SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

IN THE MATTER OF R.W., a minor
D.O.B. 10/15/2015
APP-19-02

Decided January 31, 2020

BEFORE: CORBIERE, DIETZ, FELEPPA, JUMP and WICHTMAN, Appellate Judges.

ORDER AFFIRMING TRIBAL COURT DECISION

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

This appeal arises from that Permanency Planning Hearing held pursuant to STC 30.429 commencing on March 19, 2019 and continued on May 2, 2019 and the *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019* and entered on May 6, 2019 approving a permanency goal change to permanent guardianship with RW's maternal grandmother filed by the Appellant Father.

For the reasons spelled out below, the *Order Following Continued Permanency Planning Review Hearing dated May 6, 2019* is affirmed.

Facts and Procedural History

The procedural history of this case dates back to approximately July 2017 which included the filing of a *Petition to Terminate Parental Rights* of both parents dated November 8, 2017 followed by an *Order of Dismissal of Petition to Terminate Parental Rights* of both parents dated December 6, 2017 followed by an *Order of Disposition* dated January 31, 2018 and a series of Dispositional Review Hearings and Permanency Planning Review Hearings with orders dated April 25, 2018, June 20, 2018, August 1, 2018, October 31, 2018, January 8, 2019, March 19, 2019 and May 3, 2019. RW, a minor child, has remained under the care and supervision of the Michigan Department of Health and Human Services since June 2017 – just shy of 24 months. (March 19, 2019 Hearing Transcript, p. 10). RW has been continuously placed with his maternal grandmother. (Id.). RW's mother is currently serving an 18-month prison sentence and RW's father was scheduled to be released from prison in October 2019 where he had been since the petition arose. (March 13, 2019 Hearing Transcript., pp. 8-9; May 2, 2019 Hearing Transcript, p. 6).

At the Permanency Planning hearing on March 19, 2019, duly noticed with all parties represented by counsel, respondent mother in courtroom, and respondent father appearing by video, Anishinaabek Community and Family Services ("ACFS") recommended a permanency planning goal change for RW to a full guardianship with the current placement. (March 19, 2019 Hearing Transcript, p. 10). The Appellee/ACFS introduced into evidence a Court Summary dated March 13, 2019 and elicited testimony from ACFS Worker Heather Pavlat ("ACFS Worker"). (Id., pp. 3-4). The ACFS Worker testified that RW is doing well in his current placement with his maternal grandmother and younger brother and recommended a full guardianship given the unavailability of both parents due to incarceration. (Id., p. 4-5, 8). There was some uncertainty by all parties as to Appellant Father's release date and post-release requirements. (Id., pp. 8, 11, 15-17). There was also discussion by the parties as to the type of guardianship being requested - a permanent or limited guardianship. (Id., p. 10, 12-13, 17-24). The Guardian Ad Litem requested that the Court follow the Appellee ACFS's recommendation for full guardianship. (Id., p. 17-18). The mother's attorney also agreed that "a guardianship would be the best way for [RW] to continue where he is at, what he's been doing and allow him to have the best ability possible." (Id., pp. 19-20). The Appellant Father's attorney urged "the Court to deny the request for a permanent guardianship." (Id., p. 21). In order to allow the parties to more clearly articulate the type of guardianship being requested, the Tribal Court continued the Permanency Planning hearing until April 17, 2019 but discussed with the parties her intent to consider "either a limited or full guardianship for [RW]." (Id., p. 24; see also *Order Following Permanency Planning Review Hearing dated March 19, 2019*).

Between March 19, 2019 and April 16, 2019, RW's mother's attorney was released from representation and a substitution of attorney occurred which led to adjournment of the continued Permanency Planning hearing scheduled for April 17, 2019 to May 2, 2019. (*Order of Substitution of Attorney dated April 16, 2019; Order of Adjournment dated April 16, 2019*).

