SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

COURT OF APPEALS

In the matter of: A.S-F. / E.G

APP-14-03/04

Decided February 20, 2015

BEFORE: DEPETRO, FINCH, JUSTIN, LEMIRE, and WARNER Appellate Judges.

Opinion and Order

Lemire and Warner, Appellate Judges, who are joined by Appellate Judges DePetro and Finch in this opinion and order. Judge Justin dissents from the opinion and order, and his dissenting opinion is included below.

Procedural History

This case is appealed from the Sault Ste. Marie Chippewa Tribal Court, CW 12-05, CW 12-06, requesting review of an Order dated May 27, 2014, terminating the parental rights of the Appellant father, J.S. The lengthy procedural history of this case is comprehensively and accurately set forth in the Opinion and Order of the Trial Court and will be incorporated herein by reference. *In the matter of: A.S-F. / E.G*, Sault Ste Marie Tribal Court CW 12-05, 12-06 (May 27, 2014).

Of particular note, however, and discussed more fully below, is the Trial Court's *Order of Adjudication* dated July 24, 2012, relative solely to the mother, M.G., based upon her plea. The Court held a *Disposition* for the mother and Appellant on August 29, 2012, ordering the parties to comply with an Updated Service Plan. Review hearings followed apace, until the hearing of October 25, 2013. At the review hearing held on that date, the court found that Appellant had not made satisfactory progress and ordered the agency to file a petition to terminate Appellant's parental rights. In accordance with that directive, a petition was filed on November 8, 2013 seeking to terminate Appellant's parental rights.

The Termination trial was held over four days: March 7, March 10, March 26, and April 25, 2014. The Opinion and Order terminating Appellant's parental rights was released on May 27, 2014, *Id.* at 17-18, and the Claim of Appeal was filed on June 23, 2014. This Court heard oral argument on November 14, 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.

In general, the Tribal Code requires the application of the "clearly erroneous" standard when reviewing findings related to decisions concerning 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).

However, as explained more fully below, resolution of this appeal turns solely on a question of law. Accordingly, Tribal Code Section 82.124(5) applies, requiring that "[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*."

Discussion

Appellant and Appellee raised several issues on appeal. However, because determination of the "one parent" doctrine and its application to tribal court adjudications ultimately controls the resolution of this case, this Court expresses no opinion on the other issues raised on appeal.

On appeal, Appellant argues that his fundamental rights as a parent were violated because he did not receive an adjudication of his fitness as a parent. Because this Court agrees, the trial court's decision is vacated.

As described above, the mother's parental fitness was adjudicated by the tribal court, but Appellant's rights were not. Despite the fact that his fitness was not adjudicated, Appellant was subjected to a dispositional hearing and service plan by the tribal court, because the fitness of the mother was adjudicated. Such procedure is typically referred to as the "one parent" doctrine, as only the rights of one parent are adjudicated.

On appeal, Appellant argues that such procedure violated his fundamental rights, as he was denied due process of law. The Sault Ste. Marie Tribe of Chippewa Indians (Tribe) is required to follow due process procedures, as the Due Process Clause of the U.S. Constitution is incorporated into tribal law by virtue of the Tribe's own Constitution, *The Sault Ste. Marie Tribe of Chippewa Indians Constitution and Bylaws, Article VIII-Bill of Rights*, and through application of the Indian Civil Rights Act, 25 U.S.C. § 1302(8). In considering whether Appellant's due process rights were violated, Appellant urges this Court to consider the Michigan Supreme Court's recent decision in *In re Sanders*, 495 Mich 394 (2014). The Tribe's tribal code does not address the question of whether each parent is entitled to an individual adjudication, nor is this Court aware of another tribe that has addressed this issue. Further, this Court is not aware of any federal case law addressing the issue presented. Accordingly, consideration of state case law is appropriate under such circumstances. Moreover, consideration of Michigan case law in this case is helpful, as the Michigan law is very similar to the Tribe's laws, as Michigan also requires two phases – the adjudicative phase and the dispositional phase. *In re Sanders*, 495 Mich at 404. Finally, as explained more fully below, the Court concludes that in this case Michigan's case law is instructive to this Court in its application of federal due process considerations. For these reasons, the Court considers the Michigan Supreme Court's decision in *Sanders* and finds it helpful.

Based on a review of the Michigan Supreme Court's decision in *Sanders*, it would appear that two issues must be resolved in the matter presently before this Court. First, it must be

determined whether this Court should accept the *Sanders* Court's rationale and require the adjudication of both parents' rights individually. Second, it must be determined whether application of *Sanders* is appropriate where the Appellant failed to request an adjudicatory hearing at the trial court level (i.e. seemingly before commencement or during the dispositional hearing). We address each question in turn.

