2018 IL App (2d) 180516-U
Nos. 2-18-0516 & 2-18-0523, cons.
Order filed December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re A.C., I.C., S.B., and P.B., Minors,	)	Appeal from the Circuit Court of Winnebago County.
	)	Nos. 11 JA-275 11-JA-276 11-JA-277 11-JA-278
(The People of the State of Illinois, Petitioner-Appellee v. John B., Respondent-Appellant).	)	Honorable Mary Linn Green, Judge, Presiding.

In re A.C., I.C., S.B., and P.B., Minors,	)	Appeal from the Circuit Court of Winnebago County.
	)	Nos. 11-JA-275 11-JA-276 11-JA-277 11-JA-278
(The People of the State of Illinois, Petitioner-Appellee v. Jackie C., Respondent-Appellant).	)	Honorable Mary Linn Green, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: After carefully reviewing the record in this cause, as well as the motion to withdraw by appellate counsel for respondent-father, John B., and the accompanying memorandum of law, we agree with appellate counsel that any appeal would be frivolous and without merit. As no issue supports an appeal, we allow appellate counsel to withdraw, and we affirm Appeal No. 2-18-0516. The trial court provided proper notice and copies of documents as required by the Indian Child Welfare Act (ICWA), and the State proved beyond a reasonable doubt that continued custody of the minors by respondent-mother, Jackie C., is likely to result in serious emotional or physical damage to the minors, and we affirm Appeal No. 2-18-0523.

¶ 2 In this consolidated appeal, the trial court found that it was in the minors' best interests that the parental rights of respondents, the mother, Jackie C., and the father, John B., be terminated after finding them unfit. The federal Indian Child Welfare Act, (ICWA) 25 U.S.C. § 1912(a) (2006), applies to the proceedings as the parents and the minors are members of Indian tribes. The trial court also found that the State met the burden of proof, pursuant to the ICWA, of demonstrating beyond a reasonable doubt that the conduct or condition of the parents was likely to result in imminent risk of serious physical, psychological, or emotional damage to the children if the parents had continued custody.

¶ 3 In Appeal No. 2-18-0516, appellate counsel moves to withdraw his representation of John pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel submitted a lengthy memorandum identifying three potential issues and explaining why these issues lack merit. See *In re Alexa J.*, 345 Ill. App. 3d 985, 988 (2003). We grant appellate counsel's motion and affirm the trial court's judgment.

¶ 4 In Appeal No. 2-18-0523, Jackie does not challenge the trial court's finding of unfitness or the finding of best interests under Illinois law. Rather, she contends that (1) the State did not provide the tribe notice and failed to comply with alleged document production obligations as required by the ICWA, and (2) that the State did not prove beyond a reasonable doubt that

continued custody of the children by the parent was likely to result in serious emotional or physical damage to the children as is required under the ICWA. We affirm.

¶ 5 I. FACTS

¶ 6 A. Background

¶ 7 The case arose when the Department of Children and Family Services (DCFS) received a report on July 14, 2011, that Jackie had given birth on July 13, 2011, to a premature baby girl named A.C., who had a bi-lateral cleft palate. Jackie had tested positive for cocaine at the time of birth. The baby's meconium tested positive for cocaine and Jackie told DCFS that she was homeless. Jackie also reported that she had other children. I.C., a male born on December 1, 2009, S. B., a female born on February 2, 2008, and P.B., a male born on June 4, 2006. The children were staying with Jackie's mother. DCFS advised her to contact it immediately upon her discharge from the hospital to engage in services. Jackie did not contact the DCFS worker and the number and address listed for Jackie proved invalid.

¶ 8 The DCFS worker eventually found Jackie and met with her on August 30, 2011, where it advised her of the seriousness of the baby's condition, that the baby would require specialized care, that she and the baby had tested positive for drugs, and that she needed to comply with services.

¶ 9 Both parents completed drug tests on August 30, 2011, and Jackie came back negative for all drugs and John tested positive for marijuana. At the time, the parents were living in a two-bedroom apartment with an attic space that could be used as a third bedroom, but there were no provisions for A.C.

