SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS

IN THE MATTER OF,

ASG and EG, *two minor children*

Decided October 27, 2017

BEFORE: DIETZ, FINCH, HAUTAMAKI, WARNER, AND WICHTMAN Appellate Judges.

OPINION & ORDER AFFIRMING SEPTEMBER 1, 2016 TRIBAL COURT ORDER & OPINION (TERMINATING RESPONDENT FATHER'S PARENTAL RIGHTS)

Wichtman, Karrie, Chief Appellate Judge, who is joined by Appellate Judges Finch and Warner. Appellate Judges Dietz and Hautamaki, concurring.

Procedural History

The lengthy procedural history of this case is comprehensively and accurately set forth in the several opinions and orders involving the Respondent Father's parental rights between latter 2014 and September of 2016. Therefore, this Court adopts the procedural history set forth in the Tribal Court's prior opinions in this matter - November 4, 2015 *Opinion and Order (Denying Request to Terminate Respondent Father's Rights)*; the May 24, 2014 *Order & Opinion (Terminating Respondent Father's Parental Rights);* and the September 1, 2016 *Order & Opinion (Terminating Respondent Father's Parental Rights)*; as well as the procedural history set forth in this Court's February 20, 2015 *Opinion & Order.*

On December 30, 2016, the Appellant filed an *Application for Leave to Appeal* ("Application") the Tribal Court's September 1, 2016 *Order & Opinion (Terminating Respondent Father's Parental Rights).* The Application was accompanied by an Affidavit drafted by legal counsel and signed by the Appellant attesting to his belief that his former attorney filed an appeal on his behalf. On February 13, 2017, this Court granted Appellant leave to appeal. On February 17, 2016 the Tribal Court entered an Order Granting Appellant's Request for Stay. On March 3, 2017, the Appellant filed a Notice of Appeal pursuant to STC § 82.114.

On August 10, 2017, the Court of Appeals heard oral argument. As discussed below, this Court hereby affirms the September 1, 2016 *Order & Opinion (Terminating Respondent Father's Parental Rights)*, hereinafter *"September 1 Opinion & Order"*.

Jurisdiction and Standard of Review

Under 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 (1).

Child protection 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).

The Tribal Code requires the application of the "clearly erroneous" standard when reviewing findings related to decisions concerning the termination of parental rights. STC § 30.512 ("The clearly erroneous standard shall be used in reviewing the findings of the Tribal Court on appeal form an order terminating parental rights."). *In the Matter of A.S.F/E.G.*, APP-14-03/04. "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).

Discussion

This Court has repeatedly recognized the importance of parental rights and the gravity of termination of the same on the parent/child relationship and the tribal community. *In the Matter of SD and JD*, APP 06-04, 5 (January 9, 2009)("Parents have a significant interest in the companionship, care; custody and management of their children..."); *In Re JB*, APP 09-03, 4 (May 25, 2010)(termination of parental rights is to only be used as a last resort); *In the Matter of AS and RR*, APP 12-01/02 (October 12, 2012)("Tribal Code speaks about the importance of reunification of families whenever possible."); See also STC § 30.501.

On appeal, Appellant raises several issues. Notably, Appellant claims that: (1) the Tribal Court "incorrectly found a statutory basis to terminate Appellant's parental rights, including the best served his children's interests"; (2) termination of parental rights is not the last resort pursuant to STC § 30.501; (3) alternatives to termination exist due to the relationship of the children with their maternal and paternal grandmothers; (4) Appellant consistently made substantial progress toward completion of his Case Service Plan and Parent Agency Agreement; (5) the Tribal Court prevented Appellant's contact with his children which further frustrated the

parent/child bond; and (6) that this Court, and the Tribal Court, lacks jurisdiction over the Appellant and the children. (*March 3, 2017 Notice of Appeal*). However, Appellant's four-page Appellate Brief asks one single question: "Was terminating Appellant's parental rights "clearly not in the best interest of the child[ren]"? (*May 19, 2017 Brief of Appellant, p. 1*). A question he does not answer. In his brief, the Appellant merely reiterates averments from his *Notice of Appeal* related to the Tribal Court (and therefore this Court's) jurisdiction as well as his contention that the Tribal Court's dispositional orders interfered with the Appellant's ability to complete his Case Service Plan and Parent Agency Agreement. (*May 19, 2017 Brief of Appellant, p. 3*). The Appellant's brief is almost void of legal argument or citation, fails to address the best interest standard encouraged by this Court in *In Re TCD* and points this Court only to pages in the August 4, 2016 termination trial transcript in an attempt to support his contention that the Tribal Court's basis for termination was unsupported. APP-13-02 (July 10, 2014). At oral argument counsel for the Appellant father could cite no authority for his assertions of lack of jurisdiction when questioned by this Court – Counsel for the Appellant father acquiesced and withdrew his jurisdictional arguments.

The analysis in *In Re TCD* informs this Court's opinion here. As explained in *In Re TCD* and set forth in STC § 30.503, a two-step analysis is required before parental rights can be terminated: (1) the fact-finding step; and (2) the best interest step. *In Re TCD*, p. 2. Much like *In Re TCD*, the fact-finding step is not at issue in the present matter.

The Tribal Court's record is clear. The Appellant, and his children, have been under the jurisdiction of the Court for over five years. The Appellant has had the benefit of not one, not two, but three trials in which his right and fitness to parent his children were at issue. The Appellant was represented by legal counsel through each trial and successfully appealed the Tribal Court's May 24, 2014 *Order & Opinion (Terminating Respondent Father's Parental Rights)* which resulted in this Court's rejection of the "one parent doctrine" aligning this Courts jurisprudence with the Michigan Supreme Court's decision in *In Re Sanders*, 495 Mich 394 (2014). Upon remand, the Tribal Court ordered the agency to make reasonable efforts toward reunification. *September 1 Opinion and Order*, p. 1. Between February 2015 and May 2016, the Appellant was afforded at least four opportunities to appear and present evidence to the Tribal Court regarding his progress toward compliance with the Parent Agency Treatment Plan. *Id. at 2.* At all but one of the dispositional review hearings, the Appellant was found to have made minimal progress. *Id.* After the August 4, 2016 termination trial, the Tribal Court made twenty-six enumerated findings of fact and analyzed those facts as required by the Tribal Code to determine the statutory basis necessary to support a termination of parental rights.[1] *Id. at 3-15.*

Upon finding the statutory basis for appeal, the Tribal Court turned to step 2 in the analysis – the best interest step. Specifically, STC § 30.503(b) provides:

[1] STC§§ 30.504(3)(a),(b); 30.504(4); 30.504(6); and 30.504(9).

> Once it is established that one or more of the grounds exists to terminate parental rights of respondent over the child, the Tribal Court shall order termination of respondents parental rights and order that additional efforts for reunification of the child with the respondent shall not be made, unless the Tribal Court finds that termination is clearly not in the best interest of the child.

The Tribal Code does not specifically set forth factors for the Court to consider when determining the best interest of the children. Nevertheless, over the course of five pages, the Tribal Court examined "the overall tenor of Chapter 30" acknowledging the pervasive purpose of preserving the unity of the family, whenever possible. *September 1 Opinion and Order, p. 15.* Despite the clear intentions of the Tribal Code, the Tribal Court found by clear and convincing evidence "that termination is in the best interest of the children, such that it outweighs the preference for maintaining the family unity and parental rights. *Id.*

As instructed by *In Re TCD*, the Tribal Court then examined best interest factors found in the laws of other Tribes.[2] However, the Tribal Court noted that "not each of the factors [set forth in the laws of the other Tribes] are relevant as the others in each particular instance." *Id.* The Tribal Court then chose to examine "factors to be given significant weight in the circumstances presented by [the] case." *Id.* Those factors included:

1. The love, affection, and other emotional ties existing between the parent and the child;
2. The length of time the time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity;
3. The permanence, as a family unit, of the existing or proposed custodial home or homes;
4. The moral fitness of the parties involved; and
5. Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

Id. at 15-18.

The Tribal Court also relied on guidance from the Michigan State Court Administrative Officers Memorandum, Child Best Interests in Termination of Parental Rights Proceedings for "guidance in evaluating the best interests of the children." *Id. at 18.* The Tribal Court proceeded to examine:

1. The opinions of experts;

[2] Little Traverse Bay Bands of Odawa Indians, Waganaksing Odawa Section 5.104 (D)(September 28, 2017), available at: http://www.ltbbodawa-nsn.gov/TribalCode.pdf and Grand Traverse Bay Band of Ottawa and Chippewa Indians, Grand Traverse Code Section 102(d), available at https://www.narf.org/nill/codes/grand_traverse/Title_10.pdf.

2. The current placement of the children;
3. The sibling relationship;
4. The length of time the children have been in care; and
5. The likelihood of adoption.

Id. at 18-19.

The Tribal Court further noted the consideration given to the Tribe's Child Welfare Committee which supported termination and addressed in small part appropriate alternatives short of termination. The Tribal Court ultimately concluded that no appropriate alternatives to termination existed. *Id. at 19-20.*

As previously addressed in *In Re TCD,* until further guidance is promulgated by the Tribe's legislative body, this Court expects that:

> At a minimum…there will be a well-developed record below on what is in the best interest of the specific (child(ren) at issue….[and that]…the tribal court consider Tribal Code Sections 30.102 and 30.501 should be weighed in a particular case.
>
> Beyond [the aforementioned] minimum requirements, it may be helpful for the tribal court to clearly articulate what factors it is considering in determining the best interest of the child(ren) involved.
>
> APP-12-02 at 6.

It does not go unnoticed that all the factors under which the Tribal Court chose to weigh the "best interest of the child" weighed in favor of termination. And while this Court can find no clear error in the Tribal Court's findings of fact, its chosen best interest factors, its application of the facts to the best interest factors chosen, its determinations related to STC §§ 30.102 and 30.501, or the ultimate decision to terminate the Appellant's parental rights, the gravity and finality of termination of parental rights should require certainty regarding the factors in the law to be considered regardless of the outcome of the analysis. That factors can be change, increased or decreased, on a case by case basis, is troubling.

But that simply is not the law, and it would be improper for this Court to substitute its judgment for that of the Tribal Court. STC § 82.124 (8). Indeed, this Court's prior precedent requires that "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). No abuse of discretion exists here. While the Appellant raised the issue alleging the Tribal Court's interference with his ability to create an emotional

bond with his children, the record is replete with evidence that the lack of emotional ties were more likely the effect of the Appellant's repeated shortfalls with complying with orders of the Court, failure to complete required services, and periods of incarceration. To be sure, such allegations are supported by facts, law or argument on appeal.

Beyond this appeal, given the finality of a decision to terminate parental rights, this Court is concerned about the number of termination of parental rights cases heard by the Tribal Court on an annual basis. This Court is not aware of any other tribal court system that hears as many termination of parental rights cases. The number of cases being filed in the Tribal Court seeking to terminate parental rights is deeply troubling given such cases contradict the purpose of the Tribe's Child Welfare Code. Notably, STC § 30.102(2) states that one of the purposes of the Child Welfare Code is "[t]o preserve unity of the family, preferably by separating the child from his parents only when necessary." STC § 30.102(4) goes on to provide that the Code also seeks "[t]o provide a continuum of services for children and their families from prevention to residential treatment, with emphasis whenever possible on prevention, early intervention and community based alternatives." Finally, STC § 30.102(7) states that a purpose of the Child Welfare Code is "[t]o recognize and acknowledge the Tribal customs and traditions of the Sault Ste. Marie Tribe of Chippewa Indians regarding childrearing." The number of termination of parental rights cases being filed in this tribal court system suggests that these purposes are not being met, as tribal families are not being kept unified, a full continuum of services, including guardianships, are typically not being offered, and regular termination of parental rights is not consistent with this Court's understanding of the Tribe's customs and traditions. For the reasons explained above, this is a case where termination is appropriate. However, moving forward, this Court implores the relevant stakeholders to work in a manner that better preserves the Tribe's families, as they are our greatest resource.

ORDER

This Court hereby AFFIRMS the Tribal Court's September 1, 2016 *Order & Opinion (Terminating Respondent Father's Parental Rights).*

IT IS SO ORDERED.

JUDGE DIETZ, concurring.

The Court has over several years, shepherded the two minor children into a position where neither the interests of their struggling father – the Appellant- nor errant mother has been allowed to supersede what was best for the children's welfare.

In the matter at hand the Tribal Court's September 1, 2017 Opinion and Order, based on evidence and fact, to terminate the Appellant father's rights would be in line with tribal custom:

In the Native household..."the children belonged to the mother. If she were leaving or dying, [she] willed the children to her sister or mother.[3]

Also of note is that the dependent children are girls. In our culture, the grandmothers traditionally are the ones who care for the girls and imparts the "Strawberry Teachings" (so called because of the stories and teachings are casually imparted during sewing, gathering strawberries, or beadwork). These traditions uphold the decision of the Tribal Court.

It is disturbing that the only solution is a radical severance which creates legal orphans, orphans out of the children. This cannot be good for them long term either psychologically or spiritually. There appears to be no resource to "open adoption" allowing as little as photos or birthday gifts.

The severity is reminiscent of the 100 years of legal government child abduction who were removed at age four and five to be sent away until adulthood "For their own good". As a tribal people we must be very careful in these cases not to mirror that historical error which subtracted our children from their culture and families. The permanence of a decision to terminate parental rights seems to punish the children as well.

However one may sympathize with the Appellant father, alcohol and drugs may have caused damage to his ability to understand the consequences and he may never "get it" even after all the classes, etc. The Appellant father seems to love his children but sometimes love just isn't enough...it is only one of the many parts of a true traditional upbringing that instills character into our youth. This was noted by Appellate Judge McKerchie and cited by Tribal Court Chief Judge Fabry in this very case:

> Using the medicine wheel can help to find balance and harmony and respect for a person. Everyone needs and deserves a balanced life. Moreover, the medicine wheel teaches that it is a parent's responsibility to make every effort to ensure that his or her child's physical needs are met daily. A child's needs include being with siblings and family and also stability. The medicine wheel shows that a parent should nurture the child, provide security for the child, and attempt to provide for the child's happiness. In addition to physical needs, the medicine wheel also teaches that it is a parent's responsibility to provide the mental and emotional needs of the child. The final parental responsibility is meeting the spiritual needs of the child which include moral and ethical values.
>
> *(In Re AS and RR, APP-12-01, 02, pp. 9-10).*

[3] Chippewa Child Life, M. Helger, pp. 33-4.

The Appellant father and the Tribal Court are of one mind in wanting to assure these minor children have a safe, caring, and stable home and promising future. He can then concentrate on his own healing with the knowledge that his loss has ensured the above for his children; that they were given two great gifts by him. First, the gift of life and second, by being willing to sacrifice his needs above theirs, secured a good future for them. To do this calls for great maturity of love that the Appellant father may not yet understand which the Tribal Court, in its wisdom, has identified for him.

Based on the Tribal Court record and the record before this Court on appeal, I agree that the Tribal Court's *September 1, 2017 Opinion and Order (Terminating Respondent Father's Parental Rights)* should be affirmed.

JUDGE HAUTAMAKI, concurring.

The Sault Ste. Marie Tribal Child Welfare Code, Tribal Code Chapter 30 gives the Tribal Court significant discretion in interpreting its stated purposes. Inherently, the overarching purpose is to provide for the care and protection of children and families of our tribal nation. This Court is instructed through the Tribe's laws to attempt to preserve the family and separate children from parents only when necessary. This Court is further instructed to take such actions that will best serve the spiritual, emotional, mental and physical needs of our children and to serve the best interests of the Tribe to prevent abuse, neglect and abandonment of children through providing a continuum of services for children and families. Tribal law commands the court to secure the rights of parents and all parties who come before it to ensure fairness not only to those parties but to the children themselves while recognizing and acknowledging the Tribal customs and traditions of our Tribe regarding childrearing in a manner to preserve and strengthen the child's cultural and ethnic identity.

With those purposes in mind we urge the Tribal Board of Directors to continue to look to other tribes and states to find best practices that can give the Sault Ste. Marie Tribal Court additional tools and greater flexibility to implement the continuum of services required to preserve families and cultural identity.

The Appellant father clearly loves his children and would not have fought for the last three years to secure his rights as a parent otherwise. It is important to recognize that the Appellant father made *some* progress under the Case Service Plan and Parent Agency Agreement as directed by the Tribal Court. However, incremental progress is not compliance with the Tribal Court's order. Therefore, this Court could not find that it was in the best interest of his children to resume contact the Appellant father or further delay permanency when the Appellant father has repeatedly refused to comply with the requirements laid out for him.

This Court recognizes the difficulty that felons have finding employment post-incarceration and we commend the Appellant father for the progress he made and urge him to continue along that path. Your daughters will attain the age of majority and may wish to develop

a relationship with you in the future and the actions you take now may dictate the ultimate success of that relationship. Completing the program that the Tribal Court laid out for you is but one step on that journey. You are no longer legally obligated to continue paying child support but your moral obligation to your children, their care and their future educational needs has not diminished.

It is with these facts in mind that we urge the Board of Directors to consider revisions to the Tribal Child Welfare Code to give the Tribal Court additional tools and additional flexibility to manage family law and child welfare cases. Several states have adopted legislative frameworks that allow for parental contact with children after parental rights have been terminated.[4] These laws allow for courts to continue parent-child contact when it is in the best interest of the child. The court's determination of Appellant father's current unfitness does not necessarily signify a permanent inability to serve as a positive influence in his daughters' development. As previously stated, he has taken some small steps towards compliance with the court's orders.

In that same vein, some states also allow for the reinstatement of parental rights after termination, upon motion of the child or the child's guardian, when the birth parent can demonstrate fitness. While in this case the best interest of the child has clearly been demonstrated to be the stability of their maternal grandmother's care and her adoption of these children will provide both children and grandmother with greater stability and legal certainty, grandparents do not live forever. Granting the Tribal Court the ability to reinstate parental rights after severance may greater serve the purposes of the Child Welfare Code and the interests of the Tribe as a whole in maintaining family units, when it is clearly in the best interest of the child and Tribe.

[4] Williams, Alexis. RETHINKING SOCIAL SEVERANCE: POST TERMINATION CONTACT BETWEEN BIRTH PARENTS AND CHILDREN. VOL. 41, Connecticut Law Review. (Dec. 2008).