Adoption of the *Sanders* Decision

At issue in *Sanders* was:

> the constitutionality of Michigan's one-parent doctrine. The one-parent doctrine permits a court to interfere with a parent's right to direct the care, custody, and control of the children solely because the other parent is unfit, without any determination that he or she is also unfit. In other words, the one-parent doctrine essentially imposes joint and several liability on both parents, potentially divesting either of custody, on the basis of the unfitness of one. *Id.* at 401-402

In *Sanders*,

> Upon petition by the Department of Human Services ... the trial court adjudicated respondent-mother ... as unfit but dismissed the allegations of abuse and neglect against respondent-appellant-father.... [Father] moved for his children to be placed with him. Although [father] was never adjudicated as unfit, the trial court denied [his] motion, limited his contact with his children, and ordered him to comply with a service plan. *Id.* at 402

Notably, the appellant in *Sanders* requested an adjudication of his fitness as a parent at the trial level. *Id.* at 402. This is an important factual difference from the present matter, which is discussed below.

In *Sanders*, the appellant father argued that "the one-parent doctrine violates his fundamental right to direct the care, custody, and control of his children because it permits the court to enter dispositional orders affecting that right without first determining that he is an unfit parent." *Id.* at 401. Ultimately, the Michigan Supreme Court agreed, finding that "the one-parent doctrine impermissibly infringes the fundamental rights of unadjudicated parents without providing adequate process...." *Id.* at 401. In explaining how it reached its determination, the Michigan Supreme Court began with a discussion of the heightened procedural requirements applicable to adjudication hearings but not required during dispositional hearings. For example, under Michigan law, parents are entitled to a jury at the adjudicatory hearing, and the rules of evidence apply to such hearings and/or trials. *Id.* at 405 (citing MCR 3.911(A) and MCR 3.972(C)). In comparison, these procedural rights do not apply to dispositional hearings under Michigan law. *Id.* at 405. The Michigan Supreme Court explained that "[w]hile the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because '[t]he procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation' of their parental rights." *Id.* at 406 (citations omitted).

Having established that the procedural requirements of adjudicatory and dispositional hearings differ, the Michigan Supreme Court went on to discuss the constitutional issues presented by the

case. As mentioned above, the due process protections of the U.S. Constitution apply to the Tribe, and, therefore, the Michigan Supreme Court's discussion is directly relevant to the present matter. The Michigan Supreme Court began by stating that "[i]ncluded in the Fourteenth Amendment's promise of due process is a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* at 409 (citations omitted). The Michigan Supreme Court went on to explain that "[a]mong these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 409 (citations omitted). Additionally, "[t]he right to parent one's children is 'essential to the orderly pursuit of happiness by free men,'" ... and, "'is perhaps the oldest of the fundamental liberty interests'...." *Id.* at 409. The Michigan Supreme Court, however, acknowledged that this right is not absolute, as the state "has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor' and in some circumstances 'neglectful parents may be separated from their children.'" *Id.* at 409-410. (citations omitted). However, before the state can burden an individual, due process protections must be applied. The Michigan Supreme Court explained that "[o]ur due process is also informed by [the United States Supreme Court's decision in] *Stanley v Illinois* ... in which the Supreme Court held that the Fourteenth Amendment demands that a parent be entitled to a hearing to determine the parent's fitness before the state can infringe the right to direct the care, custody, and control of his or her children." *Id.* at 412 (citation omitted). Ultimately, the Michigan Supreme Court concluded that "[t]he rule from *Stanley* is plain: all parents 'are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.'" *Id.* at 412 (citation omitted).

In *Sanders*, the Michigan Department of Human Services responded to the Appellant's arguments by asserting that the father was provided adequate due process, as he received a hearing through the dispositional proceedings. Ultimately, however, the Michigan Supreme Court disagreed, finding that "dispositional hearings are constitutionally inadequate; due process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights." *Id.* at 415. According to that Court, an adjudicatory hearing is required because such cases involve a "core liberty interest recognized by the Fourteenth Amendment." *Id.* Further, although the state has an interest in protecting children, the state's interest is also deprived when parents do not receive an adjudicatory hearing because "'the State registers no gain towards its declared goals when it separates children from the custody of fit parents.'" *Id.* at 416.

The dissent in *Sanders* objected to the majority holding, in part, because due process merely requires a hearing, which can be accomplished during the dispositional hearing. However, the majority rejected this argument, as the adjudicatory phase is the only phase when the fitness of the parent is determined, and the dispositional hearings do not serve the same function. *Id.* at 418. Moreover, there is "no presumption of fitness in favor of the unadjudicated parent." *Id.* at 419.