¶ 10 The Crisis Prevention Institute contacted the Menominee Indian Tribe of Wisconsin (Menominee Tribe), and the Lac du Flambeau Band of Lake Superior Chippewa (Lac du

Flambeau Tribe), as John is a member of the Menominee Tribe and Jackie is a member of the Lac du Flambeau Tribe, to advise them of the situation and to advise them of shelter care and protective custody. The Lac du Flambeau Tribe reported having no specialized foster home available. Protective custody of A.C. was taken on September 8, 2011. Based on the substance abuse issues of both parents and A.C.'s special needs, DCFS requested that custody and guardianship of the minor be granted to DCFS with the right to consent to medical treatment and that the parents be court ordered to cooperate with services and allow access to the other minors that resided with them. On the same day, a neglect petition was filed in the cases of the other three children, I.C., S.B., and P.B.

¶ 11 With respect to A.C., the parties agreed to the entry of a temporary custody order. As to the remaining children, the parties were ordered, *inter alia*, to ensure appropriate supervision of the minors; do random drug drops, remain drug and alcohol free; cooperate with services of DCFS; do paternity testing between John and the minors; and not allow anyone to use corporal punishment. The children were to remain in the care of the parents. Copies of the temporary custody orders were sent with other documents to the Menominee Tribe and the Lac du Flambeau Tribe. The documents included a paragraph giving notice of the next two hearings dates when the matter was set, including the times, address, and courtroom.

¶ 12 The court received correspondence from the Menominee tribe informing it that the minors were ineligible for membership in the tribe and that it would not be intervening in the case.

¶ 13 The Lac du Flambeau Tribe, however, filed a notice of intervention on October 13, 2011. The notice further stated that the minors are Indian children of the Lac du Flambeau Tribe within the meaning of 25 U.S.C. § 1903(4) and that it had the right to intervene.

¶ 14 At a status hearing as to A.C. on February 29, 2012, the court adjudicated her as neglected pursuant to the parents' factual stipulation as to one of the counts of the neglect petition. Guardianship of A.C. was placed with DCFS with the discretion to place her with a responsible relative, in traditional foster care, or with the parents.

¶ 15 B. Proceedings for Termination of Parental Rights and Consent to Adopting

¶ 16 The final termination hearing regarding unfitness took place on April 26, 2018. The parents did not appear personally at any hearings involving the proceedings to terminate their parental rights, although there was evidence of attempts to notify them. On different dates, the State filed four counts for termination of John's parental rights of A.C., I.C., S.B., and P.B. In part, the counts contained the following charges:

> Count I: John has failed to maintain a reasonable degree of interest, concern, or responsibility as to the children's welfare.
>
> Count II: John has failed to make reasonable efforts to correct the conditions that were the basis for the removal of the children from him within nine months after the adjudication of neglected or abused minors.
>
> Count III: John has failed to make reasonable progress toward the return of the children to him within nine months after the adjudication of neglected or abused minors.
>
> Count IV: John has failed to make reasonable progress toward the return of the children to him within any nine months after the initial nine months after the adjudication of neglected or abused minors.

¶ 17 Similar counts were filed against Jackie. All of the petitions included the same nine-month time period of July 29, 2013 to April 29, 2014.[1]

[1] The time period in the motions for termination state: "7/29/13 to 4/29/13," which we find is a

¶ 18 The evidence presented in support of the issue of unfitness consisted of several exhibits, testimony from Kristin Allen of the Lac du Flambeau Tribe, and the court's notes from its rating of three of the service plans made before the taking of consents on August 20, 2015, plus the recommendations on and content of those service plans. At the hearing on August 20, irrevocable consents to specific adoption and related documents were executed by John and Jackie for five of the children. The youngest was too young to have cleared an interstate compact requirement and his case is not involved in this appeal. Because the parents executed the specific consents to adoption, they were no longer involved in the case or in the lives of their children. However, the proposed adoptive parents were not able to adopt the children as planned and thus, it was necessary to continue the case as far as the unfitness of the parents and the best interests of the children were concerned.

