

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ZACHERY BRUDER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

STACEY BRUDER,

Respondent-Appellant,

and

MARTY DONALD BRUDER,

Respondent.

UNPUBLISHED

August 9, 2007

No. 276714

Cheboygan Circuit Court

Family Division

LC No. 05-002474-NA

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Respondent Stacey Bruder appeals as of right from an order terminating her parental rights to the minor child.¹ We affirm. The trial court also terminated the parental rights of the child's father, who has not appealed.

I. Basic Facts And Procedural History

Bruder's parental rights were terminated for failure to sufficiently address her substance abuse problems and her relationship issues with the child's father, and for failing to obtain stable employment and appropriate housing. The child was taken into care at birth because both he and Bruder tested positive for cocaine. Bruder pleaded no contest to allegations that she and the

¹ MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (c)(ii) (other conditions causing the child to come within the court's jurisdiction exist), (g) (failure to provide proper care and custody), (j) (reasonable likelihood of harm if child is returned to parent), and (l) (parent's rights to another child were previously terminated).

child tested positive for cocaine at the time of his birth, and that she had a substance abuse problem that prevented her from providing proper care to the child.

At the time the child was taken into care, termination proceedings were pending concerning the child's sister, who had previously been removed from the parents' care due to substance abuse issues. Bruder's parental rights to the child's sister were terminated in December 2006, on the basis of substance abuse, criminality, lack of stable housing and employment, and the parents' unstable relationship. The trial court in the present case took judicial notice of that decision at a termination hearing as to the minor child in the present case.

The trial court found that Bruder had failed to follow through on counseling to resolve her substance abuse problem and, therefore, there was a ground for terminating her parental rights under MCL 712A.19b(3)(c)(i). Additionally, Bruder would be incarcerated for approximately seven months followed by inpatient treatment, and be unable to work on services. Further, Bruder failed to obtain stable housing and employment, and failed to resolve her relationship issues with the child's father. Thus, the trial court found that grounds for termination were also proven under MCL 712A.19b(3)(c)(ii), (g), and (j). Additionally, although an appeal was pending, Bruder's parental rights to the child's sister had been terminated as a result of protective proceedings, so the trial court found that termination was also appropriate under MCL 712A.19b(3)(l). Lastly, the trial court found that termination was in the child's best interests.

II. Indian Child Welfare Act ("ICWA") Requirements²

A. Standard of Review

Bruder argues that the trial court violated the ICWA by failing to expressly determine that returning custody of the child to her would likely result in serious emotional or physical damage to the child, by relying solely on the opinion of the tribal expert without considering other evidence, and by failing to identify specific conditions in the home that would likely cause serious emotional or physical damage to the child. The determination whether a trial court sufficiently complied with the requirements of the ICWA is a question of law, which we review de novo.³

B. Serious Emotional Or Physical Damage To The Child

Under the ICWA, "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."⁴ In this case, a

² It is undisputed that the child is an Indian child within the meaning of the Indian Child Welfare Act. 25 USC 1901 *et seq.*

³ *In re NEGP*, 245 Mich App 126, 130; 626 NW2d 921 (2001).

⁴ 25 USC 1912(f); see also MCR 3.980(D).

tribal expert expressly testified that Bruder's continued custody of the child was likely to result in serious emotional or physical damage to the child. The trial court expressly referred to that testimony in its decision, and the court indicated that it was relying on the expert's testimony. Thus, it is apparent that the trial court was aware of the ICWA requirement and resolved the issue by accepting the testimony of the tribal expert. The trial court's findings were sufficient and remand for more particularized findings would not facilitate appellate review.⁵

C. Expert Testimony

We also disagree with Bruder's argument that it was improper for the trial court to defer to the opinion of the tribal expert. Although the ICWA refers to "witnesses,"⁶ only one tribal expert is required.⁷ And it was up to the trial court to determine the weight and credibility of the expert's testimony.⁸ Moreover, Bruder does not explain how other evidence renders this determination clearly erroneous. Therefore, any error in this regard was harmless, and reversal is unwarranted.⁹

D. Particular Condition In The Home

We also reject Bruder's argument that the trial court erred by failing to identify a particular condition *in the home* that was likely to cause serious emotional or physical harm to the child. The ICWA does not require that the trial court single out a particular condition in the home. Rather, the ICWA only requires a finding that *continued custody by the parent* is likely to cause such harm. Bruder's reliance on the *Guidelines for State Courts; Indian Child Custody Proceedings*¹⁰ is misplaced. Those guidelines, by their own terms, are not binding. In any event, the evidence showed that the overriding condition likely to result in serious harm to the child was Bruder's failure to deal with her cocaine addiction by successfully completing all of the services required of her, including her failure to complete and benefit from counseling, failure to complete substance abuse treatment, and failure to consistently attend live AA/NA meetings, independent from the child's father. The trial court did not consider Bruder's lack of adequate housing, potential alcohol abuse, and nonconforming social behavior in connection with the ICWA issue. For these reasons, we reject this claim of error.

⁵ MCR 3.977(H)(1); *People v Shields*, 200 Mich App 554, 559; 504 NW2d 711 (1993).

⁶ 25 USC 1912(f); see also MCR 3.980(D).

⁷ *In re Elliott*, 218 Mich App 196, 207; 554 NW2d 32 (1996).

⁸ *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

⁹ See *In re Perry*, 193 Mich App 648, 651; 484 NW2d 768 (1992).

¹⁰ *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Federal Register 67584 (1979).

III. Burden Of Proof Standard

Bruder argues that the trial court erroneously used a beyond-a-reasonable-doubt standard to determine whether a statutory ground for termination existed under state law. In state termination cases involving an Indian child, a dual burden of proof must be met.¹¹ That is, both the federal minimum standards of the ICWA¹² and the state grounds for termination must be proved.¹³ But while the probate court must find beyond a reasonable doubt that “continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child,” the court need only find that clear and convincing evidence supports termination under the applicable state statutory ground.¹⁴ Thus, we agree that the trial court erroneously used the higher beyond-a-reasonable-doubt standard when assessing the state statutory grounds for termination. However, we find the court’s error harmless given that it inured to Bruder’s benefit.¹⁵ It is axiomatic that if the evidence was sufficient to satisfy the higher beyond-a-reasonable-doubt standard, then it was also sufficient to satisfy the lesser clear and convincing evidence standard.

To the extent that Bruder alternatively argues that the beyond-a-reasonable-doubt standard should be adopted in all cases involving Indian children, this involves a policy question that should be addressed to the Legislature.¹⁶

IV. Grounds For Termination

Bruder argues that the trial court erred in finding that each of the statutory grounds for termination was sufficiently proven. We review the trial court’s findings of fact for clear error.¹⁷ Due regard is given to the trial court’s special opportunity to judge the credibility of the witnesses.¹⁸

The child was taken into care because both he and Bruder tested positive for cocaine at the child’s birth. Bruder tested positive for cocaine again on August 7, 2006. Although all of her subsequent drug screens were negative, she stopped participating on January 3, 2007, and did not complete substance abuse counseling. She also failed to consistently attend AA/NA meetings. Her counselor testified that she did not want to address the issues, including her

¹¹ *In re Elliott, supra* at 209.

¹² 25 USC 1912(f).

¹³ MCR 3.980(D); *In re Elliott, supra* at 209.

¹⁴ *In re Elliott, supra* at 209-210; see also MCL 712A.19b(3); MCR 3.977(F)(1)(b) and (G)(3); *In re Miller, supra* at 344-345.

¹⁵ *In re Perry, supra* at 651.

¹⁶ *Elezovic v Ford Motor Co*, 472 Mich 408, 425; 697 NW2d 851 (2005); *Oakland Co Bd of Co Rd Comm’rs v Mich Prop & Cas Guaranty Ass’n*, 456 Mich 590, 613; 575 NW2d 751 (1998).

¹⁷ MCR 3.977(J); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

¹⁸ *In re Miller, supra* at 337.

codependence on the child's father, and that she needed three to six months of additional counseling. She was intoxicated at the time of her January 2007 arrest. Bruder had shown the same pattern of noncompliance during earlier proceedings involving the child's sister, including failing to attend counseling and leaving an inpatient substance abuse treatment center. Bruder was due to be incarcerated for approximately seven more months and then complete a residential substance abuse treatment program. The trial court did not clearly err in finding that termination was warranted under MCL 712A.19b(3)(c)(i) because the conditions of adjudication continued to exist and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the child's age.

The evidence also showed that Bruder lacked stable employment and housing, and failed to make progress in individual therapy to address her relationship issues with the child's father, including the substance abuse codependence, alcohol abuse, and domestic violence. There was no evidence that the parents had severed their ties with each other. Therefore, the fact that the child's father would be incarcerated for not less than 30 months did not solve their relationship issues, or render them moot. Bruder had received recommendations and services to address these conditions since June 2005, but failed to make progress and benefit from the services provided. Additionally, Bruder would not be able to adequately address these issues during her incarceration and subsequent inpatient treatment. Therefore, termination was also appropriate under MCL 712A.19b(3)(c)(ii).

This same evidence also supports the trial court's determination that MCL 712A.19b(3)(g) and (j) were both established.

With respect to MCL 712A.19b(3)(l), it is undisputed that the trial court had previously terminated Bruder's parental rights to another child in 2006. Nevertheless, Bruder argues that termination was inappropriate because an application for a delayed appeal of the 2006 termination order was pending at the time of the termination hearing in this case. The statute merely requires a showing that "[t]he parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter." The statute does not address the effect of a pending appeal. In any event, because other statutory grounds for termination were established, any error in relying on § 19b(3)(l) was harmless.

V. Best Interests Determination

Bruder argues that the trial court erred in finding that termination was in the child's best interests. Once a statutory ground for termination is established, "the court shall order termination of parental rights . . . unless the court finds that termination . . . is clearly not in the child's best interests."¹⁹ We review the trial court's best interests determination for clear error.²⁰

¹⁹ MCL 712A.19b(5).

²⁰ *In re Trejo*, 462 Mich 341, 353-354, 356; 612 NW2d 407 (2000).

Bruder argues that this Court should consider the best interests factors set out in the Child Custody Act.²¹ Although a court may, as appropriate, consider the same concerns expressed in the best interest factors, those factors do not directly apply in termination proceedings.²² Moreover, Bruder has failed to offer any analysis of those best interest factors that she claims should apply.

The record did support that Bruder visited the child frequently, was loving and appropriate during visits, attended to the child's needs, and that the child had established a bond with Bruder. Nonetheless, the child had been in foster care all of his life. Bruder would be incarcerated for approximately seven additional months, followed by a residential substance abuse treatment program, after which she would still need to address her employment and housing issues, and her relationship issues with the child's father. The evidence did not clearly show that termination of Bruder's parental rights was not in the child's best interests.

VI. Conclusion

The trial court sufficiently complied with the requirements of the ICWA, and did not err in deferring to the expert witness testimony. Although the trial court erred in applying a beyond-reasonable-doubt standard rather than the clear and convincing standard when assessing the state statutory grounds for termination, requiring the petitioner to meet that higher standard was harmless, if not beneficial, to Bruder's position. Moreover, we conclude that the trial court did not clearly err in finding that there was at least one statutory ground for terminating Bruder's parental rights, and that the trial court did not clearly err in not finding that termination was clearly contrary to the child's best interests.

Affirmed.

/s/ William C. Whitbeck

/s/ Michael J. Talbot

/s/ Brian K. Zahra

²¹ MCL 722.23.

²² *In re JS & SM*, 231 Mich App 92, 99-103; 585 NW2d 326 (1998), overruled on other grounds 462 Mich 341 (2000).