At the duly noticed May 2, 2019 hearing with all parties represented by counsel and again present at the hearing, the Appellee ACFS introduced into evidence an *Update to Court for Hearing dated 4/17/19*. (May 2, 2019 Hearing Transcript, p. 4). The Appellee ACFS recommended a permanent guardianship. (Id., p. 4.) The *Update to Court for Hearing dated 4/17/19* indicated the Child Welfare Committee's support for a permanent guardianship. No other party, including the Appellant admitted any exhibits into evidence at the May 2, 2019 hearing. (5/2/2019 Hearing Transcript, *generally.)* At the hearing Appellee/ACFS informed the Court that the mother was in agreement with a permanent guardianship. (Id., p. 4). The Guardian Ad Litem discussed the permanent guardianship with the foster mother (maternal grandmother) who was also in agreement and he advocated for a permanent guardianship on behalf of RW. (Id., p. 7). The Appellee ACFS indicated that several attempts were made to contact the Appellant Father in prison to discuss permanent guardianship but were unsuccessful reaching him. (Id., p. 6.) Attorney for Appellant Father informed the Tribal Court that she had corresponded with him but did not discuss the permanent guardianship. (Id., p. 5-6). The

Appellant Father's attorney again objected to a permanent guardianship arguing that a permanent guardianship "would effectively cut off the rights to his child." (Id., p. 7). At the conclusion of the hearing, the Tribal Court addressed the parties noting there was still no definite release date for the Appellant Father, the continuing concern stemming from domestic violence between the Appellant Father and the mother which led to his current incarceration, and discussed the appropriateness for permanency for RW pursuant to the Code. (Id., p.8.). The Tribal Court also noted the cooperation of the maternal grandmother regarding visitation with the mother as well as the paternal grandmother. (Id., p. 9). The Tribal Court also noted that there had been no indication that such cooperation would not continue and any issues can be addressed by the Tribal Court should they arise. (Id.) The Tribal Court then ordered the permanency goal change to a permanent guardianship and directed that it take place as soon as possible. (Id.)

On May 6, 2019, the Tribal Court entered an *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019* changing the permanency goal to permanent guardianship of RW with his maternal grandmother. The May 6, 2019 Order further ordered supervised parenting time with both the mother and the father as well as set the date for the next Permanency Planning Review Hearing for August 7, 2019.

On May 24, 2019, Appellant Father filed a Notice of Appeal from the Tribal Court's *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019*. (*Appellant's Notice of Appeal dated May 24, 2019).* In the Notice of Appeal, the Appellant Father, relying on United States Supreme Court case law, argues that the Tribal Court's May 6, 2019 Order "denied [the Appellant Father] his due process rights inasmuch as he was not given an opportunity to participate fully in a Case Service Plan as he had been incarcerated by th[e] [Tribal] Court for a matter not attributable to this Child Welfare case.

On September 26, 2019, this Court heard oral argument on Appellant's appeal. Appellant Father and Appellee ACFS were both 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 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). 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