¶ 19 Allen is a member of the Lac du Flambeau Tribe and is the family services manager. She supervises seven programs with the tribe and the Indian child welfare program. She is familiar with the children, who are members of the tribe, and has monitored the case for at least four years. Their mother, Jackie, is an enrolled member.

¶ 20 Allen testified that the caseworker through Illinois had been in touch with her as well as the tribal attorney. Allen had reviewed the reports and other documents and was aware of what was happening with the minors.

¶ 21 It was her opinion as a qualified expert witness under the ICWA that active efforts had been made to provide services to prevent the breakup of the family. Because of parental conduct, she opined it was likely to result in serious physical or emotional harm to the children and that the children would be in danger should they be returned to their parents. Both parents

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scrivener's error.

had agreed to the termination of parental rights at one point in time. Both parents, in her opinion, had not shown their interest in caring for their children in that they signed consents for Indian relatives to adopt them. Both of them have addiction issues or mental health issues that would prevent Allen from determining that the children would be safe in their home.

¶ 22 The caseworker for LSSI, Kayla Penner, testified that, in March 2016, it became apparent that an attempted placement with the children's aunts was not working out. After that, neither parent attempted to work on any services or work toward having the children returned to them. Neither parent contacted her. Nor was she aware of any visitation between the parents and the children after March 2016. And they did not contact her to set up any visitation. The parents did not provide any food, clothing, or shelter after March 2016. Penner received a list of family members from the Menominee Tribe and attempted to find placement there. She asked Allen if there were any other family members at the Lac du Flambeau Tribe and was told there were none.

¶ 23 Following the testimony and presentation of exhibits, the trial court concluded that the State had met its burden and proved that both parents were unfit. The court found, consistent with the evidence, that after the end of March 2016, the parents made one more court appearance and have not been heard from again. "They have had no voice mails or contact from the parents. There have been no visits with the minors by the parents. No food, clothing, shelter or support in any way from the parents." In addition, the court found that the parents did not complete services that were recommended for them and never tried to get re-involved after the placements of the children with the relatives were disrupted.

¶ 24 The court further made the following findings pursuant to the ICWA statue:

> "First, the Court finds that proven beyond a reasonable doubt the conduct or condition of the parents is likely to result in imminent risk of serious physical, psychological or emotional damage to the children if the parents have continued custody. Secondly, that beyond a reasonable doubt active efforts were made to support the family in overcoming the challenges making continued custody of the children by the parents an imminent risk of serious physical or emotional damages to the *** children."

¶ 25 After the best interests hearing, the court found that the State had proved by clear and convincing evidence that it was in the minors' best interests that the parental rights of the mother, Jackie, and the father, John, be terminated. The orders were entered on June 7, 2018.

¶ 26 II. ANALYSIS

¶ 27 A. Appeal No. 2-18-0516

¶ 28 Pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate defender has moved to withdraw as counsel on appeal. Counsel has filed a memorandum of law in support of his motion, and he represents that he has advised John of his opinion and sent a copy of the memorandum and a copy of the motion to John apprising him of his actions. The clerk of this court also informed John that he had 30 days in which to respond. John has not filed a response by the deadline. Counsel identified three potential issues and outlined how these issues were not meritorious.

¶ 29 1. Unfitness under Illinois Law

¶ 30 The trial court found John unfit based on lack of reasonable efforts to correct the conditions and lack of reasonable progress under counts II and III. Counsel focuses on lack of progress found in counts III and IV. Counsel concludes that the record does not establish that John, at any time during the almost seven years after the adjudication of neglect on December

14, 2011, ever made reasonable progress towards reunification with his children. Counts III and IV are based on section 50/1(D)(m)(ii) of the Act, in which a parent may be found unfit if he fails to make reasonable progress toward the return of the children within any nine-month period after an adjudication of neglect. 750 ILCS 50/1(D)(m)(ii) (West 2016). Where multiple allegations of parental unfitness are made in a proceeding to terminate parental rights, a finding that any one allegation has been proved obviates the need to review other statutory grounds. *In re S.H.*, 2014 IL App (3d) 140500, ¶ 28.

