STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of HARRELL/HARRELL-MARLS, Minors.

UNPUBLISHED
February 4, 2014

No. 316067
Wayne Circuit Court
Family Division
LC No. 11-502868-NA

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the two orders terminating her parental rights over seven of her eight minor children, S. Harrell, J. M. Harrell, L. D. Harrell, L. R. Harrell, T. Harrell, A. Harrell-Marls, and J. Harrell, pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (3)(g) (neglect without regard to intent), and (3)(j) (reasonable likelihood that the minor child would be harmed if returned to the parent's home), with an additional ground under (3)(i) (parental rights to one or more siblings terminated due to neglect) as to J. Harrell. Because the trial court may have failed to comply with the notice requirements of the Indian Child Welfare Act, 25 USC 1901 *et seq.* ("ICWA") and MCL 712B.9(1), we conditionally reverse.

We disagree with respondent's first argument that the trial court erred when it found statutory grounds to terminate her parental rights. This Court reviews the trial court's findings that grounds for termination have been established and regarding the best interests of the children for clear error. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). A finding is clearly erroneous if, despite evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Id.* at 91. If the trial court finds that one or more statutory grounds exist for termination of parental rights and that termination of parental rights is in the children's best interests, the court must order that the respondent's parental rights be terminated and that additional efforts for reunification of the children and parent not be made. MCL 712A.19b(5); MCR 3.977(E); *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). The statutory bases for termination of parental rights must be substantiated by clear and convincing evidence. MCR 3.977(E)(3); *In re LE*, 278 Mich App 1, 22; 747 NW2d 883 (2008). Even if the trial court erroneously found sufficient evidence under one or more statutory grounds, termination still must be affirmed if at least one statutory ground was established by clear and convincing evidence. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

As noted at the outset of this opinion, with respect to the supplemental petition concerning all of the minor children, the trial court found that termination of respondent's parental rights was justified under MCL 712A.19b(3)(c)(*i*), (3)(g), and (3)(j), with an additional ground as to J. Harrell under (3)(i). MCL 712A.19b(3)(c)(*i*) provides for termination of a parent's parental rights if:

> 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds [that] . . . [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

This case opened when police officers enforcing an eviction order "discovered [S. Harrell] lying in bed with a diaper and maggets [sic] crawling on her bed," that she was "disabled and cannot walk," and that her "hair [was] matted and she was lying in her feces with a dirty [t]-shirt on." The house (which respondent was evicted from soon after the children's removal) was filthy, had a foul stench, and the only food in the entire house was one jar of peanut butter. After more than 182 days, respondent had not obtained suitable housing; as of January 30, 2012, she was living in a one-bedroom apartment with her sister and her sister's children and still claimed to be searching for housing as of March 14, 2013.

Respondent completed her parenting classes on January 17, 2013, but Taquanna Marshall, a foster-care worker, opined that she did not benefit from them because she visited the minor children only sporadically and did not assist with S. Harrell's special-education or medical needs, despite having been offered the opportunity to attend all of her medical appointments. As of March 14, 2013, respondent last visited S. Harrell on July 8, 2012, and last visited J. M. Harrell on January 23, 2013. The trial court's finding that the conditions that led to the adjudication over the minor children had not improved as of the time of the final hearings was not clearly erroneous, nor was its finding that there was "no reasonable likelihood that the conditions [would] be rectified within a reasonable time" considering the ages of the minor children. MCL 712A.19b(3)(c)(*i*). Consequently, we affirm the trial court's determination that termination of respondent's parental rights over the minor children was warranted under MCL 712A.19b(3)(c)(*i*).

The trial court's finding that respondent lacked suitable housing also justified termination under (1) MCL 712A.19b(3)(g), which provides for termination where "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age," and (2) MCL 712A.19b(3)(j), which provides for termination where "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The trial court found that respondent was unemployed during the majority of the pendency of this case, inconsistently visited the minor children, and appeared not to know the name of the father of J. Harrell, her eighth child. The trial court's findings were supported by the evidence, and thus its finding that termination was warranted under both MCL 712A.19b(3)(g) and (j) was proper.

