STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KAYLA LYNN TOIA, SAVANNAH MAE TOIA, and JOSEPH LOUIS HINTON, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JOSEPH LOUIS TOIA,

Respondent-Appellant,

and

ASHLEE ELIZABETH HINTON,

Respondent.

UNPUBLISHED
August 13, 2009

No. 289465
Wayne Circuit Court
Family Division
LC No. 05-445029-NA

In the Matter of KAYLA LYNN TOIA, SAVANNAH MAE TOIA, and JOSEPH LOUIS HINTON, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ASHLEE ELIZABETH HINTON,

Respondent-Appellant,

and

JOSEPH LOUIS TOIA,

No. 289469
Wayne Circuit Court
Family Division
LC No. 05-445029-NA

Respondent.

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Respondents Joseph Toia and Ashlee Hinton each appeal the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We conditionally affirm and remand for further proceedings consistent with the requirements of the Indian Child Welfare Act ("ICWA"), 25 USC 1901 *et seq*.

Respondents first argue that the trial court clearly erred in finding that the statutory grounds for termination under MCL 712A.19b(3)(c)(i), (g), and (j) were each established by clear and convincing evidence. We disagree.

We review the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). 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. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The trial court exercised jurisdiction over the children because both respondents had continuing problems with substance abuse and domestic violence, and Hinton had ongoing mental health challenges. Despite three years of services, respondents' problems continued to exist at the time of the termination hearing. Respondent Toia stopped and then resumed his use of marijuana and heroin, and had been convicted of a heroin-related offense. Although respondent Toia contends that he had resolved his drug problem, he was found in possession of heroin in April 2008, and tested positive for marijuana in June 2008. The trial court did not find his exculpatory explanations for these events to be credible, and we defer to the trial court's determinations of witness credibility. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Fried*, *supra* at 541. Respondent Toia also failed to establish a reliable source of income or a stable home, and his counselors reported that he remained combative, despite receiving domestic violence counseling. These conditions prevented respondent Toia from providing proper care and custody for the children, and subjected the children to a risk of harm if returned to his care.

Respondent Hinton was involved in a traffic accident and, although she was pregnant with her second child at the time, was highly intoxicated. Both her second and third children tested positive for drugs at birth. Respondent Hinton also failed to complete counseling and substance abuse treatment. While Respondent Hinton claimed to have obtained housing with a person named "Melissa," whom she considered a "great friend," she did not know this person's last name. Further, while respondent Hinton asserted that she depended on her mother for financial support, the trial court found that her mother was not a suitable support person because of her own questionable history. While Hinton argues that she was unable to comply with her treatment plan because petitioner failed to provide specialized services tailored to her specific needs, the record does not support this assertion. Instead, the evidence showed that services

were provided, but respondent Hinton never made a sincere and diligent effort to comply with those services.

Accordingly, on the record presented to us, we conclude that the trial court did not clearly err in finding that the statutory grounds for termination of both respondent's parental rights were established by clear and convincing evidence.

Next, respondent Toia argues that termination of his parental rights was not in the children's best interests.[1] Once a statutory ground for termination has been proven, the trial court shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5). We review the trial court's best interests finding for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Although respondent Toia acted appropriately with his children during visits, he was unable to provide the stability and consistency that the children needed, despite more than three years of services. The trial court did not clearly err in finding that termination of respondent Toia's parental rights was in the children's best interests.

Respondent Toia also argues that reversal is required on the basis that petitioner failed to comply with the requirements of the ICWA. Issues involving the interpretation and application of the ICWA present questions of law that this Court reviews de novo. *In re Roe*, 281 Mich App 88, 96; 764 NW2d 789 (2008).

The ICWA provides that in a case involving the foster care placement of, or termination of parental rights to, an Indian child, the state court must transfer the proceeding to the jurisdiction of the tribe upon the petition of either parent or the tribe, absent objection by either parent. 25 USC 1911(b). The tribe has the right to intervene at any point in the state proceeding. 25 USC 1911(c). If the tribe does not exercise its right to intervene, the parents are entitled to federal statutory safeguards. Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful. 25 USC 1912(d); see also *In re Roe, supra* at 96-97. Termination of parental rights may not be ordered absent a determination, supported by evidence beyond a reasonable doubt, including testimony from a qualified expert witness, 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. 25 USC 1912(f); MCR 3.980(D).

Section 1912(a) of the ICWA provides:

> In 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, by registered mail with

[1] Respondent Hinton does not challenge the trial court's best interests findings.

> return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

MCR 3.980(A)(2) provides the following notice procedure:

> If the child does not reside on a reservation, the court shall ensure that the petitioner has given notice of the proceedings to the child's tribe and the child's parents or Indian custodian and, if the tribe is unknown, to the Secretary of the Interior.

Circumstances that give a court reason to believe that a child is an Indian child include (1) any party, tribe, or agency informs the court that the child is an Indian child; (2) any public or state-licensed agency involved in child protective services or family support has information suggesting the child is an Indian child; or (3) an officer of the court has knowledge that the child may be an Indian child. *In re IEM*, 233 Mich App 438, 446-447; 592 NW2d 751 (1999). Indian tribes are in a better position to determine questions involving the membership of children who may have some relationship to the tribe, and courts should defer to the tribe's expertise. *Id.* at 447. Once proper notice is provided to the tribe, or to the Secretary of the Interior if the identity of the tribe is unknown, and if the tribe fails to intervene in the proceeding, the burden shifts to the parent to show that the ICWA applies. See *In re TM (After Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001).

In this case, respondent Hinton informed the trial court at a pretrial hearing that Kayla was of Indian Heritage.[2] The trial court instructed petitioner to make inquiries to the Cherokee and Iroquois nations. However, the record does not disclose whether the appropriate notification was provided or, if so, whether there was any determination by a tribe that Kayla or the other children were Indian children or were eligible for membership in an Indian tribe. Petitioner contends that it received documentation regarding Kayla's Indian heritage, but concedes that it never presented that documentation to the trial court. Despite respondent Hinton's earlier representation that Kayla was of Indian heritage, the trial court never made any findings on the record regarding this matter.

[2] Although the children's alleged Indian heritage derives from respondent Hinton, respondent Toia has standing to raise this issue pursuant to 25 USC 1914, which confers on "any parent . . . from whose custody [any Indian child who is the subject of any action for termination of parental rights under state law] was removed" the right to "petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title."

Under the circumstances, and because we conclude that the trial court properly terminated respondents' parental rights under Michigan law, we conditionally affirm the trial court's termination order, but remand for further proceedings to ensure compliance with the ICWA notice provisions and a determination whether the ICWA applies, consistent with the procedure prescribed in *In re IEM*, *supra* at 450. If the trial court determines that appropriate notice was provided and that the ICWA does not apply, the termination orders may stand. However, if the trial court determines that the ICWA does apply, the trial court shall conduct such further proceedings as are consistent with the act.[3] *Id.*

We conditionally affirm the order terminating respondents' parental rights, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[3] Although only respondent Toia challenges the termination order as being noncompliant with the ICWA, because it implicates the validity of the proceedings, our conditional affirmance and remand order shall apply to both respondents.