**IN THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA TRIBAL COURT**
**COURT OF APPEALS**

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| In Re the Matter of<br><br>[redacted],<br><br>Minor Child. | Case No(s).: CINA-2021-0005<br>APP-2024-0001<br><br>**DECISION** |

## INTRODUCTION

This matter came before the Court of Appeals with oral argument convening on April 24, 2024; pro tempore Associate Justice Chad M. Gordon, pro tempore Associate Justice Todd R. Matha and Chief Justice Tricia A. Zunker, presiding. Appellant mother appealed an order terminating parental rights of minor child [redacted] and the Court must determine whether to uphold the termination of parental rights. For the reasons stated herein, this Court affirms the judgment of the Trial Court.

## FACTUAL HISTORY

Appellant is an enrolled member of the Sac and Fox Tribe of the Mississippi in Iowa and the biological mother of [redacted], a descendant member of the Tribe. This matter commenced shortly after [redacted] was born. On December 11, 2020, Meskwaki Family Services (MFS) filed an Ex Parte Motion for Emergency Order for Protection and a Petition for a Child in Need of Assistance (CINA) for minor child [redacted], alleging that the child was neglected as defined by Tribal Code, sections 7-1105(c) and 7-1105(h)(6). The precipitating event was appellant's self-report to hospital staff of daily methamphetamine usage throughout her pregnancy until two weeks before [redacted] was born. The Trial Court granted a temporary emergency removal of [redacted] on December 11, 2020. The child remained in emergency custody until February 1, 2021, at which time [redacted] was reunited with the appellant during her stay at Heart of Iowa, a residential

substance use disorder treatment facility in Cedar Rapids, Iowa. A case plan was filed on February 24, 2021, which included goals focused on sobriety, health and stability for appellant as well as rehabilitation for father. On March 9, 2021, the Trial Court issued an Order of Disposition approving the current placement of [redacted] in the physical care of appellant.

While [redacted] was in the care of appellant, she had limited contact with MFS, including a period from at least May through August 2021 where MFS did not have any visits with [redacted] due to appellant's non-responsiveness. Order Changing Permanency Goal and Order Terminating Parental Rights, CINA-2021-0005, at 3 (Sac & Fox Tr. of Miss. Tr. Ct. Dec. 5, 2023) [hereinafter TPR Order].

In October 2022, appellant tested positive for methamphetamine and amphetamine [redacted] was removed from appellant's care and placed with a relative. [redacted] has not returned to appellant's care since the removal. Throughout the pendency of this case, appellant had approximately 45 UA tests offered; [1] she was a no show for 37 tests, had approximately 5 positive tests, 2 negative tests and 1 or more with questionable results. Finding of Fact 37, TPR Order at 5. The failure to have successive clean UA tests represents a primary reason preventing reunification of [redacted] with appellant.

An updated case and goal plan was filed on July 25, 2023, again focused on sobriety and stability for appellant. On August 1, 2023, MFS filed a Petition to Change the Permanency Goals, seeking to amend the case plan's goal from reunification with appellant to termination of parental rights and adoption. [redacted] has been in the physical care of [redacted] maternal uncle [redacted] since October 31, 2022.

[1] UA refers to urinalysis, which is a test used to detect the presence of drugs such as methamphetamine in the system. Random UAs were included as a requirement of the case plan, focused on the goal of sobriety. *See* Case Plan, CINA-2021-0005, at 3 (Sac & Fox. Tr. of Miss. Tr. Ct. Feb. 24, 2021); *see also* Order of Disposition, CINA-2021-005, at 3 (Sac & Fox Tr. of Miss. Tr. Ct. Mar. 9, 2021).

Reasonable and active efforts have been performed by MFS to keep the family unified and to assist the family in resolving the underlying issues of the child welfare petition, including supervised visitation, random UA testing, assignment of a Family Centered Services worker, referrals for substance abuse and mental health evaluations, local community services referrals, and transportation provided for visitation and medical appointments. Finding of Fact 10, TPR Order at 2. Despite these efforts and services, appellant was unable or unwilling to achieve the permanency goals or overcome the ongoing substance abuse.

**PROCEDURAL HISTORY**

On November 8, 2023, the Trial Court held a contested evidentiary hearing on a Petition to Change Permanency Goal and recommendation to terminate parental rights filed by MFS for M.S. Individuals present at the hearing included: Vannessa Larson, legal counsel for MFS; Oceana Buford, MFS social worker; Whitney Hills, Families First Worker [redacted] maternal uncle and caretaker of the child; Cynthia Tofflemire, attorney for the appellant; and Deb Skelton, guardian ad litem. The child's father and appellant mother were not present at the hearing. The Trial Court waited for the absent parties and commenced the hearing 22 minutes late, but they did not arrive. At the close of the hearing, Attorney Tofflemire indicated she received a text message communication from her client, the appellant, who indicated she did not have gas to attend the hearing. *Tr. of H'rg: In Re the Matter of M.S., DOB 12/6/20* (hereinafter "*Hearing Transcript*") at 45, Nov. 8, 2023. The Trial Court determined that both appellant and father had notice of the proceedings and failing to appear rendered each in default; however, the Trial Court proceeded with the contested hearing, with several witnesses called and an opportunity for counsel for both parties to question the witnesses. The Trial Court determined that the appellant and father engaged in repeated instances of severe neglect that have had a demonstrable negative impact on the child's welfare based on their ongoing substance abuse and

failure to accomplish the goals of their respective case plans. Finding of Fact 34, TPR Order at 5. The court further determined that appellant's "continued failure to comply with UA testing shows a lack of sobriety and a lack of commitment to resolving the substance abuse concerns that caused this case to be initially opened." Finding of Fact 51, *id.* at 7. Moreover, the Trial Court determined severe neglect occurred because appellant

> has not been able to successfully address her substance abuse issues and parenting concerns. She has not demonstrated consistent stability or progress in the ability to safely parent the child or to provide essential items like a substance-free home. The above items, including the long period of time that the child has been out of [redacted] appellant's care, have resulted in the severe neglect of her child that has resulted in a demonstrable impact on the child.

