

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS**

In re J. B.

APP-09-03/04

Decided May 25, 2010

BEFORE: HARPER, KRONK, JUMP, JUSTIN, and NERTOLI Appellate Judges.

ORDER AND OPINION

Kronk, Chief Appellate Judge and Judge Jump in part at Section IV, who are joined by Appellate Judges Harper, Justin and Nertoli. Appellate Judge Justin concurs in the decision, and provides a concurrence below.

This is a consolidated appeal from Judge Charles Palmer's August 20, 2009 order terminating the parental rights of D. B. and T. B., parents of J. B. In their individual Notices of Appeal dated September 17, 2009, both D. B. and T. B. request "reversal of decision and reinstatement of parental rights." The Court grants their request, with the conditions laid forth below.

DISCUSSION

I. Factual and Procedural Background

This case was originally filed as a state court matter, as the Michigan Department of Human Services filed the original petition in the 50th Circuit Court of Michigan. That court took jurisdiction over the child after a preliminary hearing. An order transferring the case was signed on August 30, 2007, and the Sault Ste. Marie Tribe of Chippewa Indians tribal court (tribal court) accepted jurisdiction over this case on October 17, 2007. Before the tribal court accepted jurisdiction, the Honorable Lowell Ulrich for the 50th Circuit removed the child from the care of his parents and placed him in foster care.

On April 14, 2008, the respondents pled responsible to the facts of the petition. Both D. B. and T. B. admitted that the child was born addicted to opiates, and that T. B. has substance abuse issues that impair her ability to parent the child. As a result of these admissions, a case service plan was implemented. On October 15, 2008, the tribal court held a Permanency Planning Hearing, at which time the tribal court determined that the parents were making progress toward reunification and continued the Permanency Planning hearing for 60 days.

However, after a December 10, 2008 Show Cause hearing against T. B. the tribal court determined that she was in Contempt of Court and suspended

her visitation with the child under the date of the adjourned Permanency Planning hearing, December 17, 2008. On December 17, 2008, the tribal court determined that T.B. had not made sufficient progress on the service plan, and authorized the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) to file a termination petition against her. The petition to terminate the parental rights of T.B. was filed on January 9, 2009, and an amended petition was filed on January 14, 2009. The Petition to Terminate Parental Rights alleged violations of Tribal Code Sections 30.504(3), (4), and (9).

The case regarding the parental rights of D.B. continued, and a Permanency Planning hearing was held on March 18, 2009. During the hearing, D.B. admitted his continuing relationship with T.B.. The tribal court determined that no reasonable progress was being made toward reunification, and authorized a petition for the termination of parental rights against the father. A petition to terminate the parental rights of D.B. was filed on March 30, 2009. It alleged violations of Tribal Code Sections 30.504 (3), (8) and (9).

The petitions to terminate the parental rights of D.B. and T.B. to J.B. were consolidated and the tribal court held a trial on July 15, 16 and 20, 2009 regarding the allegations contained within the petitions. On August 20, 2009, the tribal court granted the petitions, terminating the parental rights of D.B. and T.B. to J.B.

This is an appeal of the tribal court's August 20, 2009 decision.

II. 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. In matters involving a finding of fact by the trial court, this Court will review to determine whether the trial court's determination was "clearly erroneous." Tribal Code Section 82.124(1). Additionally, the Tribal Code Sections specific to the review of the termination of parental rights require the application of the "clearly erroneous" standard. 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).

III. Theresa Bowerman

This Court believes that Judge Palmer's August 20, 2009 order correctly identified several bases upon which the parental rights of T.B. may have been legitimately terminated. However, despite these findings, the tribal court's order terminating the parental rights of T.B. is vacated for the following reasons.

This Court is concerned that the procedural due process rights of T.B. were violated in this case in two regards. First, the Court notes that T.B. submitted a request for a new attorney on November 8, 2007, specifically requesting the Mr. Whyte be removed as her attorney as he allegedly “has no faith in the case” and “has recommended to both parents that they terminate their Parental Rights.” Motion for Appointment of New Attorney, CW-07-48 (November 8, 2007). This Court can find no response from the tribal court to T.B.’s request, and the appearance of Mr. Whyte at oral arguments in front of this Court suggests the request was not honored. This Court has failed to find any explanation in the record of why T.B.’s request was not granted.¹ Given the fundamental importance of parental rights, the tribal court’s failure to address T.B.’s request for new counsel constitutes error.

Second, this Court is concerned that the procedural due process rights of T.B., as well as D.B. were violated by the tribal court’s failure to timely file the order terminating parental rights, as discussed below.

