


Matter of IW, 419 P.3d 362 (2017)

2018 OK CIV APP 6

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419 P.3d 362  
Court of Civil Appeals of Oklahoma, Division No. 2.

In the MATTER OF IW, MM, Jr., and  
NK, Adjudicated Deprived Juveniles,  
Michael Lance McAfee, Appellant,  
v.  
State of Oklahoma, Appellee.

Case No. 115,997  
THIS OPINION HAS BEEN RELEASED  
FOR PUBLICATION BY ORDER OF THE  
COURT OF CIVIL APPEALS, Division No. 2

|  
FILED 12/29/2017

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Mandate Issued: 01/24/2018

### Synopsis

**Background:** State petitioned to terminate parental rights of father of minor children of Native American descent, alleging father, who resided in Kansas, failed to correct conditions which led to minor children's deprived status after he pled no contest to domestic battery for spanking one child who suffered significant bruising. The District Court, Pottawatomie County, Dawson R. Engle, J., terminated father's parental rights. Father appealed, raising issues under state and federal Indian Child Welfare Act (ICWA).

**Holdings:** The Court of Civil Appeals, Jerry L. Goodman, J., held that:

[1] expert was qualified to testify regarding placement of minor children, and


[2] expert testimony was insufficient to support required finding under ICWA that continued custody of children with father was likely to result in serious emotional or physical damage to children.

Reversed.

Rapp, J., concurred specially.

**Procedural Posture(s):** On Appeal.


West Headnotes (9)


[1] **Infants**  Dependency, permanency, and rights termination in general


As a general rule, before parental rights may be severed, the State must prove its case by clear-and-convincing evidence.

[2] **Evidence**  Degree of Proof in General

Clear and convincing evidence is defined as that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established.

[3] **Indians**  Dependent Children; Termination of Parental Rights

Where an Indian child is involved in proceedings to terminate parental rights, the proceedings must comply with the provisions of both the federal Indian Child Welfare Act (ICWA), and its Oklahoma counterpart. Indian Child Welfare Act of 1978, § 2 et seq.,  25 U.S.C.A. § 1901 et seq.; 10 Okla. Stat. Ann. § 40 et seq.

[4] **Indians**  Actions and proceedings in general

In cases under the State and Federal Indian Child Welfare Acts, the State must prove beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child. Indian Child

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Welfare Act of 1978 § 102, 25 U.S.C.A. § 1912(f); 10 Okla. Stat. Ann. § 40 to 40.9.

2 Cases that cite this headnote

[5] **Indians** — Actions and proceedings in general

Appellate review of the evidence in a proceeding for termination of parental rights under federal and state ICWA is directed toward assuring the evidence adduced by State, if believed, would support a conclusion by any rational trier of the facts that State's evidence demonstrated beyond a reasonable doubt that continued custody by the parent would result in serious damage to the children. Indian Child Welfare Act of 1978 § 102, 25 U.S.C.A. § 1912(f); 10 Okla. Stat. Ann. § 40 to 40.9.

[6] **Indians** — Actions and proceedings in general

The “beyond a reasonable doubt” standard in termination of parental rights proceedings involving Native American children only applies to the factual determination required to be made in ICWA termination cases, i.e., 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, whereas the lesser standard of “clear and convincing” evidence, the state-law mandated burden of proof, is applicable to all other state law requirements for termination. Indian Child Welfare Act of 1978 § 102, 25 U.S.C.A. § 1912(f); 10 Okla. Stat. Ann. § 40 to 40.9.

1 Cases that cite this headnote

[7] **Indians** — Actions and proceedings in general

Social services director employed by Kansas Native American tribe was qualified to testify as expert witness in proceeding to terminate

parental rights of father, who resided in Kansas, regarding whether continued placement of minor children with father would result in serious emotional or physical harm; expert was an elder in tribe and could speak to customs and practices of the tribe, he was a licensed social worker, and he was not disqualified by his assignment to father's case as he was not the primary caseworker. Indian Child Welfare Act of 1978 § 102, 25 U.S.C.A. § 1912(f); 10 Okla. Stat. Ann. § 40 to 40.9.

[8] **Indians** — Actions and proceedings in general

Testimony of qualified expert was insufficient to establish beyond a reasonable doubt that continued custody of Native American children with their father was likely to result in serious emotional or physical damage to children, as required to terminate father's parental rights under ICWA; expert's testimony was vague as to the likelihood of damage to children, he merely stated that he was “concerned” or “unsure” that children would suffer damage, and acknowledged on cross-examination that he had not visited the father's home in two years, thus, despite evidence that father had previously spanked one of the children, causing significant bruising, expert's testimony did not rise to required level of probability to support termination. Indian Child Welfare Act of 1978 § 102, 25 U.S.C.A. § 1912(f); 10 Okla. Stat. Ann. § 40 to 40.9.

