SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

IN THE MATTER OF,

ACG, D.O.B. 4/14/2006
APP-16-02

Decided November 14, 2016

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

ORDER AFFIRMING TRIBAL COURT DECISION

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

For the reasons spelled out below, the *Order Following Permanency Planning – as to Respondent Mother dated December 31, 2105* is affirmed. In affirming the Tribal Court's order, this Court holds that while the Tribal Court's reliance on the proposed but unsigned custody and parenting time order from the Chippewa County Friend of the Court as a basis for terminating the Tribal Court's jurisdiction was clear error; however, such error was harmless given the stated purpose of the Child Welfare Code, See Chapter 30, STC 30.102, and the Preferred Rights of Parents, STC 30.501, the length of time the matter was pending before the Tribal Court, the Tribal Court's knowledge and familiarity with the parties and the family, and the Tribal Court's consideration of the best interest of ACG, D.O.B. 4/14/2006 ("ACG").

Facts and Procedural History

While the procedural history of this case is quite long and dates back to February 14, 2012 this appeal arises from a Permanency Planning Hearing held pursuant to STC 30.429 on December 30, 2015 and the order following that hearing terminating the jurisdiction of the Tribal Court. *December 31, 2015 Order Following Permanency Planning Hearing – as to Respondent Mother.* Appellant filed a Petition to Terminate the Parental Rights of the Appellee Mother on June 5, 2015. *Petition to Terminate Parental Rights: Re MG (June 5, 2015).* Appellee Mother voluntarily relinquished rights to ACG's two half-siblings on August 26, 2015. See *08/26/15 Order Terminating Parental Rights After Release/Consent re: EG and ASG, respectively.* The Tribal Court noticed a Permanency Planning Review Hearing for ACG on November 4, 2015 which was continued to December 22, 2015 and later adjourned to December 30, 2015. See *11/4/2015 Interim Order* and *12/1/2015 Notice of Hearing.*

At the hearing on December 30, 2015, the Tribal Court noted that counsel for the Appellee Mother had secured a proposed (but unsigned) order from the Chippewa County Friend of the Court granting physical custody of ACG to her biological father and supervised visitation with the Appellee Mother ("Proposed Order"). 12/30/2015 Hearing Transcript p. 4, l8-14. A copy of the Proposed Order was provided to the Tribal Court before the December 30, 2105 hearing by the Appellee Mother's counsel. 12/30/2015 Hearing Transcript p. 3, 11-17. A copy of the Proposed Order was not provided to the attorney for the Appellant until the day of the hearing. 12/30/2015 Hearing Transcript p. 3, l1-17.

On December 30, 2015, the Appellant introduced into evidence a Court Summary and updated Service Plan but declined to call or elicit any testimony from the social worker to supplement his exhibits. 12/30/2015 Hearing Transcript p. 4, 17-25 and p.5, 1-19.

Neither Appellee Mother nor ACG's appointed Guardian Ad Litem admitted any exhibits into evidence at the December 30, 2015 hearing though all counsel as well as ACG's father and his mother (biological maternal grandmother and supervisor of parenting time for the Appellee Mother in the Proposed Order) did discuss the contents, genuineness and circumstances related to the Proposed Order. 12/30/2015 Hearing Transcript, *generally.*

At the conclusion of the hearing, the Tribal Court found that it was not in ACG's best interest to proceed with termination; rather termination of the jurisdiction of the Tribal Court was the appropriate course of action given the totality of the circumstances and the Proposed Order. 12/30/2015 Hearing Transcript, p. 11, 1-4. The Tribal Court cited a myriad of facts and circumstance that supported its specific findings related to ACG, the Appellee Mother, ACGs current custodial arrangement, the history of the matter before the Tribal Court, the rights of parents, the purpose of the proceedings, and the use of termination as a last resort. 12/30/2015 Hearing Transcript, p. 10, 1-15. Based on the Tribal Court's extensive history with the matter, the Tribal Court noted that termination of the Appellee's parental rights was not clearly in the best interests of the minor child. *Id.* The Tribal Court referenced the fact that the minor child had always been in the custody of the minor child's father since the inception of the case and that he had been a stable force in her life. *Id.* The Tribal Court also reasoned that it "didn't see any [part] of [the current custodial arrangement where the father cared for ACG and the mother was in and out of her life] changing whether [it] move[d] forward with termination or [it] dismiss[ed] the case and let the parties resolve it with a custody order. Hearing Transcript, p. 10, 6-8. The Tribal Court noted the current state of the law which makes termination of parental rights always the last resort. *Id.* The Tribal Court further determined that a parent's progress was not the only factor in determining permanency planning but that the Tribal Court must consider all of the facts and circumstances of the mom and the child for the rest of their life. *Id.*

