SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

ENTERED
7-14-14 tb
SSM Chippewa Tribal Court

In Re TCD

APP-13-02

Decided July 10, 2014

BEFORE: FINCH, JUMP, LEHMAN, NERTOLI, and WARNER Appellate Judges.

OPINION AND ORDER

Warner, Appellate Judge, who is joined by Appellate Judges Finch, Jump, Lehman and Nertoli.

As explained more fully in the discussion below, this Court reverses the tribal court order and establishes a guardianship for TCD.

OPINION

Procedural History

On February 29, 2012, the tribal court below accepted jurisdiction over this case. On April 21, 2012, an amended *Petition for Emergency Removal of Minor Children* was filed in this matter. On June 8, 2012, Appellant entered a no-contest plea and the tribal court issued an *Order of Adjudication*. The tribal court found statutory grounds were met to establish by a preponderance of the evidence that the child was a child-in-need of care, pursuant to Tribal Code Sections 30.311(2), (3), and (11). All parties agreed to proceed immediately to disposition and the tribal court issued an *Order of Disposition*, which ordered Appellant to comply with an Initial Service Plan created on February 4, 2012. On September 27, 2012, the tribal court held a dispositional hearing review and determined that some progress had been made toward reunification and ordered that TCD continue in the temporary custody of the Court. Appellant continued to have supervised visitation. On January 11, 2013, the tribal court held a permanency planning hearing. At that time, the tribal court found that some progress had been made toward reunification, that reunification was still the appropriate permanent goal as termination of parental rights was not in the child's best interests. At permanency planning hearings on April 12, 2013 and May 31, 2013, the tribal court determined that Appellant had made no progress toward reunification. Accordingly, on May 31, 2013, the tribal court ordered the agency to initiate proceedings to terminate Appellant's parental rights. On June 14, 2013, the Anishnaabek Community and Family Services (ACFS) agency filed a petition to terminate Appellant's parental rights. On August 1, 2013, the tribal court held a trial on the petition to terminate Appellant's parental rights. On August 22, 2013, the tribal court issued an order terminating Appellant's parental rights to TCD. *In the Matter of TCD*, CW 12-09 (August 22, 2013).

Appellant filed a notice of appeal to this Court on September 23, 2013. This Court heard oral argument on the merits of the appeal on May 15, 2014. During oral argument, this Court requested supplemental briefing on the importance of permanency to the best interest

determination under Tribal Code Section 30.503(b). Appellee submitted its supplement brief on June 2, 2014. Appellant submitted his supplemental brief on June 10, 2014.

Jurisdiction and Standard of Review

This Court has exclusive jurisdiction in this matter, as it is reviewing the decision of the tribal court. Tribal Code Section 82.109. The Tribal Code requires the application of the "clearly erroneous" standard when reviewing decisions related to the termination of parental rights. Tribal Code Section 30.512 ("The clearly erroneous standard shall be used in reviewing the findings of the Tribal Court on appeal from an order terminating parental rights."). "In applying the clearly erroneous standard of review, the Court will determine whether it is left with a 'definite and firm conviction' that the trial court made an error in its findings of fact." *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians*, APP-08-02, 3 (August 4, 2008). Interestingly, in terms of the Indian Child Welfare Act, which has some similarity to the present matter but is not binding here, at least one scholar has concluded that "[t]he standard of clear and convincing evidence is premised upon a presumption in favor of protection of parental rights." Michael J. Dale, *State Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 Gonzaga Law Review 353, 373 (1991).

Discussion

According to Tribal Code Section 30.503, two steps must be followed before the parental rights of a parent may be terminated: 1) the fact finding step; and 2) the best interest step.[1] In their briefs and at oral argument, the parties did not challenge the tribal court's August 22, 2013 order on the basis of the first, fact finding step. Accordingly, the tribal court's decision that Appellant's parental rights should be terminated due to unrectified conditions, failure to provide proper care, imprisonment for more than two years and that TCD has been in foster care for 15 of the most recent 22 months is not addressed below. Tribal Code Sections 30.504(3), (4), (7), (9).

The Court therefore focuses its discussion on the second step required by the Tribal Code – the best interest step. Specifically, Tribal Code Section 30.503(b) states:

> Once it is established that one or more grounds exists to terminate parental rights of respondent over the child, the Tribal Court shall order termination of

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[1] Tribal Code Section 30.503 provides:

"The Tribal Court may decree a permanent termination of parental rights as provided herein concerning a child over whom the jurisdiction of the Tribal Court has been invoked under this Subchapter. The rights of one parent may be terminated without affecting the right of the other.

(a) Fact-finding Step: Legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights. The proofs must be clear and convincing.