¶ 31 In Illinois, the Juvenile Court Act of 1987 (705 ILCS 405/1 *et seq*. (West 2016)) provides a two-stage process for involuntary termination of parental rights. First, the State must prove that the parent is "unfit" under one or more of the grounds set forth in the Adoption Act (Act). 705 ILCS 405/2-29 (West 2016); 750 ILCS 501/1(D) (West 2016). Because the termination of parental rights constitutes a complete severance of the parent-child relationship, proof of parental unfitness must be clear and convincing. *In re C.N.*, 196 Ill. 2d 181, 208 (2001).

¶ 32 On appellate review, this court "will not disturb a finding of unfitness unless it is contrary to the manifest weight of the evidence." *In re Konstantinos H.*, 387 Ill. App. 3d 192, 203 (2008). A determination will be found to be against the manifest weight of the evidence only if the opposite conclusion is clearly evident or the determination is unreasonable, arbitrary, or not based on the evidence presented. *In re D.F.*, 201 Ill. 2d 476, 498 (2002). We give great deference to the trial court's finding of unfitness, defer to the trial court's factual findings and credibility assessments, and will not re-weigh the evidence anew on appeal. *In re April C.*, 345 Ill. App. 3d 872, 889 (2004).

¶ 33 We address whether the court erred in finding John failed to make reasonable progress toward the return home of the children during the ninth-month period from July 29, 2013, to

April 29, 2014, pursuant to section 1(D)(m)(ii) of the Act. 750 ILCS 50/1(D)(m)(ii) (West 2016).

¶ 34 Reasonable progress exists when the trial court can conclude that a parent's progress in complying with directives given to him for the return of the child is sufficiently demonstrable and of such a quality that the trial court will be able to order the minor returned to that parent's custody in the near future. *In re J.H.*, 2014 IL App (3d) 140185, ¶ 22. Failure to make reasonable progress toward the return of the child includes the parent's failure to substantially fulfill his obligations under the service plan and correct the conditions that brought the child into care. 750 501(D)(m) (West 2016). The standard regarding whether a parent has made reasonable progress requires that there was some movement toward the goal of reunification with the child. *In re B.W.*, 309 Ill. App. 3d 493, 499 (1999). Under an objective standard, reasonable progress requires, at a minimum, the parent make measurable movement toward the goal of reunification through compliance with court directives, service plans or both. *In re J.A.*, 316 Ill. App. 3d 553, 564-65 (2000). The trial court is to consider evidence occurring only during the relevant nine-month period mandated in section 1(D)(m) in determining whether a parent has made reasonable progress toward the return of the minors. *In re J.L.*, 236 Ill. 2d 329, 341 (2010).

¶ 35 Counsel points out that very little live testimony was taken during the course of the hearings and most of the evidence concerning parental unfitness came through reports. These reports contain conclusions reached by Illinois Mentor that neither parent had made reasonable progress during the given period of time. The exhibits of the service plans showed, *inter alia*, that John did not cooperate with a substance abuse evaluation. He had not successfully completed drug and alcohol treatment. Nor did he properly address the domestic violence

problem that had been a deciding factor in the removal of his children. Clearly, John made no measurable movement toward reunification with his children. Accordingly, we conclude the trial court's finding of unfitness as to John was not against the manifest weight of the evidence.

¶ 36 2. Termination under the ICWA

¶ 37 Counsel next concludes that the State proved that termination of John's parental rights was supported by evidence beyond a reasonable doubt under the ICWA. Under the ICWA, if a child is subject to the Act, "[n]o termination of parental rights may be ordered in such proceeding 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." 25 U.S.C. § 1912(f) (2006).