On January 29 2016, Appellant filed a Notice of Appeal from the Tribal Court's *December 31, 2015 Order Following Permanency Planning Hearing – as to Respondent Mother* with this Court. *January 29, 2016 Appellant's Notice of Appeal.* In its Notice of Appeal,

Appellant argues that the Tribal Court's ruling should be vacated on the basis that the Proposed Order had not been properly admitted into evidence at the December 30, 2015 Permanency Planning Hearing and that the Proposed Order was insufficient evidence to support the Tribal Court's finding that conditions causing a child to be a child-in need-of-care had been mitigated to support closure of the matter and, as a result, the dismissal of a pending petition to terminate parental rights. *Id.*

On May 9, 2016, this Court heard oral argument on Appellant's appeal. Appellant and Appellee were both represented by counsel. Guardian Ad Litem for ACG was also present and allotted time for argument.

Jurisdiction

Under 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 (1).

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 is *de novo*. STC 82.124(5). "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).

Discussion

On appeal, there are two fundamental questions to be decided by this Court. First, did the Tribal Court have sufficient evidence to support a finding that the reasons leading to the removal of ACG had been rectified in order to terminate the Tribal Court's jurisdiction of the matter? And, second, was it error of law for the Tribal Court to consider the Proposed Order when it dismissed the matter given Appellant's pending petition to terminate parental rights?

Each of these questions is raised in turn below.

A. Sufficiency of the Evidence

A review of the hearing transcript on December 30, 2015 shows that none of the parties chose to call any witnesses and that Appellant sought admission of the standard and customary reports usually presented at a Permanency Planning Hearing. At the beginning of the hearing

there were numerous references and comments made by the parties and the Tribal Court related to the Proposed Order. ACG's maternal grandmother and father were both present at the hearing and while not sworn in as witnesses, were asked questions by the Tribal Court to confirm their understanding as to what had happened in state court proceedings that led to the Proposed Order and what the future custody and visitation arrangements of ACG would be.

At no time did any of the attorneys object to the Tribal Court's questions of ACG's maternal grandmother or her father. Nor did any party request to make an offer of proof after the Tribal Court's questions. Appellant could have done so, but chose otherwise. Further Appellant could have had the agency's worker comment or offer an opinion on to the suitability of the Proposed Order but again he chose otherwise. Instead all parties present merely advanced their respective arguments as to how the case should proceed.

It is clear to this Court, that at the time of the hearing the following facts of the case were not in dispute: ACG had been in the custody of her father for nearly three years and the Chippewa County, 50th Circuit Court, through the Friend of the Court was prepared to enter an order giving the father primary physical custody of ACG upon the Tribal Court dismissing its jurisdiction over the matter.

The Tribe has a very strong and protected interest in the welfare of its children. The stated purpose of Chapter 30 of the Sault Tribe Code is, among other things, "to preserve the unity of family, preferably when separating the child from his parents only when necessary" and "to take such actions that will best serve the spiritual, emotional, and physical welfare of the child and best interests of the Tribe...." STC 30.102 (2) and (3). Additionally, STC 30.501 specifically sets forth the "Preferred Right of Parents" and in part provides that "Termination of the parent-child relationship should only be used 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." See also *In Re: TCD*, p. 4 (July 10, 2014).

In the case at hand, the Tribal Court made clear that there was no need to terminate the Appellee Mother's parental rights as there was another alternative that supported the status quo and ensured the safety of the child - namely the granting of permanent physical custody of ACG to her father and supervised visitation with the Appellee which therefore protecting ACG from the circumstances leading to her being adjudicating a child in need of care. Thus, this Court finds that, given the totality of the circumstances considered by the Tribal Court, the Tribal Court did have sufficient grounds before it to terminate jurisdiction in the best interest of ACG and did not act erroneously.

Although not preserved on appeal, the Appellant argues that by allowing such an alternative, ACG faces uncertainty and danger should her father become deceased and the Appellee mother once again regain custody. Despite the fact that STC 82.125 (1) is clear that

