SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS APPELLATE COURT

In the Matter of SD **and** JD

APP-06-04

Decided January 9, 2009

BEFORE: KRONK, CJ, and HARPER and WEISS, JJ.

ORDER AND OPINION

Weiss, Appellate Judge, who is joined by Appellate Judge Harper.

The Tribal Trial Court terminated the petitioner mother's parental rights to her two children after concluding that there were grounds to support such termination. Petitioner then filed a timely application for appeal as of right to this Court. While that application was pending, unknown to this Court, the trial court engaged in the apparently unprecedented and extraordinary action of allowing the foster parents to adopt the children.

Because we find the evidence to support termination to be insufficient we vacate the order terminating the petitioner's parental rights.1 We also take this opportunity to make clear what we believe to be obvious, that the trial court is not permitted to consider an adoption following a termination of parental rights where the parent's appeal of that decision remains pending.

I. FACTS AND PROCEEDINGS

The record facts present a case dating to July 2004 when a petition was filed asserting jurisdiction over S and JD enrolled citizens of the Sault Ste. Marie Tribe of Chippewa Indians and children of CL and JD based upon allegations of parental neglect. Services were ordered, put in place and shortly thereafter the and after the children were returned to their parental home in September 2004.

On May 6, 2005, Appellant obtained an impaired driving offense and, as a result, her driver's license was restricted and she was ordered to serve thirty days in the Mackinac County jail. On July 19, 2005, an Ex Parte Motion for Emergency Removal was filed alleging that while the children were in the care of the Appellant several neighbors indicated that the children were in the middle of the street unsupervised until 11 p.m. and were wearing dirty diapers. The Appellant was alleged to have been yelling profanities at her children. On August 4, 2005, the trial court ordered the prosecution to file a petition to terminate the parental rights of both parents following the Permanency

[1] The Tribal Court also terminated the parental rights of the father, J.D. He did not appeal.

Planning Hearing. In September of 2005, Appellant was involved in a fight and was jailed on an assault charge. On October 28, 2005, a second petition for court jurisdiction was filed requesting that the court assert jurisdiction over the children. The children were again returned to the custody of their parents and soon thereafter solely to the custody of their mother, apparently in December 2004.

A subsequent complaint was filed in July 2005 alleging the children being out in a road, unsupervised, at the Appellant's new residence. In addition there were numerous allegations against the father, but as this appeal does not concern Mr. O we do not address the merits or details of those allegations.

Trial on the Petition to Terminate Parental Rights started on May 24, 2006 and continued through June 9, 2006, with attorneys submitting closing arguments in writing on June 14, 2006. On June 30, 2006, Judge Carol Andary held that the parental rights of both parents were to be terminated. Judge Andary held further that the current foster care placement of the children was to continue and that additional efforts for reunification of the children with the parents would not be made. Appellant timely filed her initial motion to appeal to this Court on July 31, 2006.

Between the time of the trial court's order terminating Appellant's parental rights on June 30, 2006 and this Court's hearing on Appellant's timely appeal of the termination order, the children were adopted.

Subsequently, allegations have been made to this Court and not adequately refuted, that cause us much trouble in assessing whether the appellant's due process rights have been adequately safeguarded. Indeed, some allegations call into question whether the termination proceeding itself was not sufficiently tainted to require, at a minimum, a rehearing of the matter *de novo*.

Of interest to the Court is an allegation that attorney JB acting as prosecutor and tribal presenting attorney, had an attorney-client relationship with the adoptive parents in this matter. Further, there is an allegation that an adoptive parent participated in the decision process that resulted in the decision to recommend termination to the Tribal Court. These allegations are of concern to the Court.

II. STANDARD OF REVIEW

For appeals from an order terminating parental rights, we review for clear error the Tribal Court's findings. Tribal Code Section 30.512. Conclusions of law are reviewed *de novo*. Tribal Code Section 82.124(5).

