SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

In RE: L.C., J.G., and L.G.

APP-13-03

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 reinstitutes the previously established Service Plan for a period of 90 days.

OPINION

Procedural History

On April 13, 2012, the tribal court accepted this matter by issuing an *Order Accepting Transfer of Jurisdiction*. On May 11, 2012, an amended petition for the emergency removal of the children was filed. On June 5, 2012, the tribal court found that sufficient evidence had been received to determine that the children met the "child in need of care" requirements under Tribal Code Section 30.311. On June 26, 2012, the tribal court issued an *Order of Disposition* ordering Appellant to comply with an Initial Service Plan dated April 4, 2012. In an *Order Following Dispositional Review* dated September 20, 2012, the tribal court found that some progress had been made toward reunification and ordered the parties to comply with the most recent service plan. In a February 28, 2013 *Order Following Permanency Planning Hearing*, the tribal court found that the permanent goal of reunification was still appropriate, that some progress had been made, that termination of parental rights was not in the child's best interests, and that the children should continue in foster care. In an April 11, 2013 *Order Following Permanency Planning Hearing*, the tribal court continued to find that progress had been made toward reunification, that termination of parental rights clearly was not in the children's best interests, and continued foster care for 45 days. In a May 16, 2013 *Order Following Permanency Planning Hearing*, the tribal court continued its previous findings and orders. In a July 8, 2013 *Order Following Permanency Planning Hearing*, the tribal court found that progress had been made toward reunification. In a September 5, 2013 *Order Following Permanency Planning Hearing*, the tribal court found that progress had not been made toward reunification and that the agency should initiate proceedings to terminate Appellant's parental rights. On September 18, 2013, a petition was filed to terminate Appellant's parental rights. On October 23, 2013 and November 1, 2013, the tribal court held trial on the petition to terminate Appellant's parental rights. On November 27, 2013, the tribal court entered an *Opinion and Order* terminating Appellant's parental rights. *In the Matter of: LC, JG, and LG,* CW 12-23, 24, 25 (November 27, 2013).

Notably, throughout the above proceedings, Appellant had several different attorneys assigned to her. On December 12, 2012, the tribal court issued an *Order of Substitution* substituting Alexis Lambros for James Lambros as Appellant's attorney. On February 11, 2013, the tribal court issued an *Order of Substitution*, substituting Monica Lubiarz-Quigley for Alexis Lambros as attorney for Appellant. On August 13, 2013, the tribal court issued an *Order of Substitution*, substituting Charles Malette for Monica Lubiarz-Quigley as Appellant's attorney.

Appellant filed a notice of appeal to this Court on December 12, 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 supplemental brief on June 2, 2014. Appellant submitted her supplemental brief on June 9, 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 November 27, 2013

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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."

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, and that the children had been in foster care for 15 of the most recent 22 months is not addresses below. Tribal Code Sections 30.504(3), (4), (9).[2]

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 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 the children here must be considered in this case. In regard to the best interests of the children here, the tribal court concluded that:

> Based primarily on the fact that [Appellant] failed to demonstrate a commitment to her children and working her case service plan throughout this case, the Court does not find that termination is clearly not in the children's best interests. … Regarding a bond between [Appellant] and her children, the record indicates that the children are happy to see her when they were visiting and that [Appellant] is an appropriate parent during visits. However, the bond between parent and child may be outweighed by the child's need for stability and permanency. *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008). [Appellant] simply has not demonstrated that she can provide the stability and permanency her children have the right to. … There was no evidence provided to the Court that [Appellant] could provide stability and permanency to her children in the long-term.

In the Matter of: LC, JG, and LG, CW 12-23, 24, 25, pp. 23-24 (November 27, 2013). Based on the foregoing, it would appear that the tribal court based its opinion regarding the best interests of the children at issue here on two findings: 1) Appellant failed to substantially comply with the applicable service plan; and 2) Appellant is incapable of providing stability and permanency for her children. Although overlapping, each of these conclusions will be discussed below.

Compliance with Service Plan

As to the tribal court's first finding in terms of the children's best interest, at the time of trial on October 23, 2013, Appellant was making progress on her service plan. Evidence of this progress is clear from the testimony of the caseworker assigned to Appellant and her children, as exemplified by the following exchange between the caseworker and the Appellant's attorney.

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[2] Notably, however, the tribal court's decisions related to the first step are relevant to the second step, best interest analysis and therefore may be examined from that perspective.

Question: So the goals that she had when she entered when she entered treatment are the same goals that are outstanding, she hasn't completed any goals?
Answer: She's made progress, has she completed them? No. ....
Question: Can you describe for the Court the progress that she's made?
Answer: Well if I go back to the first goal, to live a clean and sober lifestyle. When [Appellant] entered treatment in February she reported that she was drinking several times a week. She was not employed, she did not have housing, she was in a relationship that was volatile. ... Since then she did obtain employment. ....
Answer: She obtained housing ... she has a two bedroom apartment there. She admits to her relapses that she did have but her drinking, is considerably less and non existent at this point per her report, than it was when she into treatment, so I consider that progress. ...

[There is testimony that Appellant reported that she had not drank since August 12, 2013.]

Question: Has she been attending any outpatient therapy?
Answer: She has attended, she's been scheduled for thirty two appointments since February, and she's attended twenty two of those appointments. So her average is about seventy percent attendance.
Question: Okay. And then it also says that [Appellant] will develop a recovery plan, has that happened?
Answer: Yes she did.
Question: And I'm assuming part of that recovery plan was to develop the relapse prevention plan and has she done those planning goals?
Answer: Yes ...

Question: How has she done anything to progress in that goal?
Answer: What we worked on was identifying some of the triggers that trigger her depression, also taking a look at her childhood and some of the trauma and abuse that she had has a child. In coming to some form of acceptance I guess with that. And really, her mood is much improved from the time that she initially came in. She's generally happy when she comes in for her sessions now. She's also found ways to deal with stress, she's doing some arts and crafts projects at home, she always is doing different household repair type things, painting, or cleaning, turning on music, and trying to lift her mood, things like that.

In the Matter of: LC, JG, LG, CW 12-23, 24, 25, Transcript of October 23, 2013 trial, pp. 67-69.

At the time of trial, the six goals of Appellant's service plan were: 1) provide a safe nurturing environment for her children; 2) maintain a positive relationship with ACFS staff; 3) address any

substance abuse issues affecting herself and her parenting; 5)[3] address any mental health issues affecting herself and the way she cares for her children; 6) address domestic violence issues affecting herself and the way she cares for her children; and, 7) address physical health issues affecting herself and the way she cares for her children. *In the Matter of: LC, JG, and LG,* CW 12-23, 24, 25, pp. 9-10 (November 27, 2013).

The testimony at trial demonstrates that Appellant complied with several aspects of the applicable service plan, as, at the time of trial, she had secured employment, housing, maintained her sobriety for a significant period of time, developed a recovery plan and made improvements in her mental health. In other words, the testimony at trial demonstrated that Appellant was making progress on goals 1, 3, and 5 at the very least. Furthermore, as Appellant stated in her supplemental brief, there was also evidence at the trial that she was in a relationship completely devoid of any domestic violence at the time of trial. *In RE: LC, JG, and LG*, APP 13-03, Reply Brief for Appellant, 4 (June 9, 2014). Therefore, at the time of trial, Appellant was also making progress on goal 6. In short, the record demonstrates that Appellant was making progress on her service plan at the time of the trial on October 23, 2013 and November 1, 2013.

The tribal court's November 27, 2013 order and opinion also found that there was testimony that Appellant "has made progress on her behavioral health goals in that she has admitted she has an alcohol program, was employed, had housing, and was drinking less per self-report." *In the Matter of: LC, JG, and LG,* CW 12-23, 24, 25, pp. 13 (November 27, 2013). With regard to Appellant's housing, the tribal court acknowledged that "[according] to the workers in this case, this home is appropriate and clean." *Id.* at 15.[4] Furthermore, the tribal court determined that Appellant "has been more consistent with attending her visits as the case has progressed. … [two witnesses] testified that [Appellant] was appropriate the majority of the time during her visits with the children." *Id.* at 17. The record and the tribal court's opinion therefore support the conclusion that Appellant was making progress on, at the very least, the majority of her service plan goals at the time of trial. Prior to its September 5, 2013 *Order Following Permanency Planning Hearing*, the tribal court had found five times that Appellant was making progress on her service plan. The record, however, suggests that she was doing even better at the time of trial than prior permanency planning hearings in terms of progressing on her service plan goals, yet the tribal court ordered termination. It is unclear from the record why this occurred.

Given the foregoing, the Court "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). This conclusion is buttressed by Tribal Code Section 30.503(a), which requires that the proofs offered to establish the factual basis of parental unfitness sufficient to warrant termination be clear and convincing. Based on the record in this case, the Court concludes that the proofs at trial were not clear and convincing. Therefore, the Court rejects the

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[3] As noted in the tribal court's November 27, 2013 opinion and order, the service plan did not have a number 4 goal, jumping from the 3rd goal to the 5th goal. *In the Matter of: LC, JG, and LG,* CW 12-23, 24, 25, n. 1 (November 27, 2013)

[4] The tribal court went on to speculate about Appellant's ability to maintain possession of her apartment in the future, but, at the time of the trial, it is uncontested that she had appropriate housing.

tribal court's finding that termination was in the best interest of the children because Appellant failed to comply with the applicable service plan.

It appears here that the tribal court conflated step one, the fact finding step, of Tribal Code Section 30.503 with the step two, best interest step. This is because the tribal court concluded that because the Appellant had allegedly not complied with her service plan (step one), termination was in the best interest of the children (step two). Clearly, given there are two independent steps, Tribal Code Section 30.503 requires that separate criteria apply to the first and second step. Accordingly, the Court rejects the proposition that a positive finding on the first, fact finding step would ever automatically result in a finding that termination was in the best interest of the children (i.e. the second step).