Respondent argues that her partial compliance with the parent-agency service plan precluded a finding that she was not likely to provide proper care or custody of the minor children in the future. The service plan required respondent to establish a legal source of income, secure suitable housing, and attend hearings, parenting time, parenting classes, domestic-violence counseling, and individual therapy. Her partial compliance consisted of completing domestic-violence counseling (which was largely irrelevant because there were no allegations of domestic violence in this case), securing employment over one year after the adoption of the service plan and offering proof of such employment for the first time at the dispositional hearing on March 14, 2013, and attendance at most hearings.

However, the evidence supported the trial court's findings that her visits with the minor children were inconsistent, she was terminated from individual therapy "due to lack of cooperation," she did not benefit from parenting classes, and she continued to live with her sister and did not obtain suitable housing. "While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). The respondents in *Frey* "did participate in and complete certain mandated requirements of their respective treatment plans, [but] they failed to demonstrate sufficient compliance with or benefit from those services," leading this Court to hold that the trial court did not clearly err when it found insufficient compliance with, and benefit from, the services provided by DHS. *Id.*

Respondent's lack of progress from the October 20, 2011, introduction of the treatment plan to the March 2013 termination hearings permits the conclusions that she would not be in a position to offer the minor children proper care and custody within a reasonable time, MCL 712A.19b(3)(g), and that the minor children would be reasonably likely to be harmed if returned to respondent's care, MCL 712A.19b(3)(j). Respondent's argument that her neglect of S. Harrell did not prove that any of the minor children would be harmed if returned to her care lacks merit because "[e]vidence of how a parent treats one child is evidence of how he or she may treat the other children." *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). Further, respondent's neglect of S. Harrell was one of several bases for the conclusion that the minor children were at risk of harm in her care.

Respondent raises two arguments relating specifically to the original petition concerning J. Harrell. She contends that termination of parental rights as to J. Harrell under MCL 712A.19b(3)(c)(*i*) was not permitted for initial petitions and that MCL 712A.19b(3)(i) "was not intended to apply in a case where the 'prior' terminations happened during the same hearing." However, as we previously noted, a termination order must be affirmed when at least one statutory ground was established by clear and convincing evidence, notwithstanding an erroneous finding of sufficient evidence under one or more other grounds. *In re Ellis*, 294 Mich App at 32. On the petition regarding J. Harrell, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (3)(g), (3)(i), and (3)(j). With the exception of the first listed subsection, each of these was an appropriate ground to terminate respondent's parental rights at an initial disposition. See MCR 3.977(E)(3)(b). As discussed above, the trial court did not clearly err when it found termination justified under MCL 712A.19b(3)(g) and (3)(j). Hence, whether any error was made under other statutory provisions is irrelevant to our ultimate disposition.

Respondent also argues that the "entire case was based upon the DHS file," in apparent contravention of the requirement that evidence in initial disposition hearings be "legally admissible." MCR 3.977(E)(3). However, respondent does not point to any evidence she considers inadmissible. In addition to Marshall, petitioner called the Child Protective Services worker assigned to the petition concerning J. Harrell and respondent's maternal cousin, with whom some of the minor children were placed, as witnesses during the statutory-grounds portion of the hearing. Respondent argues that Marshall "had only seen [respondent] with the children briefly at [c]ourt, and had no real first hand [sic] knowledge of [her] abilities to parent, must [sic] less the bond between [respondent] and any of her children," but does not explain how those facts affect the admissibility of evidence. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012) (quotation marks and citation omitted). This Court defers to the "trial court's superior fact-finding ability and its determination regarding the relative weight to assign testimony as appropriate under the circumstances." MCR 2.613(C); *Berger v Berger*, 277 Mich App 700, 715; 747 NW2d 336 (2008).

Respondent next argues that the trial court erred when it determined that termination of respondent's parental rights was in the best interests of the minor children.