III. ANALYSIS

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in Tribal Code Section 30.504 has been met by clear and convincing evidence. *Id.* If a statutory ground for termination is established, the trial court must terminate parental rights unless there exist clear evidence, on the whole record, that termination is not in the child's best interests. Tribal Code Section 30.503(b). The trial court's decision terminating parental rights is reviewed for clear error. Tribal Code Section 30.512. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Rex Smith v. Sault Ste. Marie Tribe of Chippewa Indians,* APP-08-02, 3 (August 4, 2008.)

A. Does the Adoption Moot this Matter?

Before addressing the merits of the case, the Court must decide whether the matter was rendered moot by the adoption of the children. We will take this opportunity to state what we believe to be obvious – the trial court does not have the authority to allow children to be adopted following the termination of parental rights where the parent's appeal of the termination decision is pending. Accordingly, we hold that we do have the authority to overturn the trial court's decision and its actions did not render the matter moot.

This decision is consistent with the Tribal Code, which specifies at Tribal Code Section 30.512 that a parent whose rights are terminated is entitled as a matter of right to appeal of that termination decision. Additionally, our decision is consistent with the decision of the Michigan Supreme Court in a very similar case, *In re J.K.*, 468 Mich. 202 (2003).2 In *In re J.K.*, the mother's parental rights were terminated by the family division of the circuit court and her appeal to the Court of Appeals was unsuccessful, yet, while her timely appeal was pending in front of the Michigan Supreme Court, the family division of the circuit court allowed the foster parents to adopt the child. When confronted with the same question of its ability to overturn the lower court's adoption, the Michigan Supreme Court also held as we do today that a lower court "is not permitted to proceed with an adoption following a termination of parental rights where the parent's appeal of that decision remains pending." *In re J.K.*, 468 Mich. 202, 205 (2003). The Michigan Supreme Court explained that "[i]t is in the interests of both the natural parent and the child, as well as the interests of the integrity of the justice system, that the termination decision not be reviewed, as it has been here, under the specter of having to remove the child from adoptive parents ..." *Id.* at 218. We agree.

For these reasons, should a trial court violate tribal law by allowing children to be adopted following the termination of parental rights where the parent has filed a timely

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[2] Typically, state law should only be cited by this Court after tribal and federal law has been exhausted. However, given the exceptional nature of this case and its parallels to *In re J.K.*, it is appropriate to look to Michigan law in this instance.

appeal with this Court, this matter is not rendered moot, as this Court has the authority to overturn the trial court's decision.

B. The Termination Proceeding

The Court cannot determine whether the appellant had an opportunity to bifurcate or separate her case from that of her husband, Mr. O ; we are left with the opinion that the termination decision was made considering all of the allegations against both parents when, at the time of the Tribal Court proceeding, the couple had been estranged. Holding one parent responsible for the past acts of an estranged partner or spouse strikes us as manifestly unjust. Indeed, it may be argued that Ms. L's separation from Mr. O was an effort by her to better the situation for both she and her children. The trial record does not elucidate.

We hold that in cases of estranged[3] parents that the Tribal Court should encourage the selection of legal counsel for each parent and make findings on the record as to the fitness of each individual parent.

We feel that it is a natural inclination of jurists to rely upon programmed steps in making the difficult, many times heart rending, decisions in termination proceedings. Such steps are necessarily provided in our Tribal Code to assist the fact finder. *See* Tribal Code Section 30.504(1) through (9).

Of paramount importance in assessing a termination case is the language contained in the preamble of the termination Code appropriately entitled "Preferred Right of Parents:"

> The Tribal Code provisions dealing with the termination of parental rights "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***...." Tribal Code Section 30.501 (emphasis added.)

We are left with the strong feeling that had the Tribal Court (1) viewed the termination decision on the direct allegations concerning the mother and the mother alone that there did not exist clear and convincing evidence to support termination, and (2) even if a reasonable fact finder were to make such a finding, it could not rise to the level of being a remedy of "last resort." Tribal Code Section 30.501. We address the "best

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[3] Estrange is defined as "(1) to remove or keep at a distance, (2) to divert from affection or personal attachment. Estrange may suggest development of hostility, separation, or divorcement." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) (1993) at 779. It is the intent of the Court to interpret "estrangement" as intentional separation of a couple

interest" factor below.

Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process. A due-process violation occurs when a state-required breakup of a natural family is founded solely on a "best interests" analysis that is not supported by the requisite proof of parental unfitness. *Quilloin v. Walcott*, 434 U.S. 246, 255; 98 S. Ct. 549 (1978).

1. Best Interests of the Child -- Sufficiency of Evidence

There were not adequate statutory grounds for terminating the respondent's parental rights pursuant to Tribal Code Section 30.504. For that reason, we need not address the question whether termination was in the best interests of the child. Tribal Code Section 30.503(b). But assuming *arguendo* that there existed sufficient statutory grounds in the quantum of proof necessary, there was no finding by the Trial Court judge supporting the second prong of "best interests" as required by Tribal Code Section 30.503(2). Judge Andary explained in her June 30, 2006 Opinion and Order that

> [i]n this matter, little, if any evidence was presented about the children's best interests. Certainly, both parents have testified about loving their children and there was testimony about how upset the children were upon being removed from their parent's care. Given the lack of evidence on this issue and the Court not being persuaded that it is not in the best interests of SD and JD to terminate the parental rights of CL and JD, the parental rights are terminated.

Order and Opinion, CW 05-40/41, 15 (June 30, 2006). Accordingly, very little, if any, direct evidence was presented at trial concerning the best interests of the children; a termination decision unsupported by a best interests analysis is clear error and by itself would warrant reversal.

We conclude that the trial court "clearly erred" by terminating respondent's parental rights.

IV. OTHER

The members of this Court have each reflected upon this case at length. There is no ideal result. There is no outcome that will avoid the imposition of suffering upon either the birth parent of these children or their present adoptive parents. If there is a practical reason that adoptions not be permitted while a parent is in the process of appealing a termination decision, it is that reflected in the choices now available to this Court in this case. It is in the interests of both the natural parent and the children, as well as the interests of the integrity of the justice system, that the termination decision not be reviewed, as it has been here, under the specter of having to remove the child or children

from adoptive parents in order to give faithful effect to the law. To say the least, this Court has not taken this decision lightly. Rather, we are fully cognizant that it is an imperfect decision and that it will have a significant effect on the lives of everyone connected with this case. We conclude, however, that the result reached is compelled by Tribal law and that the legal and cultural values underlying this law are important in upholding the native family relationship.

As the Tribal Court considers this matter further, it must consider a view that we find instructive - what the Michigan Supreme Court said nearly fifty years ago: "It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered to the [child]." *Fritts v. Krugh*, 354 Mich 97, 115; 92 N.W. 2d 604 (1958). The Tribal Court must not suggest or make comparisons between the homes of the adoptive parents and the natural mother in determining whether to terminate Ms. L's rights.

V. ORDER

We vacate the order of adoption in all respects because it is invalid. As to the termination of parental rights, we direct further inquiry into this matter. We remand this case to the Tribal Court who shall take such proofs as it deems appropriate as to the fitness of MS. L alone (excluding MR. D), enter findings of fact and conclusions of law, and determine what further order, if any, should be entered with regard to the parental rights of MS. L. Further, this case is to receive expedited consideration from the Tribal Court. Pending resolution of MS. L's parental rights, the children are to continue to reside with the adoptive parents.

As the father, JD, is not a party to this appeal, the ruling of the trial court as to the termination of his parental rights is not to be disturbed.

We retain jurisdiction.

Chief Appellate Judge Kronk, dissenting.

While I am sympathetic to the concerns raised by the majority, I ultimately believe that the majority departs from the clear requirements of the Tribal Code on the basis of unsubstantiated allegations. The trial court clearly followed the relevant provisions of the Tribal Code, as the record indicates there are many reasons to terminate

the parental rights of Appellant.[4] Therefore, the trial court's termination of Appellant's parental rights was not clearly erroneous. For this reason, I dissent from the majority.