This appeal raises a fundamental question related to due process rights of the Appellant Father as well as a question related to the occurrence of judicial error when the Tribal Court ordered the permanency goal change from reunification to a permanent guardianship. While these questions are rightfully ones within this Court's discretion to review, an underlying question related to jurisdiction, in the first instance, troubled this panel. An appeal is properly before this Court if it is a final decision of the Tribal Court. STC § 82.111 (1). Neither Chapter 82, from where this Court's jurisdiction arises, nor Chapter 30 delineates what constitutes a "final decision" of the Tribal Court. A review of this Court's past decisions as well as the Sault Ste. Marie Tribal Court Rules of Court, likewise, do not provide clarity. *See* STC Chapter 82, Chapter 30 and Sault Ste. Marie Tribe of Chippewa Indians Rules of Court, respectively. A review of Federal and Michigan case law on the question presents a myriad of makeshift multi-part tests; however one constant emerges, a "final decision" or "final order" is consistently defined as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all parties…." See MCR 7.202. We note that at least once before the legal doctrine of "ripeness" has been addressed by this Court finding that "[r]ipeness is a justiciability doctrine designed to prevent courts, through premature adjudication, from entangling themselves in abstract disagreements. Ripeness becomes an issue when a case is based in future events that may not occur as anticipated or at all." (*Michael Jay Lumsden v. Sault Ste. Marie Tribe if Chippewa Indians' Election Committee*, APP-16-03, p. 2, citing *Ky. Press Ass'n Inc. v. Ky.*, 454 F.3d 505, 509 (6th Cir. 2006). It follows then, that this Court and the issues raised on appeal are foreshadowed by the question of whether or not a decision arising from a permanency planning hearing in which subsequent hearings are contemplated that will include the adjudication of the rights of the parties – including the Appellant Father - such as parenting time, is indeed a final decision of the Tribal Court as contemplated by STC § 82.111 (1). While such a proceeding and the following order of the Tribal Court could constitute a final order where the Tribal Court terminates its jurisdiction over the matter, that is simply not the case. Indeed, with matters yet to be decided by the Tribal Court, the May 6, 2019 *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019* is not a final decision of the Tribal Court. To find otherwise would be to render each and every permanency goal change appealable when in fact the Tribal Court has retained jurisdiction and the rights of the parties have hardly been fully adjudicated. This Court recognizes the limits of its discretion as provided by STC, Chapter 82 and finds that the appeal of the Appellant Father presents a ripeness issue that cannot be

overcome due to the Tribal Court's continuing jurisdiction and the likelihood of subsequent Tribal Court orders.

Notwithstanding, the aforementioned ripeness issue, the Appellant Father, in his briefing and at oral argument, argues that "parents are entitled to procedural due process in determining whether they are unfit and unable to maintain care and custody of their children." (Appellant's Brief, p. 2). The Appellant Father further argues that a permanent guardianship is a severing of that right. (Id.) The Appellant Father urges this Court to find that an order such as the Tribal Court's May 6, 2019 *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019* affects his relationship with his child so much that it amounts to a liberty interest that is protected by due process. (Id.) STC § 82.111 (3) allows this Court to hear matters arising from "an order affecting a substantial right and which determines the action and prevents a judgment from which an appeal might be made." At oral argument and in his brief, the Appellant Father relied on *Moore v. East Cleveland*, 431 US 494 (1977); *Troxel v. Granville*, 530 US 57 (2000); and *Santosky v. Kramer*, 455 US 745, 753-753 (1982) to emphasize his "liberty interest" argument. The Appellant Father's reference to *Troxel v. Granville*, 530 U.S. 57 (2000), is unpersuasive to this Court in that the holding in *Troxell* has no bearing on the instant matter. *Troxel* was derived out of a child custody matter and visitation. *Troxel*, 530 U.S. at 68. This is a child protection matter not a custody or visitation matter, does not involve visitation nor any parental decisions related thereto. Indeed, the sole issue in *Troxel* was whether the State of Washington law that "permits 'any person" to petition a court for visitation at 'any time'" violates a parent's due process right to make decisions concerning the care and custody of their children. *Troxel*, 530 U.S. at 63. Similarly, the Appellant Father's reliance on *Moore* is misplaced in the context of a child welfare proceeding. *Moore* was a public housing matter that challenged a housing ordinance permitting only a few categories of related individuals to live together as a "family," and under which it was a crime for grandmother to have grandson living with her. In analyzing the substantive due process issues raised by the ordinance, the US Supreme Court held that the ordinance could not be justified as the means of preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burden on city's school system. *Moore*, at 496.

In enacting the Child Welfare Code, the Sault Tribe Board of Directors took great measures to secure the rights of parents, custodians, and guardians. STC § 30.102. As correctly argued by the Appellant Father, inherent in these rights is the fundamental liberty interest of a natural parent to raise their child. Unlike *Troxell* and *Moore*, *Santosky* is informative in the instant matter. *Santosky* was a child protection matter in which the evidentiary standard necessary to support termination of parental rights was challenged. In *Santoksy*, the United States Supreme Court held that held that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence not a mere preponderance. *Santosky* 746. In their infinite wisdom, the Sault Tribe Board of Directors ensured that STC § 30.504 likewise requires

a higher evidentiary burden before terminating parental rights. But this is not a termination case. In fact, very soon after the start of the case, a Petition to Terminate Parental Rights was filed but the Court found the petitioner was either unable to show a statutory basis by clear and convincing evidence or that termination was in the child's best interests. (December 6, 2017 *Order of Dismissal of Petition to Terminate Parental Rights).* Moreover, a permanent guardianship does not "completely and irrevocably sever the rights of the parents in their natural child" as was the case in *Santosky*. Indeed, a permanent guardianship is the very remedy contemplated by this Court in *In Re: TCD,* APP-13-02 (July 10, 2014) to avoid such a harsh remedy. The Appellant Father acknowledges the authority of the Tribal Court "to issue an order directing the agency to pursue a permanent guardianship" but argues that the Tribal Court is required to conduct a hearing and make findings pursuant to STC§ 30.429. (Appellant's Brief, p 2). Seemingly, to support the due process violation claim, the Appellant Father's counsel points to the failures of Appellee ACFS to present substantial risk of harm and argues that Court did not address the existence of alternatives to the permanent guardianship. (Id.) This Court disagrees.

A review of the hearing transcripts on March 19, 2019 and May 2, 2019 and the documents included in the Notice of Preparation submitted to this Court constituting the Appellate Record, reflects that: (1) at all times the Appellant Father was represented by Counsel; (2) that all hearings were duly noticed and that Appellant Father was provided with accommodations to appear from prison when he was able; (3) the Appellee ACFS submitted both evidence and testimony related to the Appellant Father's ability to participate in the case service plan, his participation in the case service plan to the best of his ability and his communication efforts with both ACFS and RW; (4) at the time of both hearings there was no clarity as to when the Appellant Father would be released from prison or where he would reside once release occurred; (5) at review hearings on April 25, 2018, June 20, 2018, August 1, 2018, January 1, 2019, and May 3, 2019 the Court made findings that respondent father made only *minimal* progress towards alleviating or mitigating conditions that caused the child to be found a child-in-need-of-care; (6) this matter had been pending for almost 24 months; (7) termination was not a contemplated permanency option due to the success of the mother; and (8) all parties except the Appellant Father agreed that it was in the best interest of RW to provide permanency ending Court intervention with this family through a permanent guardianship with the maternal grandmother.

Equally important, STC § 30.102 makes clear that the purpose of the Child Welfare Code, including STC § 30.804 which delineates the powers and duties of the guardian, must be interpreted in a manner that comports with the purpose of Chapter 30. Therefore, to the extent the Tribal Court retains jurisdiction over any matter related "to the guardianship that may be instituted by an interested person" this would include any matter instituted by the Appellant Father who would have standing as a biological parent under STC §30.804(d). In addition, the Tribal Court was clear that the guardianship would allow for visitation and a continued relationship with RW for both parents. (May 2, 2019 Hearing Transcript, p. 9). As a Court

speaks through its written orders, the record also clearly reflects that the Tribal Court would fashion additional orders to ensure the Appellant Father's relationship with RW would continue.

Based on the record, we find no clear error committed by the Tribal Court when it ordered the permanency goal change. The Tribal Court received and reviewed the evidence present, made sufficient findings on the record and the Appellant Father was afforded the due process that he was entitled at this stage in the proceeding.

ORDER

Because the May 6, 2019 *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019* was not a final decision being rendered by the Tribal Court "dispos[ing] of all the claims and adjudicate[ing] the rights and liabilities of all parties" (citation omitted) and because the Appellant Father's parental rights have not been "completely and irrevocably severed" by "an order affecting a substantial right and which determines the action and prevents judgment from which an appeal might be made" violating due process , this Court affirms the May 6, 2019 *Order Following Continued Permanency Planning Review Hearing dated May 3, 2019*.

IT IS SO ORDERED.