IV. Theresa and Dale Bowerman

In addition to the procedural due process concerns raised by the tribal court’s failure to address T.B.’s request for a new attorney, the Court is concerned that the procedural due process rights of both T.B. and D.B. were violated by the tribal court’s failure to timely file an order terminating parental rights. Tribal Code Section 30.511 (1) provides that “[i]f the Tribal court does not issue a decision on the record following the hearing, it **shall** file its decision within twenty-eight (28) days after taking of final proofs.” (emphasis added). As mentioned above, the hearing on the termination petitions ended on July 20, 2009. Accordingly, under the requirements of Tribal Code Section 30.511(1), the tribal court’s final decision should have been issued on August 17, 2009. However, the tribal court’s final decision was not issued until August 20, 2009. If this had been the sole procedural error in this case, this Court may decline to vacate the tribal court’s decision on the basis of this error. However, given the other concerns raised in this opinion, this Court believes that the tribal court’s failure to follow the mandatory requirements of Tribal Code Section 30.511 (1) in issuing its final order is a factor supporting vacating the tribal court’s decision terminating the parental rights of T.B. and D.B.

Furthermore, the delays in the processing of this case were unacceptable. There were six months between acceptance of this case and entry of a plea. Tribal Code Section 30.425 requires that an Adjudicatory Hearing be held within 65 days after filing of a petition with the court. This requirement, as well as other timeliness requirements of the Code, serves to ensure that the purposes of the Code, as enumerated in Tribal Code

¹ This Court may consider issues not raised in front of the tribal court, such as the failure to respond to T.B.’s request for alternative counsel, if a “miscarriage of justice” would result from failure to consider the matter. Tribal Code Section 82.125(1). The Court finds that a miscarriage of justice would result if T.B.’s request for new counsel were not taken into consideration

Section 30.102 are met. While all parties stipulated to waive the 65 day requirement, a full six month delay is in direct conflict with the purpose the Code. This conclusion is supported by the fact that the one enumerated time period for a delay under Tribal Code Section 30.425 is 14 days. Tribal Code Section 30.425(3)(d). This suggests that, while delays under Tribal Code Section 30.425 are allowable under extreme circumstances, such delays should be limited to be consistent with Tribal Code Section 30.102.

Additionally, Tribal Code Section 30.429 requires that a Permanency Planning Hearing be held not more than twelve months after removal, wherein the focus of the Court intervention changes from working with parents to ensure reunification to focusing on permanency for the child, which may not include reunification with the parent. A delay in adjudication effectively reduces the twelve month period by the length of delay. In the case at hand, the parents were only allowed six months of court review and reinforcement prior to entering the permanency planning stage.

In addition to procedural concerns raised above, the tribal court did not exhaust all potential options to avoid termination of parental rights, which is to be a "last resort". According to Tribal Code Section 30.501, "[t]ermination 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." As *J. B.*'s Guardian Ad Litem notes in her brief to this Court, it was the Guardian Ad Litem's recommendation to the tribal court during the termination hearing that *T. B.* and *D. B.* be given additional time to prove their ability to properly and safely care for their child. Response Brief by Guardian Ad Litem on Behalf of Minor Child, APP-09-03/04, 20 (Feb. 17, 2010). The tribal court's August 20, 2009 order terminating the parental rights of *T. B.* and *D. B.* does not address this recommendation from the Guardian Ad Litem. Because the tribal court failed to address a less severe alternative proposed by the Guardian Ad Litem to termination of parental rights, which is to be used only as a last resort, the tribal court did not comply with Tribal Code Section 30.501 when it terminated the parental rights of *T. B.* and *D. B.*

This Court's conclusion that the tribal court's order terminating the parental rights of *T. B.* and *D. B.* be vacated should not be seen, however, as implicit support for the parenting ability of these individuals. The Court is very concerned regarding their ability to successfully and safely parent the child. Additionally, the Court notes that *Matter of Parshall*, 159 Mich. App. 683 (1987) is good case law. Even if *D. B.* is capable of parenting his son, his parental rights should be terminated if he continues to permit an environment where his son will likely suffer because of *T. B.* Therefore, although this Court vacates the tribal court order terminating the parental rights of *T. B.* and *D. B.* the tribal court is to maintain jurisdiction over this matter. If *T. B.* and *D. B.* are unable to come into compliance with the requirements and time table dictated below, this Court sees no reason at this time not to terminate their parental rights in six months time.

CONCLUSION AND ORDER

For the reasons articulated above, the tribal court's August 20, 2009 order terminating the parental rights of T.B. and D.B. to J.B. is hereby vacated.

However, the tribal court is to maintain jurisdiction over this matter and custody over J.B. is not to be returned to T.B. and D.B. at this time.

ACFS is ordered to create an updated service plan within 15 business days of the issuance of this order for T.B. and D.B. in relation to their parenting of J.B. ACFS is ordered to assign T.B. and D.B. a new service worker. This matter is to be a priority for both ACFS and the tribal court.

T.B. and D.B. have a maximum of 180 calendar days to perform the updated service plan. Following the completion of the 180 days, ACFS shall have 15 business days to make and submit a recommendation to the tribal court regarding the parental rights of T.B. and D.B. to J.B. Notably, ACFS is not required to give D.B. and T.B. the full 180 day period; if ACFS determines J.B. is at risk while in the care of D.B. and T.B., a shorter time period would be appropriate. If ACFS recommends termination of parental rights, the recommendation shall receive expedited review from the tribal court. Failure to comply with the terms of this order shall be viewed as contempt of court.

It is SO ORDERED.