I agree, however, with the majority that the adoption of the children does not moot the present matter.

I. Jurisdiction of Trial Court to Terminate Parental Rights on June 30, 2006

However, just because this Court has the authority to vacate adoptions in circumstances such as the one presented in this case does not mean that this Court should exercise that authority in every instance. Where the error is harmless, as I believe it is in this case, this Court should not exercise its authority to vacate the adoption.

Appellant argues that the trial court did not have jurisdiction to terminate her parental rights on June 30, 2006 because the court lacked jurisdiction to do so on that date. Specifically, Appellant argues that the original petition to terminate her parental rights was closed on August 24, 2005 when the trial court granted a guardianship to the children's parental grandfather. Therefore, Appellant contends that an entirely new petition to terminate her parental rights was opened on October 28, 2005 and she should have had twelve months to rectify before her rights were terminated. *See* Tribal Code Section 30.504(3). In a nutshell, Appellant argues that this procedural error constitutes reversible error. However, a reading of Tribal Code Section 30 simply does not support Appellant's argument. Additionally, given it has been approximately eighteen months since the children were placed in their new adoptive home, it would seem fundamentally unfair to now remove the children from their home.

First, a reading of Tribal Code Section 30 does not support Appellant's argument that the trial court lacked the authority to terminate her parental rights on June 30, 2006, as twelve months had not elapsed since the October 28, 2005 petition to terminate rights was submitted. As to the involuntary termination of parental rights, Tribal Code Section 30.503 provides the general guidelines for such termination actions: fact finding and the best interests of the children, which is discussed below. As to fact-finding, "[l]egally 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." Tribal Code Section 30.503(a). The fact-finding requirement does not limit the court to considerations presented in the petition most immediately in front of it, as Appellant would suggest.

Additionally, Tribal Code Section 30.504 provides the grounds for involuntary termination of parental rights. As the present matter raises concerns about unrectified conditions, Tribal Code Section 30.504(3) is applicable. This Section provides, in relevant part, that termination based on unrectified conditions may occur after "twelve (12) or more months have elapsed since the issuance of ***an initial disposition order or***

[4] I disagree with the majority that the trial court did not provide adequate reasoning to justify the termination of Appellant's rights alone. As explained below, there is ample evidence in the record provided to suggest that Appellant's rights should be terminated regardless of the father's rights.

removal of the child ...." Tribal Code Section 30.504(3) (emphasis added). The Tribal Code does not indicate that a new twelve month period begins to run if a second termination petition is filed. Notably, the Tribal Code speaks to "an initial disposition order," and does not delineate between an initial disposition order or a subsequent order. Accordingly, this Court views the initial disposition order in the case from August 26, 2004 to satisfy the requirements of the Tribal Code, and, therefore, it was close to two years from the initial termination petition to the time Appellant's rights were finally terminated. Moreover, the facts of this case also show that the second prong of Tribal Code Section 30.504(3), "or removal of the child," was met. The children were removed from Appellant on numerous occasions, starting in the summer of 2004. The Tribal Code does not specify when the children needed to be removed to trigger the twelve month period to rectify conditions.

Clearly, Appellant was on notice, both through the original disposition order and the removal of her children on several occasions that her parental rights to the children was in jeopardy. Additionally, I view Appellant's description of the action taken by the trial court, that of "closing" the case, when the children's grandfather was appointed guardian to be an inaccurate representation of the case. The case was not closed because Appellant had not rectified the previous conditions justifying termination as discussed in the original petition for termination. Rather, the parental grandfather stepped forward and indicated a willingness to undertake guardianship. Therefore, at best, it can be said that the original petition for termination was stayed pending the outcome of the paternal grandfather's guardianship. Appellant was certainly therefore on adequate notice that her parental rights may be subject to termination.