"[u]nless a miscarriage of justice would result, the Court of Appeals will not consider issues that were not raised before the Tribal Court", and while not germane to this decision, this Court believes such an argument to be disingenuous. The Tribal Court made clear that it was "considering all the facts and circumstances of mom and this child for the rest of her life..." "to serve the best interests of the child." 12/30/2015 Hearing Transcript, p. 10, 13-23. The Tribal Court is in the best position to determine the best interest of the child at the time it enters its orders. Appellant's suggestion that termination of the Appellee Mother's parental rights because of a possibility of uncertainty in the future is neither consistent with the traditional values of Tribe nor the current state of the law. As an Indian community, our children are our most precious asset. Ensuring their safety and upbringing surrounded by family and community is a key to them growing and leading a balanced life. As Indian people we have long since accepted that growth of the mind, body and spirit occurs at a pace set only by the Creator and that individual. It is our traditional way, that caring for a child is a community effort in which grandparents, aunties, uncles, and extended family assume parental roles in a child's life at different times. When there were circumstances where a mother is unable to care for her child, she was not shunned or prevented from having a relationship with her child, rather the community continued to fill the gap until the mother was ready to be a parent. Even if a mother were never able to care for her child, that child would still grow to be strong and healthy knowing her place in the world and who she came from – a concept not contemplated by the Western world. Instead, the Western system of justice deals too frequently with rigid timeframes and unattainable measures that would sever the parent/child relationship unnecessarily. It seems in a quest for certainty that will never be achieved the Appellant has overlooked the differences between the Tribal community and such Western ways. This Court cannot follow suit. Thus, this Court interprets literally, as did the Tribal Court, the mandate of STC 30.501 that termination of parental rights should only be used as a last resort. The Tribal Court was presented with an acceptable alternative and as the law requires terminated its jurisdiction in favor of that alternative.

The Appellant, in his brief, also warns of the dangers of allowing parties to stipulate away the jurisdiction of the Tribal Court once a child has been found to be a child-in-need of care. And while, again, such arguments were not preserved on appeal, it is prudent to address this issue. This Court agrees that such a practice should not be condoned. Once the Tribal Court has exercised jurisdiction, such jurisdiction exists to the exclusion of all others. STC 30.202 and 30.203. However, the example used by the Appellant, without citing specifics, is not the case here. The Tribal Court's knowledge of the Proposed Order as a possibility was no secret as shown through the Tribal Court's reference to "the possibility of resolving this with a custody order for some time." 12/30.2015 Hearing Transcript, p. 9, 24-25 and p. 10, 1. Moreover, such an order was consistent with the current placement arrangements of ACG, and provided permanency for ACG with her natural parent without disrupting the parental bond between mother and child – consistent with the framework of STC Chapter 30.

Turning next to the Proposed Order, STC 30.426(3) provides that "all relevant and material evidence, including oral and written reports, may be received and may be relied on to the extent of their probative value, even though such evidence may not be admissible at trial." While proper procedure would have been for one of the parties to formally admit the Proposed Order into evidence at the December 30, 2015 hearing or for the Tribal Court to have inquired as to whether or not such admission was desired; a review of the transcript makes clear that the Proposed Order was incorporated into whole of the record by the Tribal Court itself. Such incorporation into the record without more constitutes clear error. However, Appellant never objected to the Tribal Court's consideration of the Proposed Order. Thus, coupled with the stated purpose of STC 30.102, and the Preferred Rights of Parents, STC 30.501, the length of time the matter was pending before the Tribal Court, the Tribal Court's knowledge and familiarity with the parties and the family, and the Tribal Court's consideration of the best interest of ACG, any reliance on the Proposed Order to terminate the jurisdiction of the Tribal Court was harmless.

B. Dismissal of Case in Light of a Pending Termination Petition

The Appellant contends that it was error for the Tribal Court to have dismissed jurisdiction in the case while there was a pending Petition to Terminate the Parental Rights. This Court disagrees. As noted previously, termination of parental rights should only be used a last resort. *In Re: TCD*, p. 4 (July 10, 2014).

An alternative existed that would allow the Tribal Court to forgo such termination in the form of a state court custody order. In addition, during oral argument all parties indicated that it was typically the procedure of state court judges not to sign a proposed custody order if there was a pending Tribal Court action. If the Tribal Court matter wasn't dismissed, the state court could not establish jurisdiction over the parties or enter orders related thereto. Second and more importantly, Section 30.429(2) of the Tribe's Code specifically requires at a Permanency Planning Hearing that the Tribal Court "review the status of the child and the progress being made toward the child's return to his natural parents or to some other permanent home." The Proposed Order represented such progress. A finding that ACG could not be returned to the custody of her natural parent was not necessary, nor was it reality as ACG was already residing with her father (and had been for three years) and with the entry of the Proposed Order said arrangement would become permanent. Thus, the reasons giving rise to either the *Petition for Jurisdiction and Removal of the Minor Children, as amended* ceased to exist and the termination of the court's jurisdiction and closure of the matter also properly disposed of the Appellant's pending termination petition.

ORDER

For the foregoing reasons, the Tribal Court's *December 31, 2015 Order Following Permanency Planning Hearing – as to Respondent Mother* is affirmed.

IT IS SO ORDERED.