The *Sanders* Court also considered and rejected the argument that its decision would result in additional burdens on state agencies and courts, explaining that "those burdens do not outweigh the risks associated with depriving a parent of that right without any determination that he or she is unfit, as the one-parent doctrine allows." *Id.* at 419. Further, the Michigan Supreme Court

rejected an assertion that the adjudication of the rights of one parent could be protective of the rights of the other parent, as there would be no process in place for the non-adjudicated parent to assert his or her rights. *Id.* At 420. Ultimately, the *Sanders* Court concluded that the rights of each parent must be adjudicated before the state can interfere with the parent's fundamental right.

Also interesting in light of the facts of the case presently before this Court, the Department of Human Services also argued in *Sanders* that the case should be moot because the father in that case was incarcerated for violating federal laws. Similarly, the Appellant in the present case is incarcerated. However, the *Sanders* Court rejected the argument that such incarceration mooted the case, because an incarcerated parent can still exercise his or her rights while imprisoned.

In its conclusion, the majority opinion explained that decisions involving fundamental due process rights cannot be decided on the basis of convenience. As the Michigan Supreme Court explained:

> Admittedly, in some cases this process may impose a greater burden on the state than would application of the one-parent doctrine because "procedure by presumption is always cheaper and easier than individualized determination." But as the United States Supreme Court made clear ... constitutional rights do not always come cheap. The Constitution does not permit the state to presume rather than prove a parent's unfitness "solely because it is more convenient to presume than to prove." *Id.* At 422.

Because this Court finds the *Sanders* Court's rationale well-reasoned and persuasive on this issue, it adopts it as its own. Further, because the *Sanders* Court refused to interfere with the fundamental right of parents to parent their children, it is also consistent with the tribal code's focus on keeping families intact whenever possible. See Tribal Code Section 30.102 providing, "[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. (emphasis added)

Accordingly, this Court adopts the holding and rationale of the Michigan Supreme Court in *Sanders* because: 1) the decision interprets and applies the U.S. Constitution, which is applicable to the Tribe through its Constitution; 2) the overall rationale is persuasive; and, 3) the rationale is also consistent with "the philosophy that the family unit is of most value to the

community." Further, reliance on the guidance provided by Michigan case law in this matter is appropriate given there is no tribal or federal law addressing this issue and the underlying Michigan law is substantially similar to the tribal law at issue here. Because this matter involves a fundamental right, this Court's holding should be applied both retroactively and prospectively.[1]

Waiver of *Sanders* Argument on Appeal

This decision, however, does not resolve the present matter. As noted above, unlike the appellant in *Sanders*, Appellant did not request an adjudicatory hearing while the matter was pending in front of the tribal court. Accordingly, an issue remains as to whether Appellant therefore waived his right to bring forward a *Sanders*-like claim now. The *Sanders* Court did not address this issue. However, a Michigan Court of Appeals was first presented with this issue in *In re S. Kanjia*, LC No. 11-053881-NA (Oct. 21, 2014). Subsequent to its release, the Opinion was vacated and became a published opinion *In re S. Kanjia,* Minor LC No. 11-053881-NA (December 30, 2014).

Similar to the facts in *Sanders*, in *Kanjia*, the appellant argued that "his adjudication in these child protective proceedings violated his procedural due process rights." *In re S. Kanjia*, LC No. 11-053881-NA, 2 (December 30, 2014). Unlike *Sanders*, however, the appellant in *Kanjia* raised his right to an adjudicatory hearing on appeal, rather than at the dispositional trial court phase -- as the appellant in *Sanders* had done. Accordingly, the *Kanjia* court considered whether the appellant in that case could still raise his right to an adjudicatory hearing on appeal; specifically, the court considered whether such an argument raised on appeal constituted an impermissible collateral attack on the trial court's decision. Ultimately, the *Kanjia* court held "that a *Sanders* challenge, raised for the first time on direct appeal from an order of termination, does not constitute a collateral attack on jurisdiction, but rather a direct attack on the trial court's exercise of its dispositional authority." *Id.* at 5. The court explained that "[b]ecause respondent was never adjudicated, and in fact was not named as a respondent in the trial court's order of adjudication, it is difficult to see how he could have appealed that order of adjudication." *Id.* at 6. Therefore, the court held that "respondent is entitled to raise his *Sanders* challenge on direct appeal from the trial court's order of termination, notwithstanding the fact that he never appealed the initial order of adjudication." *Id.* at 6. Accordingly, in the present case before this Court, because Appellant did not have an opportunity to challenge the adjudicatory hearing below, as he was not a party to the mother's adjudication, he did not waive his right to assert such a right now.