Although the trial court focused its decision on unrectified conditions, it appears that Tribal Code Section 30.504(8), Parental Rights to Sibling Terminated, also applies to this case. Specifically, Tribal Code Section 30.504(8) provides that the trial court may involuntarily terminate parental rights when the "[p]arental rights to one (1) or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful." The record indicates that Appellant's parental rights to the older brother of the children, JL , were terminated due to neglect, although whether this was "serious and chronic neglect" is not clear. Also, the second prong of Tribal Code Section 30.504(8), "prior attempts to rehabilitate the parents have been unsuccessful," is met. Based on the record in front of this Court, it is clear to me that Appellant had not been successfully rehabilitated. It would therefore appear that the involuntary termination of Appellant's parental rights would have also been justifiable under Tribal Code Section 30.504(8), where the rights to other siblings have been terminated.

Finally, as noted in Appellee's brief and at oral argument, Tribal Code Section 30.505 provides that "the Tribal Court may enter an order terminating parental rights at the initial disposition hearing." Accordingly, it seems clear under the Tribal Code that the trial court had the authority to terminate Appellant's parental rights on June 30, 2006, as this was a hearing following the submission of a petition to terminate parental rights.

Ultimately, the trial court complied with the applicable Tribal Code provisions and, therefore, had jurisdiction to terminate Appellant's parental rights to the children. The majority opinion merely asserts that there was not enough evidence to support the termination of Appellant's rights, but fails to show how this is the case. As explained above, it is clear to me that multiple provisions of the Tribal Code supported termination in this case, and, therefore, the trial court's decision should be sustained.

II. Best Interests of the Child -- Sufficiency of Evidence

Additionally, although the majority does not address the best interests of the children in this case, the record strongly suggests that it was in the best interests of the children to terminate Appellant's parental rights. As previously explained, this Court applies the clearly erroneous standard of review in reviewing the trial court's findings of fact, and, therefore, 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. Tribal Code Section 82.114(2)(d).

In her brief and at oral argument, Appellant presented a litany of assertions regarding how she has or is demonstrating (or could potentially demonstrate) the ability to parent the children. However, Appellant fails to provide any evidence that it would be in the best interest of the children to return them to her care or that it was not in their best interest to terminate her parental rights in the first place. There is virtually no argument or evidence presented suggesting what is or is not in the best interest of the children.

This is similar to the evidence presented and arguments made to the trial court below. Judge Andary explained in her June 30, 2006 Opinion and Order that

> [i]n this matter, little, if any evidence was presented about the children's best interests. Certainly, both parents have testified about loving their children and there was testimony about how upset the children were upon being removed from their parent's care. Given the lack of evidence on this issue and the Court not being persuaded that it is not in the best interests of SO and JD terminate the parental rights of CL and JO , the parental rights are terminated.

Order and Opinion, CW 05-40/41, 15 (June 30, 2006). Accordingly, very little, if any, direct evidence was presented at trial concerning the best interests of the children, and, therefore, Judge Andary's conclusion seems reasonable.

Moreover, although not directed specifically to the issue of the best interests of the children, Judge Andary made numerous conclusions suggesting that it would not be in the best interests of the children to remain in the care of Appellant. For example, almost a year after the trial court originally took jurisdiction over this issue, "[a]ccording to Mr. M , several witnesses that he interviewed over a two-day period stated that the

children were outside and unsupervised in the street at various times even until midnight and that [redacted] was yelling out the window at her children using profanities." *Id.* at 6. Additionally, Judge Andary found that Appellant contacted Caseworker [redacted], indicating in October of 2004 that she could no longer care for the children. *Id.* at 7. It was also concluded that Appellant acknowledged that her housing situation was not stable. *Id.* Furthermore, "[redacted] has been involved in two different criminal offenses since the matter commenced. One involved impaired driving and the other was an aggravated assault." *Id.*

Perhaps most damaging to Appellant's claim that she is capable of parenting the children, however, was Judge Andary's finding that:

> Caseworker [redacted] stated that [redacted] has been on her case load since 2002 and that although she has participated in family counseling, parenting programs and the like, at times she will take three steps forward and then two steps back. [redacted] indicated that [redacted] needs on-going direction. Given her four years of providing various services to [redacted] she indicated that [redacted] is not in a position to keep herself and the children safe; essentially, she needs 24/7 services. Further, given the substantial services that have been provided, [redacted] does not see in the near future how the children would be safe in [redacted] care at least not until they were much older. Caseworker [redacted] concurred with the same.

