

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

In the Matter of JK.

APP-06-02

Decided January 9, 2009

BEFORE: HARPER, KRONK, NOLAN, and WEISS, Appellate Judges.

ORDER AND OPINION

Weiss, Appellate Judge, who is joined by Appellate Judges Harper and Kronk.

This case is appealed from the Sault Ste. Marie Chippewa Tribal Court, CW 04-10, requesting review of an Order dated January 31, 2006 terminating the parental rights of KK "Mother") to her biological daughter, JK ("the Child"). Oral arguments were heard in this matter on August 15, 2008 by this Court, as to the statutory ground(s) for termination of Mother's rights and the best interests determination, and this Opinion and Order now issues.

SUMMARY OF CASE

On October 31, 2003, Chippewa County Circuit Court – Family Division received a petition alleging sexual abuse of Child. Mother cooperated with services and protected Child from the alleged perpetrator, RB ("B").

On February 19, 2004, a second petition was filed with the Chippewa County Family Division, alleging that Mother continued to have contact with B. The case was transferred to the Sault Ste. Marie Chippewa Tribal Court ("Tribal Court") for further proceedings. The Tribal Court held a dispositional hearing on June 16th and 17th, 2004, at which time the request for termination of Mother's rights was denied. The Tribal Court found that Mother had not received remedial services prior to the request for termination, and ordered that services be provided as part of a case service plan.

Mother completed several services included in the case service plan. She complied with a parenting program, completed a substance abuse program, and took prescribed medication for a mental health condition. She did not, however, demonstrate that she was able to provide proper care for Child, who was residing with her biological father ("Father").

A Permanency Planning Hearing was held on August 3, 2005. The Tribal Court found that returning Child to Mother would cause a substantial risk of harm to Child because of Mother's mental health condition and failure to accept responsibility for the earlier abuse of the Child. The Court did not pursue termination of Mother's rights,

however; instead, it awarded custody of Child to Father, and set another Permanency Planning Hearing (“PPH”) in six months.

Prior to the next PPH, Mother was found to have had contact with B again. Both Mother and B were in a care, intoxicated, and B was arrested for driving while impaired. Mother was escorted home. Shortly after that incident, ACFS and the Tribal Prosecutor filed the most recent Petition requesting termination of Mother’s rights.

The Tribal Court heard oral arguments on the Petition, which requested termination pursuant to Tribal Code 30.504(3), which states:

The Tribal Court may terminate the parental rights of a parent to a child adjudicated a child-in-need-of-care if the Tribal Court finds, by clear and convincing evidence, one or more of the following:

...

[3] Unrectified Conditions: The parent was a respondent in a proceeding brought under this chapter, twelve (12) or more months have elapsed since the issuance of an initial dispositional order or removal of the child, and the Tribal Court, by clear and convincing evidence finds either of the following:

- (a) The conditions that led [to] the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child; or
- (b) Other conditions exist that cause the child to be a child-in-need-of-care. The parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice, a hearing, and been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

On January 31, 2006, the Tribal Court issued its Opinion and Order terminating Mother’s parental rights to Child. The Court held that Mother was a respondent in the case, and that twelve or more months had elapsed since the initial dispositional order. The initial dispositional hearing was held June 16-17, 2004, the initial service plan was issued on August 18, 2004, and the Petition requesting termination was filed on October 20, 2005 (sixteen months after disposition).

Although Mother had complied with some services, including the parenting class and some counseling, the Tribal Court held that the conditions that led to the adjudication still existed, and that there was no reasonable likelihood that the conditions would be rectified within a reasonable period of time. The Tribal Court also stated that it had “not been persuaded that it is not in the best interest of JK to terminate [Mother’s]

parental rights to [Child].” (Term Op, p 2, ¶ 5). The Tribal Court did not, however, cite its analysis for the best interests determination.