1 Cases that cite this headnote

[9] **Indians** — Actions and proceedings in general

The expert testimony required to support termination of parental rights under ICWA need not be the sole basis for finding that the continued custody of the child by the parent is likely to result in serious emotional or physical damage, but the expert's testimony must support that

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finding. Indian Child Welfare Act of 1978 § 102,

25 U.S.C.A. § 1912(f); 10 Okla. Stat. Ann. § 40 to 40.9.

2 Cases that cite this headnote

\*363 APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY, OKLAHOMA; HONORABLE DAWSON R. ENGLE, TRIAL JUDGE

**REVERSED**

**Attorneys and Law Firms**

W. S. Haselwood, HASELWOOD & WEBB, Shawnee, Oklahoma, For Appellant

Richard Smotherman, DISTRICT 23 DISTRICT ATTORNEY, Rebecca Bauer, ASSISTANT DISTRICT ATTORNEY, Shawnee, Oklahoma, For Appellee

**Opinion**

JERRY L. GOODMAN, JUDGE:

\*364 ¶ 1 M.M. (Father) appeals an April 6, 2017, order terminating his parental rights to his minor children, IW, MM, Jr., and NK. Based upon our review of the record and applicable law, we reverse the order under review.

**BACKGROUND**

¶ 2 The minor children, who are of Indian descent, were removed from the biological mother's home in October of 2012 due to alcohol abuse.<sup>1</sup> Father, who resides in Kansas, stipulated to a deprived petition for failure to protect in December of 2012.

¶ 3 An individualized service plan (ISP) was adopted on January 9, 2013, requiring Father to complete a family functional assessment, complete a domestic violence inventory, visit the minor children, provide the Department of Human Services (DHS) a list of appropriate caregivers for the minor children, sign releases, and contact the caseworker at least monthly.

¶ 4 After Father made significant progress on his ISP, DHS recommended trial reunification. In May of 2015, the minor children were placed with Father in Kansas. However, in October of 2015, reunification was terminated after Father spanked MM, leaving significant bruising. Father was charged with domestic battery, ultimately pleading no contest.

¶ 5 State filed a motion to terminate Father's parental rights on September 16, 2016, pursuant to 10A O.S.2011, § 1-4-904(B)(5), alleging Father had failed to correct the conditions which led to the minor children's deprived status. A jury trial was held on March 20–21, 2017. At the conclusion of the trial, the jury found the allegations of the petition to terminate Father's parental rights were true and that termination was in the best interests of the minor children. The trial court subsequently entered an order terminating Father's parental rights. Father appeals.

**STANDARD OF REVIEW**

[1] [2] [3] [4] ¶ 6 As a general rule, before parental rights may be severed, State must prove its case by clear-and-convincing evidence. *In re S.B.C.*, 2002 OK 83, ¶ 5, 64 P.3d 1080, 1082. “Clear and convincing evidence” is defined as “that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established.” *In re C.G.*, 1981 OK 131, ¶ 17 fn.12, 637 P.2d 66, 71 fn.12. Where an Indian child is involved, as in the present case, however, “the proceedings must comply with the provisions of both the federal ICWA, 25 U.S.C.A. 1901 through 25 U.S.C.A. 1963, and its Oklahoma counterpart, the Oklahoma ICWA, 10 O.S. 40 through 10 O.S. 40.9.” *In re T.L.*, 2003 OK CIV APP 49, ¶ 11, 71 P.3d 43, 46 (cited with approval in *In re H.M.W.*, 2013 OK 44, ¶ 6, 304 P.3d 738, 740). “[I]n cases under the State and Federal Indian Child Welfare Acts, the State must prove beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child.” *In re H.M.W.*, 2013 OK 44, at ¶ 6, 304 P.3d at 740.

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¶ 7 Pursuant to the federal ICWA:

No 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.A. § 1912(f).

[5] [6] ¶ 8 Appellate review of the evidence is thus directed toward assuring the evidence adduced by State, if believed, would support a conclusion by any rational trier of the facts that State's evidence demonstrated beyond a reasonable doubt that continued custody by Father would result in serious damage "to [the children]." *T.L.*, 2003 OK CIV APP 49, at ¶ 12, 71 P.3d at 47. However, the "beyond a reasonable doubt" standard only applies to the factual determination required by 25 U.S.C.A. § 1912(f) to be made in ICWA termination \*365 cases, *i.e.*, "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," whereas the lesser standard of "clear and convincing" evidence, the state-law mandated burden of proof, is applicable to all other state law requirements for termination. *In re Adoption of R.L.A.*, 2006 OK CIV APP 138, 147 P.3d 306; *In re J.S.*, 2008 OK CIV APP 15, ¶ 4, 177 P.3d 590 (agreed with in *In re Adoption of G.D.J.*, 2011 OK 77, ¶ 37 fn.25, 261 P.3d 1159, 1169 fn.25).