(b) Best Interest Step: Once it is established that one or more grounds exists to terminate parental rights of respondent over the child, the Tribal Court shall order termination of respondents parental rights and order that additional efforts for reunification of the child with the respondent shall not be made, unless the Tribal Court finds that termination is clearly not in the best interest of the child."

> respondents parental rights and order that additional efforts for reunification of the child with the respondent shall not be made, unless the Tribal Court finds that termination is clearly not in the best interest of the child.

Accordingly, whether termination is in the best interest of TCD must be considered in this case. In regard to the best interests of TCD, the tribal court concluded that:

> It would certainly not be in [TCD's] best interests to keep her in a "wait and see" holding pattern for the coming years to see if her father is even granted parole with each passing year, and then wait and see if he participates from and benefits from services. This little girl has a life to lead and deserves permanency. ... [TCD] does not have more time, nor is the court going to award [Appellant] more time to do what he should have done when he had the opportunity to do so. ... [TCD] deserves permanency and the stability that [Appellant] has demonstrated he is unable to provide.

In the Matter of TCD, CW 12-09, 22-23 (August 22, 2013). In sum, the tribal court determined that TCD's need for permanency outweighed any other factors that might be considered.

This conclusion, however, is not supported by legal precedent or the record in the case. First, the tribal court's decision does not cite to any evidence to support its conclusion that TCD's need for permanency outweighed all other applicable factors. Second, at trial on August 1, 2013, counsel for Appellee stated in his closing argument that "there really is no evidence of what is in [TCD's] best interests and why." *In the Matter of TCD*, CW-12-09, trial transcript, p. 97 (August 1, 2013). Accordingly, based on the tribal court's failure to provide support for its conclusion and counsel's statement, it would seem that the trial on the petition to terminate the parental rights of Appellant did not address the second step of Tribal Code Section 30.503(b).

A review of the trial transcript reveals, however, that there was discussion of TCD's best interests. For example, there is the following exchange between counsel for Appellant and witness for Appellant[2]:

> Question: Do you think that continued contact between [TCD] and [Appellant] would be in her best interest?
> Answer: I do. I believe it's in any child's best interest when they have a parent that is willing to love them and want to be there for them.
> Question: And do you believe that [Appellant] is that parent?
> Answer: I do.

In the Matter of TCD, CW-12-09, trial transcript, p. 72 (August 1, 2013). Another helpful exchange occurred between Appellant's counsel and his father, called on Appellant's behalf:

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[2] Notably, although this witness was Appellant's sister, she had served as TCD's foster parent and witnessed numerous interactions between TCD and Appellant.

> Question: Do you think that it's in [TCD's] best interests to continue to have a relationship with her father?
> Answer: Yes I do.

Admittedly, this testimony may have been discounted by the tribal court because of the personal relationship between the witnesses and Appellant. Yet, it is notable that the only testimony at trial regarding the best interests of TCD suggests that it was not in her best interest to terminate Appellant's rights. Put another way, there appears to be no testimony at trial, other than the testimony mentioned above, speaking directly to the best interests of TCD.

Given this, it is helpful to look to the Tribal Code for guidance. As Appellant argued at oral argument before this Court, Tribal Code Sections 30.102 and 30.501 provide guidance in such circumstances. Tribal Code Section 30.102 provides, "[t]he Child Welfare Code shall be liberally interpreted and construed to fulfill the following expressed purposes … (2) To preserve unity of the family, preferably by separating the child from his parents only when necessary." Tribal Code Section 30.102 constitutes the stated purpose of Tribal Code Chapter 30, and, therefore, all provisions of Chapter 30 should be read in light of the stated purpose.

Tribal Code Section 30.501 similarly states that,

> This subchapter shall be construed in a manner consistent with the philosophy that the family unit is of most value to the community, and the individual family members, when that unit remains united and together. Termination of the parent-child relationship should be used only as a last resort, when, in the opinion of the Tribal Court, all efforts have failed to avoid termination and it is in the best interests of the child concerned to proceed under this section.

Both Tribal Code Sections 30.102 and 30.501 indicate that the unity of the family should be preserved. Tribal Code Section 30.501 goes on to specifically state that termination of parental rights is a **last resort**. The tribal court's order below discusses neither of these Tribal Code Sections nor how the preference for family unity should be balanced against TCD's alleged need for permanence.

Because Tribal Code Section 30.501 states that termination should only be a "last resort", it is helpful to consider whether there are other options available before terminating Appellant's parental rights. At oral argument, Appellant argued that another option may be a temporary or limited guardianship. Notably, Tribal Code Sections 30.802 and 30.803 specifically contemplate the creation of guardianships. Given Appellant is currently incarcerated, Appellant argued that there is no harm to TCD by essentially maintaining the status quo through a guardianship. In response, Appellee argued at oral argument that a guardianship would be inappropriate in this case given TCD's need for permanency. Accordingly, this Court ordered supplemental briefing regarding the issue of permanency.