Mother appealed the Tribal Court decision to this Court, pursuant to Tribal Code Section 82.101, *et seq.*

STANDARD OF REVIEW

Under Tribal Code Section 82.124, in deciding an appeal, the Court of Appeals shall apply the following standards, in pertinent part:

(1) A finding of fact by a judge shall be sustained unless clearly erroneous.

...

(3) A factual inference drawn by a judge or jury shall be reviewed as a finding of fact if more than one reasonable inference can be drawn from the fact.

(4) Any finding, whether explicit or implicit, of witness credibility shall be reviewed as a finding of fact.

(5) A conclusion of law shall be reviewed by the Court of Appeals without deference to the Tribal Court's determination, *i.e.*, review is *de novo*.

...

(7) A matter which is a mixture of law and fact is reviewed by the standard applicable to each element.

(8) 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. A matter committed to the discretion of the Tribal Court shall not be subject to the substituted judgment of the Court of Appeals.

ANALYSIS

I. The parent was a respondent in a proceeding brought under this chapter.

Mother was a named respondent in the lower court case file number CW 04-10 alleging the abuse of Child. She was adjudicated in the case and was placed on a case service plan pursuant to the Tribal Court's order.

II. Twelve (12) or more months have elapsed since the issuance of an initial dispositional order or removal of the child.

The initial dispositional order in CW 04-10 was dated June 17, 2004. The termination opinion and order were issued on January 31, 2006 – nineteen (19) months after the initial disposition in the Tribal Court case.

III. The Tribal Court, by clear and convincing evidence, finds that the conditions that led to the adjudication continue to exist.

The conditions that led to the adjudication in 2004 included Mother's mental health condition, substance abuse, failure to protect her child from abuse by B, and failure to take responsibility for the abuse by B.

At the time of the termination petition, Mother still suffered from the mental health condition and was not following proper medication protocol to treat it (*i.e.*, she was found to be intoxicated, and admitted drinking multiple alcoholic beverages, when she was taking medication that carried with it a prohibition on use of alcohol). Additionally, she was found to be in the company of B on October 9, 2005 when they were stopped in a vehicle by law enforcement. Although Mother testified that B had initiated the contact, and that she was in his presence due in part to her fear of him, she also did not offer any plausible reason why she had chosen to ride in his vehicle on October 9th, why she had not chosen an alternate course of action to avoid him, or why she failed to report her fear of him or desire to be protected from him to law enforcement or to other bystanders when she had repeated opportunities.

Mother's failure to adequately participate in counseling and therapy to assist Child in resolving emotional issues from B sexual abuse was confirmed by multiple counselors during the termination hearing. Mother's asserted reason for failure to complete the counseling was that she felt Child needed to be there, despite the counselor's determination that it was not in Child's best interests to participate at the initial stages of therapy with Mother. Throughout the pendency of the case service plan and provision of services, Mother resisted active participation in counseling related to assisting her daughter in dealing with sexual abuse issues.

Finally, Mother's own testimony at the termination hearing established that she was again pregnant, and had consumed alcohol during the pregnancy. She agreed with the proposition on the record that drinking while pregnant was abusive to the unborn child. (Tr, Term Hrg, p 147).

IV. There is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

The initial petition related to abuse of Child was filed on October 31, 2003. Services were provided to Mother and initially Mother appeared to protect Child from the abuser, B. A second petition was filed on February 19, 2004, alleging that Mother had continued contact with B. The petitioner requested termination of Mother's parental rights at initial disposition on the second petition. After a lengthy hearing, the Court did not terminate Mother's rights, but gave her a second opportunity to engage in services. Child was placed with Father, and was ordered to receive counseling. Quarterly reviews of the case began, and Mother did comply with portions of the case service plan, but she never demonstrated the ability to properly care for Child.

At the Permanency Planning hearing on August 3, 2005, the Court again found that returning Child to Mother would pose a substantial risk of harm to Child, and that conditions that led to the adjudication – Mother’s mental illness and failure to accept responsibility for the abuse of Child – still existed. Despite that finding, the Court still did not order termination of Mother’s rights, but instead awarded custody of Child to Father, and set another Permanency Planning hearing for February, 2006.