Stability and Permanency

Second, the tribal court also bases its conclusion that termination is not against the best interests of the children here because Appellant is incapable of providing stability and permanency for them. In reaching this conclusion, the tribal court acknowledged that a bond exists between Appellant and her children, but "the bond between parent and child may be outweighed by the child's need for stability and permanency." *In the Matter of: LC, JG, and LG,* CW 12-23, 24, 25, pp. 23 (November 27, 2013) (citing *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008)). As explained by Appellant, however, in her supplemental reply brief, reliance on *In re LE* is misplaced for three reasons: 1) the parent at issue in that case had been an alcoholic and drug addict (crack cocaine, powder cocaine, and marijuana) for twenty years suggesting more serious problems than those present in this case AND the parent had no housing and had dropped out of therapy; 2) the parent was allotted 23 months between the termination petitions; and, 3) the parent was still granted an additional 6 months to complete her service plan. *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008) therefore stands for the proposition that stability and permanency may be in the best interests of the children but only where substantial problems exist and the parent has been given every opportunity to correct the deficiency.

In its supplemental brief on the role permanency plays in the second best interest step, Appellee argued that *Castorr v. Brundage*, 459 U.S. 928 (1982) stands for the proposition that finality is compelling. However, as Appellant's reply brief points out, the United States Court of Appeals for the Sixth Circuit held below (and the Supreme Court did not address the merits of the Sixth Circuit's decision) that "the preference for finality might be outweighed by more compelling considerations." *In RE: LC, JG, and LG*, APP 13-03, Reply Brief for Appellant, 1 (June 9, 2014) (citation omitted).

The other cases cited by Appellee in its supplemental brief may also be distinguished. In *In re Dahms*, 187 Mich App 644, 645 (1991), the record showed that the parent would need at least 2 to 3 years to meet the children's needs. There is nothing in the record here suggesting that Appellant would need such a substantial time to come into compliance with her service record, especially in light of the progress made at the time of trial. In *In re Foster*, 185 Mich App 630, 632 (2009), the parent was given 10 years of services, which is a substantially longer time period than given to Appellant. In *In re VanDalen*, 293 Mich App 120, 141 (2011), parental rights were

terminated in large part because of potential physical abuse to the children at issue if they were returned. Here, there is no allegation that Appellant would abuse her children. In *In re BZ*, 264 Mich App 286, 300 (2005), parental rights were terminated when the parent did not visit with the children or make progress on the service plan. Here, to the contrary, Appellant has visited her children and made progress on her service plan. In *In re Utrera*, 281 Mich App 1, 5 (2008), before terminating the parent's rights, the court determined that no bond existed between the parent and child. Here, as the tribal court itself acknowledged, a bond does exist between Appellant and her children. In sum, the case law does not support an assertion that permanency and stability should always outweigh other factors when considering the best interests of the child.

Moreover, there is no evidence in the record as to what is in the best interest of the specific children in this case.

In the absence of controlling legal precedent and a developed factual record, it is helpful to examine tribal law for guidance. 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 discusses neither of these Tribal Code Sections nor how the preference for family unity should be balanced against the alleged need for permanence.

Next, Tribal Code Section 81.105(2) allows for the consideration of tribal law, and therefore it may be helpful to consider the decisions of other tribal nations. Appellee included in its supplemental 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).[5] This case has an interesting procedural posture as the court considered 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

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

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 there 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.

It should also be noted that the Tribe and the 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, the children's connection to their Tribe and family certainly impact the analysis of what constitutes their best interest.

For these reasons, the Court "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). The tribal court's sole reliance on *In re LE*, 278 Mich App 1, 29-30; 747 NW2d 883 (2008) is misplaced. Furthermore, the tribal court failed to consider how Appellant's bond with her children in conjunction with the requirements of Tribal Code Sections 30.102 and 30.501 weighed against the children's need for permanence. And, finally, there is nothing in the factual record below to suggest that terminating Appellant's parental rights was in the best interest of the children involved. For these reasons, the tribal court's conclusion was clearly erroneous.

Inconsistency of Representation

The Court's decision here is also buttressed by the fact that Appellant had a least four different attorneys during the course of this case before appeal. There was some suggestion at oral argument in front of this Court that part of Appellant's difficulty in complying with the applicable service plan was because information was not clearly conveyed to her as a result of the high attorney turnover in the case. Accordingly, such inconsistency combined with the Tribal Code's preference against termination suggests that Appellant should be given more time to come into compliance with the service plan.

ORDER

For the reasons explained above, the tribal court's decision to terminate Appellant's parental rights is reversed. This case is remanded to the tribal court for management consistent with this opinion and order. The previous service plan, referenced at page 5 of the tribal court's

November 27, 2013, decision should be reinstituted, unless the agency believes modification is necessary given the lapse in time.

However, Appellant should only be given 90 days to make substantial progress on the service plan. In other words, Appellant has 90 days to make substantial progress toward stable housing, employment, and mental and physical health. If the tribal court or agency determines that Appellant is violating her service plan in any way during the 90 day period, the agency does not have to wait for expiration of the 90 day period to renew the termination petition. Rather, if Appellant fails to comply, the termination petition may be renewed immediately. If, however, Appellant makes substantial progress on the service plan then the family should be allowed to progress toward reunification at the pace deemed appropriate by the tribal court.

It is SO ORDERED.