In its supplemental brief, Appellee considered the issue of how important permanency is to a minor child in foster care. Arguing that permanency is important, Appellee pointed to Tribal

Code Section 30.429, which requires permanency planning hearings at 12 months and every 90 days thereafter. Appellee also relies on the Adoption and Safe Families Act of 1997, which includes being in foster care for 15 of 22 months as a basis for termination of parental rights, as evidence that instability is a basis for termination. Appellee then went on to consider several court decisions.

First, Appellee cites to *Castorr v. Brundage*, 459 U.S. 928, 929 (1982) for the proposition that litigation would have emotional and physical adverse impacts on the child in the case. However, in *Castorr*, the Court relies on an established record which demonstrated the likelihood of such harm. In this case, however, such a developed record as to the best interests of TCD does not exist, as previously discussed. In fact, a review of the full decisions of all of the Michigan cases referenced by Appellee shows that the presiding court based its decision regarding the paramount importance of permanency on a well-developed record that the children involved in those cases particularly needed permanency. Given the case specific nature of these decisions, the cases are ultimately unhelpful as to the question of how to resolve the Tribal Code's statement that termination should be a "last resort" and the best interests of TCD.

On the question of guardianships, Appellee attaches three cases to its brief: *In re McGowan*, 2011 Mich App LEXIS 899, 12, 2011 WL 187938 (2011); *In re Gildner-Ray*, 2012 Mich App LEXIS 1726, 11, 2012 WL 3965903 (2012); and *In re Johnson*, 2013 Mich App LEXIS 1479, 3, 2013 WL 4747484 (2013). In *In re McGowan*, the parent attempting to avoid termination of her parental rights had severe mental health problems, as "after [she] heard voices telling her to harm herself" she tried to set her house on fire with a child inside of it. *In re McGowan*, 2011 WL 187938 at *1. Similarly, the parent at issue in *In re Johnson*, also had severe mental health problems, as she was schizophrenic and refused to take her medications. *In re Johnson*, 2013 WL 4747484 at *2. Because of the mother's refusal to take her medication, the court concluded that the possibility of any long term stability was poor. *Id.* at *4. Again, in *In re Gildner-Ray*, the mother at issue had a significant drug problem, as all three of the children were born with prenatal drug exposure and she admitted to a methadone addiction. *In re Gildner-Ray*, 2012 WL 3965903 at *1-2. In denying the proposed guardianship, the court determined that the children would likely be harmed if returned to the mother and also that a bond did not exist between the mother and her children. *Id.* at *8-*9. Also, in this case, specific evidence was submitted that termination was in the best interests of the specific children at issue. *Id.* at *11.

Accordingly, all three of these cases can be distinguished from the matter presently before this Court. Unlike in the cases discussed above, there does not appear from the trial transcript in this case to be a significant drug use problem, and, there is even evidence suggesting that Appellant is sober. Also, Appellant has not previously harmed TCD. And, finally, there is no specific testimony that termination of Appellant's rights is in the best interest of TCD. In fact, the trial record demonstrates just the opposite. TCD's former foster mom testified that "[TCD] would see him walking up and she would run to the window and yell daddy out the window, and then if he left should would follow after him and yell and cry for him too." *In the Matter of TCD*, CW-12-09, trial transcript, p. 69 (August 1, 2013). For the foregoing reasons, the Court concludes that Michigan case law is unhelpful on this point.

However, tribal law may be instructive. Tribal Code Section 81.105(2) allows for the consideration of tribal law. Given that tribal law may be persuasive on this issue, Appellee included in its brief a decision from the Confederated Tribes of the Grand Ronde Community of Oregon Juvenile Court, *In the Matter of: B.A. and C.A.* (September 8, 2000).[3] This case has an interesting procedural posture as the court is considering whether to issue a petition for termination (and not the actual petition itself). One of the arguments made as to why the petition should not be filed is that "[c]urrent Tribal law clearly states that adoption is a step of last resort, and that other permanent plans for children, such as legal guardianship, are preferred." Confederated Tribes of the Grand Ronde Community of Oregon Juvenile Court, *In the Matter of: B.A. and C.A.*, ¶ 20 (September 8, 2000). While the court rejects this argument as a basis for preventing the issuing of the petition to terminate, the court does explain that tribal preferences are "probative" and may be considered when the court considers the merits of the termination petition. *Id.* at ¶ 28.