This Court reviews the trial court's findings regarding the best interests of the children for clear error. MCR 3.977(K); *In re Rood*, 483 Mich at 90-91. Once a statutory ground for termination is established, the trial court must determine whether termination is in the best interests of the child. MCL 712A.19b(5); *In re HRC*, 286 Mich App 444, 452-453; 781 NW2d 105 (2009). To make that determination, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (internal citations omitted). The fact that a child is placed with a relative weighs against termination, and it is generally in a child's best interests to place siblings together. *Id.* at 42-43. "[T]he preponderance of the evidence standard applies to the best-interests determination." *In re Moss Minors*, 301 Mich App 76, 83; 836 NW2d 182 (2013).

The trial court found that termination of respondent's parental rights was in the best interests of S. Harrell, J. M. Harrell, L. D. Harrell, L. R. Harrell, T. Harrell, and A. Harrell-Marls because respondent "ha[d] been unable to demonstrate that she has the parenting abilities to . . . parent these children, either today or even in the foreseeable future." It found that termination of respondent's parental rights was in J. Harrell's best interests because respondent did not complete the parent-agency service plan and rarely visited her, J. Harrell was not bonded with respondent, and "the first 12 months of a child's life are critical[] in terms of establishing those connections that are so vital for a child's development."

Although respondent argues that she and the minor children loved and were bonded to each other, this assertion does not address the trial court's findings concerning the best interests of the individual children, which were united by skepticism that respondent could properly parent the minor children based on her failure to complete the parent-agency service plan and her failure to consistently visit the minor children. "When an appellant fails to dispute the basis of

the trial court's ruling, this Court need not even consider granting [them] the relief they seek." *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks and citation omitted). In any event, as the trial court correctly observed, "the bond of the children is not the most important issue[] with regards to whether or not it is in the children's best interest that parents' parental rights be terminated. It is a parent's ability to parent their child and provide their child with permanency . . . that is important." Contrary to respondent's assertion, the trial court considered the placement of the individual children with relatives, deciding in the case of each child that termination of respondent's rights was appropriate notwithstanding their placement and the general rule that relative placement should weigh against termination. *In re Olive/Metts*, 297 Mich App at 43.

We do, however, agree with respondent that the trial court erred when it failed to comply with the ICWA. "Issues involving the application and interpretation of ICWA are questions of law that are reviewed de novo. A court's factual findings underlying the application of legal issues are reviewed for clear error." *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012) (internal citation omitted). The United States Congress enacted the "ICWA in response to growing concerns over 'abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'" *Id.* (quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989)). The "notice provision" of the ICWA provides, in part, that, "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention." 25 USC 1912(a). See also MCL 712B.9(1) (mirroring 25 USC 1912(a)). MCR 3.965(B)(2) sets forth the responsibilities of the trial court:

> The court must inquire if the child or either parent is a member of an Indian tribe. If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the child's tribe and, if . . . the petition requests removal of the child, follow the procedures set forth in MCR 3.967.

Citing with approval the Colorado Supreme Court's analysis of the ICWA's notice provision, our Supreme Court held that "the 'reason to know' standard for purposes of the notice requirement in 25 USC 1912(a) should set a rather low bar." *In re Morris*, 491 Mich at 105. The *In re Morris* Court examined the ICWA at length, including its notice provision, holding that "sufficiently reliable information of virtually any criteria on which membership [in an Indian tribe] might be based is adequate to trigger the notice requirement of 25 USC 1912(a)," which requires "notice to the tribe or, when the appropriate tribe cannot be determined, to the Secretary of the Interior." *Id.* at 108. "If there must be error in determining whether tribal notice is required, let it be on the side of caution." *Id.* Turning to the question of what constitutes "indicia sufficient to trigger tribal notice," the Supreme Court offered five situations:

> (1) the trial court has information suggesting that the child, a parent of the child, or members of a parent's family are tribal members, (2) the trial court has information indicating that the child has Indian heritage, even though no particular Indian tribe can be identified, (3) the child's birth certificate or other

> official record indicates that the child or a parent of the child is of Indian descent, (4) the child, the child's parents, or the child's Indian custodian resides or is domiciled in a predominantly Indian community[,] and (5) the child or the child's family has received services or benefits from a tribe or the federal government that are available to Indians. [*Id.* at 108 n 18.]