By the time the termination petition was filed, Mother had already had three opportunities, over the span of two years, to meaningfully and actively engage in services, address the conditions that led to the adjudication, and demonstrate the ability to properly care for Child. Although her rights could have been terminated on one of those prior occasions, Mother was instead allowed additional services and opportunities to make progress toward reunification. Unfortunately, she failed to follow through, and on October 5, 2005, found herself engaged in the same behaviors that contributed to the abuse of her daughter by . B years before.

When the initial petition was filed in 2003, Child was 7 years, 10 months old. The Court no doubt took Child’s young age into consideration when deciding to order services for Mother and Child and to continue pursuing reunification, even when the grounds for termination might had been established. At the termination hearing, however, Child was 9 years, 1 month old. Over a year of possible bonding and parenting had been lost due to Mother’s failure to successfully rectify the conditions that led to the adjudication. Moreover, Child is now 11 years, 9 months old, and has lived exclusively with her Father for over four years. While in 2003, it was reasonable to expect Mother to be able to remediate her behavior and successfully reunify with Child, in 2006 and 2008 it is far less likely, and the Court found that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering Child’s age.

Child protective proceedings fall within the jurisdiction of the Tribal Court. *See* Tribal Code Chapter 30. 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. [Italics added.] A matter committed to the discretion of the Tribal Court shall not be subject to the substituted judgment of the Court of Appeals.

In this case, the record reflects that the Tribal Court properly exercised its discretionary authority under Tribal Code Sections 30.501, *et seq.* The requirements for terminating parental rights under Tribal Code Section 30.504(3) were established by clear and convincing evidence by the Tribal Court, as explained *supra*. The Tribal Court did not abuse its discretion in granting the petition for termination of Mother’s parental rights, based upon her failure to rectify the conditions that led to the adjudication and the finding that there was no reasonable likelihood that Mother would rectify those conditions within a reasonable amount of time given Child’s age. We find, therefore, that the Tribal Court properly found that the ground for termination of parental rights under Tribal Code Section 30.504(3) were proven by clear and convincing evidence.

Once the Court establishes that one or more grounds exist to terminate parental rights of a respondent over a child, the Tribal Court *shall* order termination and order that additional efforts for reunification of the child with the respondent not be made, *unless* the Tribal Court finds that termination is clearly not in the best interests of the child. Tribal Code Section 30.503(b). [Italics added.] In this case, the Tribal Court stated that it “has not been persuaded that it is not in the best interest of JK to terminate KK’s parental rights.”

In the case of *In re Trejo Minors*, statutory grounds must be found under which this Court must determine whether the parental rights of these parents must be terminated. *In re Trejo Minors*, 462 Mich 341 (2000).¹ Pursuant to the guidance provided in *Trejo*, the petitioner for termination of parental rights bears the burden of proving at least one ground for termination. If the Court finds clear and convincing evidence that the petitioner has proven one or more grounds for termination, it must order termination of parental rights and that additional efforts for reunification of the child with the parent not be made, unless it finds that termination of parental rights is clearly not in the child’s best interest. MCL 712A.19b(3) (emphasis added). The Tribal Court determined that termination of Mother’s parental rights was in the Child’s best interests. Finding no abuse of discretion by the Tribal Court, the appellate court shall not substitute its judgment for that of the lower court.

CONCLUSION

This Court finds that the Tribal Court did not abuse its discretion in terminating the parental rights of KK to the Child, JK, and therefore affirms the decision of the lower court.

IT IS SO ORDERED.

¹ This Court recognizes that it should not refer to state law until tribal and federal law is exhausted. In this instance, no tribal law from the Sault Ste. Marie Tribe of Chippewa Indians could be found to address this particular point of law. Additionally, federal courts very rarely address questions associated with the termination of parental rights. Accordingly, it seems appropriate to look to the Michigan courts for guidance on this particular point of law.