¶ 38 Based on the opinion of the expert witness Allen, the trial court specifically found, pursuant to the ICWA statute, that the State had proved beyond a reasonable doubt that, even though active efforts were made to help this family, the conduct or condition of the parents was likely to result in imminent risk of serious physical, psychological, or emotional damage to the children if John and Jackie had continued custody. After reviewing the evidence, we determine that the State proved the finding of unfitness under the ICWA beyond a reasonable doubt.

¶ 39 3. Best Interests of the Children under Illinois Law

¶ 40 Counsel next concludes that the State proved that termination of John's parental rights was in the best interests of the minors by a preponderance of the evidence. We agree.

¶ 41 Once a parent is found to be unfit, the State must establish by a preponderance of the evidence that termination of that parent's parental rights is in the best interests of the minors. The crucial determination at the best interests hearing is not what is best for the parent, but rather

what is best for the minor. *In re Shru R.*, 2014 IL App (4th) 140275, ¶ 23. The trial court found, after considering the best interests factors as they applied to the minors' ages and developmental states, and considering the evidence presented, that the State had proved that it was in the minors' best interests that the parental rights of the parents be terminated.

¶ 42 The evidence presented shows that, of the four children, three of them share a placement with people who wish to adopt them and one with a non-adopting foster parent who is willing to provide permanency for him until a suitable adoption situation becomes available. All four children are in stable, secure placements and seem to have adjusted well. Moreover, there is no evidence that John made any effort at any time to re-unite the family. In fact, the record shows that, at least from the execution of the special consent to adoption documents, his efforts were always to locate a member of the Lac du Flambeau Band Tribe or later, the Menominee Tribe, to adopt his children. Thus, raising the children by him, with their mother, was never sought. As testified by Allen, the ICWA expert, she believed that it would be dangerous for the children with John because he had consented to their adoption and indicated no interest in raising them.

¶ 43 In summary, after carefully reviewing the record in this cause, as well as counsel's motion to withdraw and the accompanying memorandum of law, we agree with John's appellate counsel that any appeal would be frivolous and without merit. As no issue supports an appeal, we allow appellate counsel to withdraw and affirm the judgment the trial court that it was in the minors' best interests that the parental rights of John be terminated after finding him unfit..

¶ 44 B. Appeal No. 2-18-0523

¶ 45 Jackie does not challenge the unfitness or the best interests findings under Illinois law. Rather, she alleges that the trial court did not provide the tribe notice and copies of documents as required by the ICWA, and that the State did not prove beyond a reasonable doubt that continued

custody of the children by the parent is likely to result in serious emotional or physical damage to the children as is required under the Act.

¶ 46 1. Sufficiency of Notice under the ICWA

¶ 47 The State agrees that the ICWA is applicable to the children. Section 1912(a) requires notice to the tribe of the proceedings and of the tribe's right to intervene. 25 U.S.C. § 1912(a). Whether the juvenile court was required to give notice to an Indian tribe under the ICWA and the sufficiency of such notice are issues of statutory interpretation, which we review *de novo*. *In re F.O.*, 2014 IL App (1st) 140954, ¶ 47.

¶ 48 Jackie argues that the State did not provide adequate notice of court filings and other paperwork to the tribe after their notice of intervention and request for such documents, as required by section 1912(a) and (c). 25 U.S.C. § 1912(a), (c).

¶ 49 Section 1912(a) provides in relevant part that "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 return receipt requested, of the pending proceedings and of their right of intervention." 25 U.S.C. § 1912(a). Section 1912(c) titled "Examination of reports or other documents" states:

> "Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based." 25 U.S.C. § 1912(c).

¶ 50 Illinois courts have held that, in order to establish compliance with the ICWA's notice provision, "trial courts have a duty to ensure that the record includes, at a minimum, (1) the original or a copy of the actual notice sent by registered mail pursuant to section 1912, and (2)

the original or a legible copy of the return receipt or other proof of service." *In re K.T.*, 2013 IL App (3d) 120969, ¶ 14.

¶ 51 The record shows that, once Jackie disclosed her American-Indian heritage, the State sent notice to the Lac du Flambeau Tribe on September 14, 2011, via certified mail. The notice contained relevant information about the minors, significant dates, potential dispositional outcomes of the State's proposed action, with accompanying neglect petitions, and the notice informing the tribe of its right to intervene in the proceedings. The tribe acknowledged receipt of the notice, and the tribe did, in fact, intervene in the cause. Attached to the tribe's notice of intervention was a letter addressed to the trial court and copied to the State's Attorney's Office, acknowledging having received the notice and the neglect petitions. The tribe remained involved in the proceedings thereafter.

¶ 52 Following its intervention, the tribe had the right to examine all of the reports and documents, as set forth in section 1912(c), and, as pointed out by the State, there is no indication in the record that the tribe was barred from examining the reports and documents. It is clear that the record supports a finding that the State complied with the ICWA's notice provisions.

¶ 53 The tribe's notice of intervention "demand[ed]" that "each of the parties to this proceeding and their counsel of record provide the undersigned with copies of all documents filed with the court in the above proceeding pursuant to 25 U.S.C. § 1911(d), and with notice of all hearings hereinafter set." Then, on July 16, 2012, the tribe sent a letter to the trial court stating that it filed a notice of intervention and that it had not received information or notices and that, [u]nder federal law we are entitled to this participation." The letter asked the court to provide the tribe with the information as to the status of these cases and when the next court appearance was scheduled.

¶ 54 As stated, the ICWA provides that each party to a foster care placement or termination of parental right proceeding under State law involving an Indian child shall have the right to *examine* all reports or other documents filed with the court. 25 U.S.C. § 1912(c). The law does not obligate the State to send copies of every document filed in the case to the tribe.

¶ 55 Jackie also claims that the tribe did not receive any notices of proceedings after the initial notice. As an intervening party, the tribe was entitled to notice. However, we observe that Jackie does not argue how this prejudiced her or the tribe in any way. Additionally, as is apparent from Allen's testimony, the tribe was actively involved in the case for four years prior to the termination proceedings. In a status report filed on February 11, 2014, the caseworker assigned to the case wrote that she had on-going contact with Allen and provided her with information regarding upcoming court dates as well as updates regarding case progress. On July 28, 2017, the State filed a motion to disclose requesting release of all court reports contained in the court file as well as service plans from LSSI and the Illinois Mentor of the family to Allen, as the information was necessary for her to form a credible expert opinion. The motion noted that the termination for parent rights had been set for hearing.

¶ 56 2. Sufficiency of the Evidence under the ICWA

¶ 57 Allen was determined to be an expert witness for purposes of section 1912(f). Jackie does not contest this finding. In order to satisfy the requirements of this section, Allen opined that continued custody by the parents is likely to result in serious emotional or physical damage to the children.

¶ 58 Jackie's only claim of error is that, because her status was unknown at the time of the fitness hearing, the State could not have met its burden of proving beyond a reasonable doubt that had the minors "continued" in her custody, it would have likely resulted in serious emotional

or physical damage to the children. Specifically, she claims that, because she "had no contact with DCFS after March of 2016," the State was effectively precluded from meeting its burden.

¶ 59 We find this argument nonsensical. To follow it to its logical conclusion would mean that any parent could frustrate termination proceedings indefinitely simply by disappearing. As pointed out by the State, indefinitely postponing such proceedings would be detrimental to the very minors that such proceedings were enacted to protect. Furthermore, Jackie's disappearance actually strengthened the State's case. When she was last involved, she had not complied with the service plan, she signed a specific consent to give up the children, and then she was not heard from. Her lack of involvement helped establish that placing the children with her would be dangerous.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, in Appeal No. 2-18-0516, we grant counsel's motion to withdraw and affirm. The judgment of the circuit court of Winnebago County in Appeal No. 2-18-0523 is affirmed.

¶ 62 Appeal No. 2-18-0516: affirmed.

¶ 63 Appeal No. 2-18-0523: affirmed.