"[T]he mere triggering of the notice requirement does not strip the trial court of jurisdiction over the children and does not mandate automatic reversal of all proceedings occurring after the notice requirement was triggered." *In re Morris*, 491 Mich at 119. "The requirement to provide tribal notice under 25 USC 1912(a) is the *means* by which a court determines its jurisdiction, but is not itself a divestiture of jurisdiction." *Id.* The appellate remedy for violation of the ICWA's notice provision is to "conditionally reverse the trial court and remand for resolution of the ICWA-notice issue," which means that "the ruling is reversed unless ICWA does not apply," and, "if the child is determined to be an Indian child, then the foster care or termination proceedings are invalidated and the proceedings begin anew under ICWA's standards." *Id.* at 120, 122. "If no Indian child is involved, however, or the tribe given proper notice does not respond within the times allotted by 25 USC 1912(a), any notice violation is harmless." *Id.* at 120-121.

At a pretrial hearing, the assistant attorney general, respondent's attorney, and the trial court discussed whether one of the parties was of American Indian heritage for the purposes of the ICWA:

> *The Court*: All right, the petition is authorized. The children have been placed with relatives. What else? I guess—is that it? Did anyone ever ask is there any . . . American Indian heritage in this family? American Indian heritage?
>
> *Ms. Safran (attorney for respondent)*: Do you have any Indian heritage in your family?
>
> *The Court*: Cherokee, Chippewa.
>
> *Ms. Safran*: There might be some grand—on the grandmother's side, what was it? Some time—some type; attenuated.
>
> *Ms. Trott (attorney for petitioner)*: Ms. Topp was told no at the other—
>
> *Ms. Safran*: Well, we didn't have all the parties.
>
> *Ms. Topp (case worker)*: I talked to [respondent], as well, in the police station[,] and I was told no.
>
> *Ms. Safran*: She doesn't think—
>
> *The Court*: You don't have any kind—are you sure it's American, or, any idea what we're talking about? I mean, what kind of Indian? Cherokees, Chippewa? I mean, there's a whole bunch.

Unidentified speaker: I don't—I don't know; I can ask.

The Court: And . . . what relative? Grandma? Great-grandma?

Ms. Safran: Your Honor, can we get a date because . . . they want me in [Judge] Slavens[' courtroom] and I can't believe it.

The Court: You've got to wait just one second. All right, you can investigate and see. That's pretty distant; great-grandma is pretty far back. So, I'm not gonna demand that we send notice.

Ms. Trott: This is on the paternal side? Or maternal? Of which father?

The Court: On the mother's side or father? It better be a maternal because right now—all right. You have the right to have this heard by a referee as to all the children . . . or by a judge with or without a jury, and, of course, continued right to an attorney at all hearings. We're setting this for trial?

Ms. Trott: Yes.

It is clear from the record that the trial court had information, however slight, "suggesting that [a] child, a parent of [a] child, or members of a parent's family are tribal members," which was one of the five situations the Supreme Court listed as "sufficient to trigger tribal notice." *In re Morris*, 491 Mich at 108 n 18. Specifically, respondent's attorney informed the court that "there might be some [Indian ancestry] on the grandmother's side." Because it is for the tribes to determine a child's eligibility for membership, *In re Fried*, 266 Mich App 535, 540; 702 NW2d 192 (2005), the trial court clearly erred when it found that the possibility of Indian heritage in a great-grandmother of one or more of the minor children was too remote to justify the notice required by the ICWA and MCL 712B.9(1).

Following the Supreme Court's analysis in *In re Morris*, we conditionally reverse the trial court's termination of parental rights and remand to the trial court for resolution of the ICWA-notice issue:

> On remand, the trial court[] shall first ensure that notice is properly made to the appropriate entities. If the trial court[] conclusively determine[s] that ICWA does not apply to the involuntary child custody proceedings—because the children are not Indian children or because the properly noticed tribes do not respond within the allotted time—the trial court['s] respective orders terminating parental rights [should be] reinstated. If, however, the trial court[] conclude[s] that ICWA does apply to the child custody proceedings, the trial court['s] orders terminating parental rights must be vacated and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA. [*In re Morris*, 491 Mich at 123.]

Conditionally reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra