LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT

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In the Matter of:
Mshkoadekewe Kiogima, dob: 8/17/1995;
Joy Kiogima, dob: 7/27/1999;
McKenzie Kiogima, dob: 5/31/2006;
Cameron Kiogima, dob: 6/19/2007;
Jacob Kiogima, dob: 6/13/1996

Trial Court Case No. JCW-055-0313

Appellate Court Case No. A-033-0726

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OPINION AND ORDER

After two criminal trials in state court, Melvin Kiogima ("Appellant") pled nolo contendere to two counts of criminal sexual conduct in the fourth degree. Upon being notified of the plea, the Tribal Court issued an order pursuant to the Child Protection Statute, Waganakising Odawa Statute (WOS) § XXIV terminating Appellant's parental rights to the children in this matter. We are asked to decide whether the Tribal Court terminated Appellant's parental rights consistent with the Child Protection Statute and with Appellant's rights under the Little Traverse Bay Bands of Odawa Indians' (LTBB) Constitution. Exercising jurisdiction under Article IX, Section C, paragraphs 1 and 5 of the LTBB Constitution and under WOS § XXIV(I), we affirm that it did.

I.

The Final Order and Opinion terminating Appellant's parental rights, issued on June 17, 2016, aptly summarized the facts in this protracted matter. Appellant timely appealed the Order. Following the completion of briefing, the Appellate Court heard oral arguments on February 3, 2017.

II.

The Child Protection Statute, WOS 2012-010, replaced the former Child Welfare Code, creating a comprehensive legislative scheme to "protect the rights and interests of children," § XX(B)(1), and "preserve the unity of the family." Section XX(B)(2). In instances, as here, where those objectives are at odds, § XXIV provides for termination of parental rights. The purpose of § XXIV, which survived verbatim from the original Child Welfare Code, WOS 1998016, states:

> Purpose. The purpose of this Section is to provide for the voluntary and involuntary termination of the parent child relationship and for the substitution of parental care and

> supervision by judicial process. This Section *shall be construed* in a manner consistent with the philosophy that . . . termination of the parent child relationship is of such vital importance that it should be used only as a last resort when, in the opinion of the Court, all efforts have failed to avoid termination and it is in the best interest of the child concerned and of the Tribe to proceed under this Section.

Section XXIV(A)(Italics supplied).Thus, the purpose of § XXIV is to enable the court to proceed with termination "only as a last resort," where the Court deems termination "in the best interests of the child[ren] concerned and of the Tribe." In fulfillment of this section, the Court assesses the facts in the record supporting each of these criteria. Given the "vital importance" of the family unit and of the parent-child relationship, the Court's cautious approach is warranted. To great extent, it is also unnecessary.

Legislative "purpose" sections generally express the policy the legislation is designed to implement, and they may guide courts' efforts to construe the legislation. The Child Protection Statute is no different, as the plain language of § XXIV(A) establishes a principle of construction. The verb phrase "shall be construed" indicates the Council's intent to convey such guidance. Second, the proposition in the section's second sentence beginning with "termination" refers back to the word "philosophy." As a result, the entire clause following the italicized phrase describes the philosophy that the statute charges the judiciary with upholding: valuing a united family unit. Finally, subsection (A) prescribes no evidentiary threshold by which to measure the best interests of the children and of the Tribe. To fill this void, the Tribal Court imported the "beyond a reasonable doubt" standard from subsection (C). In short, subsection (A) commits to the Court the responsibility and discretion to proceed with termination only where the Court deems it necessary.

For these reasons, subsection (A) does not impose independent requirements that must be satisfied as a precondition of terminating parental rights. As such, the Order's best interests analysis is not subject to the clearly erroneous standard of review set forth in subsection (I) because the discretion is committed to the Court. As a matter of statutory construction, the Appellate Court is not vested with authority to review the best interests determination.

If the Statute mandated evaluation of the best interests of the children and the best interests of the tribe as a precondition of terminating a parent's rights, the evidence in the record would be insufficient to satisfy the highly stringent threshold of "beyond a reasonable doubt."

With respect to the best interests of the children, the Court reviews evidence in the record related to several of the twelve factors set forth in § IV(D) of the statute. The recitation of these factors demonstrates the lack of evidence. As an example, the second factor involves the capacity and disposition of the parties to give the children love, affection and guidance. The Opinion observes that "guidance may be difficult to accomplish with the paternal history." Opinion at 5. It is unclear whether this projected difficulty is inferred from the record or mere speculation, as no evidence is cited to support or explain the assertion that Appellant would be incapable of giving guidance to his children. The fourth factor examines the "length of time the child has lived in a stable, satisfactory environment..." According to the Court, "[t]his factor militates for termination." *Id.* However, there is no alteration of living arrangements in these proceedings. As such, the children will maintain continuity in their existing environment. The ninth factor

concerns the "reasonable preference of the child," which was disregarded out of reluctance "to subject them to more scrutiny." Opinion at 6. Under the twelfth factor, "any other factor considered by the Court to be relevant," the Court justifies the decision not to interview or administer evaluations to the children, suggesting that subjecting the children to intrusions "again would be unfair by any measure." Opinion at 6. While we appreciate the desire to distance the children from this case, the approach is inconsistent with the requirement that termination be reserved "only as a last resort, when all efforts have failed to avoid termination."

Further, the testing in this matter—largely performed eighteen or more months prior to termination—yielded conflicting conclusions among the experts. In terms of establishing facts that are directly relevant to the best interests factors, the *short-term* inconvenience of updated evaluations stands in contrast to the *permanency* of termination.

As to the best interests of the tribe, the Court deems the Child Welfare Commission's recommendation "the most important to the Court." Order at 7. In doing so, the Opinion essentially designates the Commission as a mouthpiece for the Tribe. Without question, the Commission serves an invaluable role for the Tribe. Among other duties, it licenses foster care facilities, adoptive homes, and child-placing agencies. But in the context of a parental termination hearing, the Commission's role is limited to advising and making recommendations to the Tribal Prosecutor and Human Services Department, who represent the Tribe's interests in court proceedings. That is not to say that the Commission could not have a role in parental termination hearings. The statute that created the Child Welfare Commission, WOS 2012-011, Section IV(A)(6) authorizes the Commission to "[a]ppear in court proceedings," and section IV(D)(6) provides that the Commission's "[c]onfidential records may be introduced and used in court cases." As the statute demonstrates, the Council contemplated its participation in child protection matters.

As a result, the Court's direct reliance on the recommendation of the Commission as a proxy for Tribal interests was mistaken because neither the commissioners nor their records were examined as part of the record. Applying a constitutional due process clause similar to that of LTBB's, the Supreme Court has admonished that"[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *see also Rivera v. Marcus*, 696 F.2d 1016, 1025-24 (2nd Cir. 1982) (holding that because an adult had a liberty interest in remaining the foster parent to two half-siblings, due process demanded an opportunity to confront and cross-examine adverse witnesses in a removal hearing).

If the "best interests of the Tribe" had been a prerequisite to termination, the Commission's recommendation would have formed the basis of the Court's analysis, heavily influencing the outcome of the case despite Appellant's lack of opportunity to confront and cross-examine Commission members as adverse witnesses. Due process demands that, before the Commission's recommendation can be regarded as probative on an issue of fact, the Appellant must first be afforded the opportunity to cross-examine the commissioners.

Nevertheless, the flawed subsection (A) analysis ultimately has no bearing on the disposition of this matter.

III.

Because subsection (A) determinations are not subject to appellate review, the only question on review concerns the Court's finding that at least one of the criteria among subsection (C)(1)-(6) is present. "The Court may only terminate the parental rights of a parent to a child if the Court finds, beyond a reasonable doubt, one or more" of the six circumstances in subsection (C). In its Opinion, the Court found subsections (C)(2) and (C)(4) satisfied beyond a reasonable doubt. Thus, the decision of the Court is not clearly erroneous if the evidence supports a finding beyond a reasonable doubt that either of these two circumstances are satisfied.

Subsection (C)(2)(a) involves three prongs, all of which must be satisfied to justify termination of parental rights. The first prong is met where the "child or a sibling of the child has suffered . . . sexual abuse. . ." As the record discloses, both this matter and Appellant's criminal case are the result of an accusation by Appellant's adopted daughter, who is a sibling to the other minors in this matter. Appellant plead nolo contendere to Criminal Sexual Conduct in the fourth degree. The second prong requires the Court to find the "parent's act caused the physical or sexual abuse . . ." As with the first prong, both this matter and the criminal case are direct consequences of the accusation against Appellant. The first and second prongs are satisfied where "the parent's act caused the physical or sexual abuse" of the children or a sibling of the children.

The third prong requires the Court to find "a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. . . ." Section XXIV(C)(2)(a). The Court appends to the provision ". . . for supervised visitation," Opinion at 4, and finds the modified standard satisfied. In support of this finding, the Opinion cites the conflicting testimony of Dr. Ira Joseph Schaer and Mr. Tim Strauss. *Id.* at 4. The Court resolves the conflict in favor of Mr. Strauss on the grounds that he had interacted with the children on multiple occasions, whereas Dr. Schaer's testimony critiqued Mr. Strauss's work product. *Id.* at 4-5. In testimony delivered during a hearing in January of 2015, Mr. Strauss defended his concern that the children would experience anxiety if reunified with Appellant after a prolonged absence. Dr. Schaer, conversely, asserted that Mr. Strauss's testing showed a lack of anxiety, and that if there were anxiety, its continuous presence could not be blamed on the father because he had not seen the children in over 18 months. (Tr. Jan 23, p. 19, 1-24.)

Absent additional reports or testimony to develop the record with respect to the likelihood and severity of the children's reaction to visitation with the father, it would be clearly erroneous to equate anxiety with suffering "injury or abuse." As the record stands, none of the experts testified that the children would face imminent risk of injury or abuse. Indeed, Mr. Strauss testified that the risk of child abuse was low.[1] The most direct testing was performed by Dr. John Ulrich, who concluded that Appellant "rated as low risk for re-offense." (Tr. Jan 23, p. 50, 8-11.) Updated or supplementary expert testimony certainly could establish a basis for finding beyond a reasonable doubt that placement in Appellant's custody would entail a reasonable likelihood of injury or abuse in the foreseeable future. But given the conflicting views of the experts, and the

[1] "So the issue there, as far as, is he going to be a sexual risk? I think everyone would agree that that's low." (Tr. Jan 23, p. 100, 2-4.)

lack of testimony that Appellant would inflict injury or abuse on his children,[2] more evidence would be needed to establish this contention beyond a reasonable doubt. Thus, the third prong is not satisfied beyond a reasonable doubt.

Section XXIV(C)(4) is a different matter, however, as the Court must find only that "[a] parent of the child is convicted of a violent or criminal sexual crime." The Michigan Penal Code states that "[a] person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of" eight circumstances apply. Thus, the misdemeanors to which Appellant pled nolo contendere are "sexual crime[s]."

Under Michigan law, a defendant who pleads nolo contendere admits "all the essential elements of a charged offense." *People v Patmore*, 264 Mich. App 139, 149; 693 N.W.2d 385 (2004). It "is tantamount to an admission of guilt for the purposes of the criminal case." *Id.* In the state court that tried Appellant's criminal case, Michigan Court Rule 6.302(D) requires a judge taking a nolo contendere plea to establish an evidentiary basis on the record to ensure that a plea is based in fact:

> (2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must: (a) state why a plea of nolo contendere is appropriate; and (b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

Thus, Appellant's plea of nolo contendere carries the weight of a conviction of a sex crime within the meaning of § XXIV(C)(4).

For his part, Appellant has not denied he has been "convicted of a violent or criminal sexual crime." Rather, he argues that his right to due process termination of parental rights is not mandated by § XXIV(B)(2) because the charge he plead nolo contendere to, fourth degree Criminal Sexual Conduct, does not involve an element of "penetration, attempted penetration, or assault with intent to penetrate." The effect of the plea merely relieves the Tribal Presenting Officer of the obligation to "include a request for termination of parental rights within the initial petition filed with the Court," except that the initial petition filed in 2013 included the then-mandatory request. Regardless, the Court is authorized to involuntarily terminate parental rights pursuant to § XXIV(C).

Appellant further argues that he "was denied due process when the Tribal Court ordered the proofs closed and denied him the opportunity to present testimony and evidence as to why his parental rights should not be terminated; and was denied the opportunity to cross-examine the Petitioner's witnesses, including the authors of the reports on which the Court relied." Brief of Appellant at 8. There would be merit to this contention if § XXIV(A) required the Court to make and justify best interests findings, or if the termination depended on § XXIV(C)(2). Because the Court's decision to terminate parental rights is independently justified under § XXIV(C)(4), the

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[2] Mr. Strauss had suggested "the possible risk, specifically to McKenzie, of sexual abuse," Parent/Child Observation, filed Sept. 10, 2013, p. 7, but seemed to walk back the threat in the hearing on January 23, 2015. *See* fn. 1, supra.

Court's decision was not clearly erroneous, and Appellant was not deprived constitutional due process.

IV.

The Child Protection Statute commits exclusive discretion to the Tribal Court to determine whether termination of parental rights pursuant to § XXIV(C) is "consistent with the philosophy that" the statutory procedures are "used only as a last resort," where "all efforts have failed to avoid termination" and termination is "in the best interests of the child concerned and of the Tribe." In expressing "the opinion of the Court" that all the foregoing were satisfied, the Final Opinion and Order comports with subsection (A). It also confirms beyond a reasonable doubt that Appellant was "convicted of a violent or criminal sexual crime." Accordingly, the termination of Appellant's parental rights conformed with the Constitutional due process and with the Statute. **AFFIRMED**.

Date: March 31 2017

Sean Cahill, Appellate Justice

Patrick Shannon, Appellate Justice
William Denemy, Appellate Justice