Id. at 8. Additionally, the Guardian [redacted] appointed by the trial court in this matter also recommended Appellant's rights be terminated. Therefore, the people charged with protecting the best interests of the children, the caseworkers and Guardian [redacted] all recommended the termination of Appellant's rights.

Accordingly, I am not left with a definite and firm conviction that the trial court clearly erred in finding that terminating Appellant's parental rights did not violate the best interests of the children. There was little to no evidence presented at trial that spoke specifically to the issue of what was in the best interests of the children, nor did Appellant raise any such issues on appeal. *See* Tribal Code Section 82.125(2) ("Facts which are not in the record shall not be presented in any manner to the Court of Appeals, and if presented, shall not be considered by that Court."). The record is replete with examples all showing the Appellant is not capable of parenting the children.

III. Concerns Associated with this Case

Ultimately, I believe the majority bases its opinion not on the Tribal Code, as I believe the Tribal Code clearly demands termination in this case as explained above, but rather on unsubstantiated allegations raised for the first time during oral argument. While

I agree that these allegations raise substantial concerns that should be investigated, I do not believe that these allegations warrant the reversal of the trial court and complete upheaval of the lives of these children.

We all struggled mightily with the facts of this case. The struggle was related to the many concerns raised during the appellate hearing of this case. First, we are all very troubled by the actions of both the trial court and the Court of Appeals in this case. As previously discussed, the trial court should never have allowed for the adoption of the children before this Court affirmed its decision terminating Appellant's parental rights. By doing so, not only did the trial court violate tribal law, but it placed everyone involved in this case in an untenable and unstable position. Such a situation must never occur again.

Moreover, it is unacceptable that this Court took over two years to hear and render a decision on Appellant's timely application for appeal. In all instances, but especially given the importance of the issues raised in this case, all citizens are entitled to the timely adjudication of their claims. This is right held dear by our community. Although there are reasons to explain the delay due to transitions on the Court, these reasons do not justify the delay. And, accordingly, such a situation must never occur again.

Second, at oral argument, Appellant raised troubling ethical concerns regarding the tribal prosecutor involved in this matter and the adoptive parents of the children. It was alleged at oral argument that the tribal prosecutor, James Bias, who submitted the petition for termination of parental rights and ultimately prosecuted the case, also served/serves as attorney for the adoptive parents of the children. Such allegations, if true, raise especially troubling ethical considerations. However, I ultimately believe that these ethical considerations do not undermine the sound legal foundations articulated in the trial court's opinion for the termination of Appellant's parental rights. Additionally, I do not feel the Court is in the position at this time to address these concerns raised at oral argument for the first time given there was no evidence provided to support these allegations nor were the individuals mentioned given the opportunity to address the allegations. I would have encouraged Appellant to raise her concerns with a body better able to address these concerns, such as the State Bar of Michigan or the Sault Ste. Marie Tribe of Chippewa Indians Board of Directors.

CONCLUSION

Although several substantial concerns were raised during the Court's deliberations on this matter, I ultimately believe that the trial court correctly applied the Tribal Code in terminating Appellant's parental rights. First, the adoption of the children did not render Appellant's appeal moot, allowing this Court to consider the merits of Appellant's appeal. However, Appellant's parental rights were correctly terminated because the conditions outlined in the initial petition for termination were not rectified within twelve months. Additionally, there is nothing in the record before the Court

suggesting that it was not in the best interests of the children to terminate Appellant's rights.

I am deeply saddened that the actions of this Court today will have such a disruptive impact on the lives of these innocent children. My thoughts are with them and their family today.