors (which this Court agrees more appropriately align with child protection matters) reflects that its best interest determination was supported by the opinion of the Sault Tribe Foster Care worker who testified at the termination trial that permanency for the minor children was in their best interest and that the Appellant Father was unable to provide such permanency at that time. Further, the children's Guardian Ad Litem and the Sault Tribe Child Welfare Committee both recommended termination in the best interest of the children. The Tribal Court also briefly addressed alternatives to termination, albeit finding none in favor of their current Sault Tribe home

placements and those families "willing[ness] to continue sibling visits in order to maintain the bond and connection between the children." (*Termination Order* at 17.) As this Court has previously indicated, it is not this Court's proper function to delineate the factors to be used by the Tribal Court but has merely noted that due to "the gravity and finality of termination of parental rights [the Tribal Code] should require certainty regarding the factors in the law to be considered" to ensure proper application of STC CH. 30. APP-17-01 and APP 17-02. While the record certainly could have been better developed as to these specific best interest factors, this Court does not find that the Court abused its discretion in selecting the factors used or the analysis performed to determine that termination was in the best interest of the minor children G.L. and Z.L.

Based on the record, we find no clear error committed by the Tribal Court when it ordered the termination of Appellant Father's parental rights.

ORDER

This Court hereby AFFIRMS the Tribal Court's June 2, 2020 *Order & Opinion Terminating Respondent Father's Parental Rights.*

IT IS SO ORDERED.