Further, and of particular application to this matter, is the question of retroactivity. The initial decision in *Kanjia* (vacated by the Court on motion for reconsideration) did not adopt full retroactivity, as is done in the present published case. The issue was reviewed through examination of the three key factors to be considered when retroactivity is in question. The Court was comfortable as to the purpose of the new rule, the reliance on the old rule, and the effect on the administration of justice. *Id.* at 7. Also noted by the Court "the *Sanders* decision rested, at

[1] This conclusion is also consistent with the Michigan Supreme Court's decision in *Sanders*, as the court there applied its holding to the parties presently before it, despite the fact that the state relied in good faith on the long-standing pre-existing one-parent doctrine in the events below.

least in part, on the due process guarantee of the United States Constitution, and where federal law is concerned, full retroactivity is the rule." *Id.* at 7 (citation omitted).

Thus the rationale as stated in *Sanders* is adopted by this Court and is given full retroactive effect to all cases pending on direct appeal at the time of this decision, consistent with the reasoning in *Kanjia*.

ORDER

For the reasons stated above, the order of the Tribal Court is vacated and remanded to the Tribal Court for further proceedings consistent with this opinion.

Following this opinion, the fitness of any parent must be adjudicated before an order interfering with the parental rights of that parent may be entered.

It is SO ORDERED.

Justin, Appellate Judge, who dissents from this opinion and order.

I respectfully dissent from the majority based upon my reading of the Trial Transcript and having reviewed portions of the underlying record.

I believe there was more than adequate evidence to support the Trial Court taking jurisdiction based upon the statements of the Appellant at the Dispositional Hearing. At that hearing the Appellant was quite clear in his admission that drug abuse by he and the mother of the children preventing them from being adequate parents. Further he admitted there were incidents of domestic violence, some of which he took responsibility for and some of which he attributed to the mother of the children, which also prevented a proper environment in which the children were raised in. He echoed these sentiments and perhaps expanded upon them during the Termination Trial.

I have no doubt that the Appellant understood the basis for all the remedial efforts that went into his drug and domestic violence issues. They were raised at each Review Hearing and he received commentary from the Trial Court about the remedial efforts. The Appellant was made perhaps painfully aware of each of his dirty drug tests or the tests that he failed to appear for. I observe with great irony that the only employment the Appellant had was within a life coaching business owned by his mother and he was tasked with contacting clients of the business to notify them of various appointments they needed to keep.

To wait until the eve of the Trial Termination proceedings (and even then not by written motion) makes no common sense whatsoever. I would conclude from the Defendants' actions and testimony that he has waived his right to a separate Adjudicative Hearing. Throughout the proceedings inclusive of the first Dispositional Hearing he was represented by well-seasoned and competent counsel. He said what he said and acted all under the scrutiny of his Attorney which appeared with him in each Court proceeding. That is a fact not to be taken lightly. With that I can only conclude that counsel advised him of whatever rights he had and stood ready to assert whatever rights he had. Under these set of facts I must conclude that the Appellant implicitly waived his right to a separate Adjudicative Hearing.

I further conclude that there is absolutely no reason to doubt the findings of fact made by the Trial Court. I will not repeat all the numerous acts of domestic violence committed by the Appellant as found by the Trial Court. I do note that the underlying record found the Appellant responsible for cutting the mother's hair. This holds cultural significance to this nation. It was an act done to humiliate the children's mother. A portion of that humiliation was public. Further the Appellant yet resides under the care, custody and control of the State of Michigan through its department of corrections serving a lengthy sentence well beyond the two years that the record would seem to imply that he would serve. This arose out of an assault by the Appellant upon the mother of his children while she was tied to a tree. If these events took place while the Tribe was trying to remediate this family, I can hardly imagine what the Appellant is capable of.

This nation like many others wrestles with the effects of domestic violence on fathers, mothers and children. The Trial Court acted properly.

In penning this dissent I am mindful of the reasoning and scholarship for a result different that I would conclude. As our Chief Appellate Judge has stated, reasonable minds may differ. I take solace in that observation and would hope that those that would review my dissent understand clearly our differing points of view.

I wholeheartedly concur with majority opinion which outlines the policy of having dual adjudication. In fact, the Trial Court has modified its practice so I do not believe this situation will arise again. Where I may differ from the majority is whether or not from these facts we can imply a waiver from the actions and testimony of the Appellant. It is clear that there is not an expressed waiver but one which I imply based upon the totality of the circumstances here. It is possible that had an expressed waiver been placed on the record, you would have a unanimous court. However we do not.

The fact that this Court is able to rationally debate various issues in this case and yet respect each other's view is strength while not quantifiable, and speaks to the character of each of the Judges that have participated in this Appeal. It is in that sense and respect of the majority that I pen this dissent.