In considering the best interests of TCD, it should also be noted that the Tribe and her Native family play an important role in the best interests of Native children. For example, the Washington Court of Appeal stated that "[i]t is in the Indian child's best interest that [her] relationship to [her] tribe be protected." *In re Custody of S.B.R.*, 43 Wn. App. 622, 719 P.2d 154, 156 (1986). Moreover, the United States Supreme Court recognized in *Holyfield* that "studies showed Native American children raised in white environments develop a variety of problems during adolescence. The problems center on the young adult's feelings of estrangement, or total lack of cultural affinity. Interestingly, such psychological harm, even when appearing later in life, is a relevant consideration in an Anglo best interest analysis." Michael J. Dale, *State Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 Gonzaga Law Review 353, 371 (1991) (citations omitted). Accordingly, TCD's connection to her Tribe and family certainly impact the analysis of what constitutes her best interest.

Moving forward, the Court acknowledges that some guidance on what should be considered under Tribal Code Section 30.503(b) would be helpful. 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 Tribal Code Sections 30.102 and 30.501 should be weighed in the particular case.

Beyond these minimum requirements, it may be helpful for the tribal court to clearly articulate what factors it is considering in determining the best interests of the child(ren) involved. While keeping in mind the unique culture, traditions and laws of the Sault Ste. Marie Tribe of Chippewa Indians, the tribal court may want to consider the tribal laws of other tribes when developing the criteria or factors that it will consider in determining the best interests of a child. Consideration of such tribal law may prove useful as the Tribal Code does not define what factors should be considered in determining the "best interest" of a child.

[3] The Court appreciates Appellee's efforts to review potentially applicable tribal law.

As an example of tribal law the tribal court may wish to consider, the Little Traverse Bay Bands of Odawa Indians at Title V, Chapter 1 of its Tribal Code defines "best interest" as:

> "Best Interests of the Child" means: As used in this statute, means the sum total of the following factors to be considered, evaluated, and determined by the Court:
>
> 1. The love, affection, and other emotional ties existing between the parties involved and the child;
>
> 2. The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and rearing of the child in his or her religion or creed, if any;
>
> 3. 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 the Tribe in place of medical care, and other material needs;
>
> 4. The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity;
>
> 5. The permanence, as a family unit, of the existing or proposed custodial home or homes;
>
> 6. The moral fitness of the parties involved;
>
> 7. The mental and physical health of the parties involved;
>
> 8. The home, school, and community record of the child;
>
> 9. The reasonable preference of the child, if the Court considers the child to be of sufficient age to express preference;
>
> 10. 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;
>
> 11. Domestic violence, regardless of whether the violence was directed against or witnessed by the child; and
>
> 12. Any other factor considered by the Court to be relevant.

Little Traverse Bay of Odawa Indians, Waganaksing Odawa Section 5.104 (April 8, 2014), available at: http://www.ltbbodawa-nsn.gov/TribalCode.pdf.

Similarly, the Grand Traverse Band of Ottawa and Chippewa Indians defines the "best interests" of children as follows:

> (d) "Best Interests of the Child": As used in this Code, the sum total of the following factors to be considered, evaluated, and determined by the Court:
>
> (1) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (2) 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.
>
> (3) 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 Tribe in place of medical care, and other material needs.
>
> (4) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (6) The moral fitness of the parties involved including the criminal history of any person living in the same household as the minor child.
>
> (7) The mental and physical health of the parties involved.
>
> (8) The home, school, and community record of the child.
>
> (9) The reasonable preference of the child, if the Court considers the child to be of sufficient age to express preference.
>
> (10) 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.
>
> (11) Domestic violence, regardless of whether the violence was directed against or witnessed by
> the child.
>
> (12) Any other factor considered by the Court to be relevant to a particular child custody dispute.

(13) The willingness to provide the child with a strong cultural identity and to expose the child to the customs, values and mores that may form the child's cultural.

10 Grand Traverse Band Code Section 102(d), available at: http://www.narf.org/nill/Codes/gtcode/Title_10.pdf (last visited June 30, 2014).

Ultimately in this case, however, given the tribal court's August 22, 2013 decision does not support its conclusion regarding whether termination is in the best interest for TCD with either legal precedent or the record in this case, this Court finds the tribal court's decision is clearly erroneous. This conclusion is buttressed by the fact that the only apparent testimony in the record speaking to the best interests of TCD suggests that termination of Appellant's parental rights is not in her best interest. Additionally, the August 22, 2013 order is clearly erroneous, as it fails to consider Tribal Code Sections 30.102 and 30.501. Given the requirement in Tribal Code Section 30.501 that termination should be a last resort and the fact that case law examined in this case does not preclude it, this Court orders the creation of a guardianship for TCD.

ORDER

As explained above, the tribal court's August 22, 2013 Order terminating the parental rights of Appellant is reversed. This Court orders the creation of a guardianship in this case and remands the matter to the tribal court for a determination as how to best structure the guardianship in light of the circumstances of this specific case.

It is SO ORDERED.