#### ANALYSIS

[7] ¶ 9 On appeal, Father contends State failed to introduce testimony from a qualified expert witness as required under the Indian Child Welfare Act (ICWA). Father asserts State's witness, Timothy Oliver with the Kickapoo Tribe of Kansas,

was unqualified because he was the social worker regularly assigned to the case, citing 25 C.F.R. § 23-122.

¶ 10 Title 25 U.S.C.A. § 1912(f) requires State to present the testimony of a qualified expert witness. The record provides Oliver is employed by the Kickapoo Tribe of Kansas as the social services director. He is an elder in the Kickapoo Tribe of Kansas and can speak to the customs and practices of the tribe. He is a licensed social worker in the State of Kansas. Oliver testified he was not the primary caseworker for this case.

¶ 11 We find no error by the trial court's decision finding Oliver was qualified as an expert for purposes of the ICWA.

[8] ¶ 12 Father further contends State did not establish beyond a reasonable doubt with expert testimony that continued custody of the minor children by Father would result in serious emotional or physical damage, as required by § 1912(f). Father asserts Oliver only vaguely testified to physical or emotional harm to the minor children. State disagrees, asserting Oliver's testimony along with the child welfare worker's testimony, sufficiently established State's burden of proof.

¶ 13 Title 25 U.S.C.A. § 1912(f) provides:

No termination of parental rights may be ordered in such proceedings 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.

The Guidelines for the Bureau of Indian Affairs provides: "the evidence must show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the particular child who is the subject of the proceeding," and "the causal relationship between

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the conditions that exist and the damage that is likely to result.” See Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, D.3(c), 44 Fed. Reg. 67584, 67593 (November, 26, 1979) (BIA Guideline D.3 [c] ). This evidence must include expert witness testimony. See 25 U.S.C.A. § 1912(f).

¶ 14 With respect to IW, Oliver testified that he “think[s] she would” suffer serious emotional or physical damage if returned to Father. Regarding MM, Oliver merely stated he was very concerned about him and that he's scared, particularly about these proceedings. Oliver never affirmatively testified that MM would suffer serious emotional or physical harm if returned to Father. With respect to NK, Oliver stated “I'm really unsure on that one. ... I really am. I'm just really unsure.” Finally, on cross examination, Oliver acknowledged that he had not been in the home in two years so he could not really say whether the children would suffer serious emotional or physical damage if returned to Father.

¶ 15 Angela Dockrey, a permanency planning worker with DHS, testified she did not believe the minor children could be returned to Father's home safely. She stated the children had a strained relationship with Father. In addition, she believed Father did not know how to handle MM's behavioral issues or know how to discipline him appropriately.

[9] ¶ 16 We find State failed to present evidence through the testimony of a qualified expert affirmatively showing beyond a reasonable \*366 doubt that the continued custody of the minor children by Father was likely to result in serious emotional or physical damage to the children, a showing required by § 1912(f). The Court recognizes that “ICWA does not require that the experts' testimony provide the sole basis for the court's conclusion that continued custody will likely result in serious emotional or physical damage; ICWA simply requires that the testimony support that conclusion.” *Brenda O. v. Arizona Dep't of Econ. Sec.*, 226 Ariz. 137, 244 P.3d 574, 579 (Ariz. Ct. App. 2010) (quoting *E.A. v. State Div. of Family & Youth Servs.*, 46 P.3d 986, 992 (Alaska 2002) ). The testimony of the qualified expert witness constitutes

some of the evidence on which a decision regarding the likelihood of damage should be made. See *Marcia V. v. State of Alaska*, 201 P.3d 496, 508 (Alaska 2009). The expert testimony need not be the sole basis for finding that the continued custody of the child by the parent is likely to result in serious emotional or physical damage, *but the expert's testimony must support that finding.* *Id.* (Emphasis added). We agree.

¶ 17 We emphasize that State in this case must meet a heightened burden of proof beyond a reasonable doubt. Although Father's assault on MM is very serious, there is a total lack of expert witness testimony to support a conclusion beyond a reasonable doubt that continued custody of the minor children by Father is likely to result in serious emotional or physical damage. Testimony as to possibilities such as “think[s]” or “I'm really unsure” does not rise to the required level of probability.

¶ 18 Accordingly, State failed to present evidence through the testimony of a qualified expert affirmatively showing beyond a reasonable doubt that the continued custody of the minor children by Father is likely to result in serious emotional or physical damage to the children, a showing required by 25 U.S.C.A. § 1912(f). Because State did not meet its burden of proof imposed by ICWA, the order terminating the parental rights of Father must be reversed.

¶ 19 **REVERSED.**

FISCHER, P.J., concurs, and RAPP, J., concurs specially.

RAPP, J., concurring specially:

The reversal in this case does not necessarily require that the deprived children's case should be dismissed or that Father should have custody of the Children.

**All Citations**

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### Footnotes

- 1 The biological mother is not a party to this appeal.

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