Finding of Fact 52, *id.*

MFS case worker Oceana Buford provided a recommendation, based on her professional opinion, that parental rights for M.S. be terminated and adoption by caretaker relatives be completed. *H'rg Tr.* at 38. The Guardian ad Litem agreed with this recommendation. *Id.* at 57. The Court determined by clear and convincing evidence that there were sufficient grounds that the change in permanency goal and the termination of parental rights for both parents was in the best interests of the child under section 7-2301. This appeal ensued.[2]

**ISSUES PRESENTED**

(1) Whether the Trial Court abused its discretion in continuing the hearing when appellant did not attend despite receiving notice and the opportunity to be heard;

(2) Whether the Trial Court abused its discretion in granting a termination of parental rights without first considering guardianship;

(3) Whether "severe neglect" of [redacted] occurred as required under section 7-2301(c) of the CHILD WELFARE CODE.

[2] The father of [redacted] did not appeal the termination of his parental rights.

## STANDARD OF REVIEW

Concerning the termination of parental rights, we review the Trial Court's findings of fact for clear error and its conclusions of law de novo. *In Re the Matter of J.C.G.L.*, JCGL-CV-APP-2002-04-158, at 4 (Sac & Fox Tr. of the Miss. Ct. of App. Mar. 12, 2009);[3] *see also In Re the Matter of J.A., J.A., J.A., and L.A.*, JA-CV-APP-2011-02-368; 03-369; 04-370; 05-371, at 2 (Sac & Fox Tr. of the Miss. Ct. of App. Aug. 1, 2012). Furthermore, the Court will employ an abuse of discretion standard whenever scrutinizing matters committed to the discretion of the Trial Court judge. *Sac & Fox Tr. of the Miss. in Iowa et al. v. Ray Young Bear and Alex Walker, Jr.*, APP-2009-01-194, at 4 (Sac & Fox Tr. of the Miss. Ct. of App. Sept. 18, 2009); *see also Sac & Fox Tr. of the Miss. in Iowa v. Attorney's Process & Investigation Servs., Inc.*, APP-2009-02-238, at n.3 (Sac & Fox Tr. of the Miss. Ct. of App. Jan. 11, 2010) ("[T]he 'abuse of discretion' standard does not mean no review at all. It simply means that we shall not second-guess the decision of a trial judge that is in conformity with established legal principles and, in terms of its application of those principles to the facts of the case, is within the range of options from which one could expect a reasonable trial judge to select.") (citing *Gateway E. Ry. Co. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1142 (7th Cir. 1994))).[4] Under this highly deferential standard, the Court will uphold the Trial Court's findings unless "a decision is clearly unreasonable, is not supported by substantial

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[3] In *In Re the Matter of J.C.G.L.*, the Court of Appeals cited to Federal Rules of Civil Procedure, Rule 52(a)(6) in regard to review of findings of fact on appeal. Rule 52(a)(6) states: "*Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." The United States Supreme Court has held that a finding is 'clearly erroneous' for purposes of Rule 52(a)(6) when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Essentially, the appellate court must determine that a finding is unsupported by substantial, credible evidence in the record to meet this standard.

[4] This Court references external case law as persuasive, not binding, authority and in an attempt to demonstrate a consistent approach to basic legal principles. We are entitled to look to other jurisdictions "for the purpose of guidance and example when permitted by the laws of the Tribe and when no applicable specific Tribal common law is available." SAC & FOX TR. OF MISS. CODE § 1-2101(b); *see also Sac & Fox Tr. of the Miss. in Iowa et al. v. Ray Young Bear and Alex Walker, Jr.*, APP-2009-01-194, at n.1 (Sac & Fox Tr. of Miss. Ct. of App. Sept. 18, 2009).

evidence, or is the result of an erroneous application of the law." *In re E.H.*, 578 N.W.2d 243, 246 (Iowa 1998).

## ANALYSIS

### I. The Trial Court did not abuse its discretion in proceeding with the hearing when appellant had notice of the hearing and an opportunity to be heard.

Appellant's counsel argues the Trial Court's decision to proceed with the hearing despite appellant's absence was in error. Whether the Trial Court should have continued the hearing is a decision within the discretion of the Trial Court judge. Appellant was provided notice of the hearing and an opportunity to be heard prior to entry of any judgment. SAC & FOX TR. OF MISS. CODE § 7-2301(c). Appellant claims she did not have gas to attend the hearing. She had an out-of-home visit with Families First employee Whitney Hills that morning and did not communicate a need for gas money or a ride to the tribal court. The hearing started 22 minutes late to permit appellant an opportunity to arrive late or to contact someone regarding her absence. She eventually did communicate with her attorney during the hearing, and her attorney raised appellant's lack of gas as the reason for her absence during her closing statement. *H'rg. Tr.* at 58; *see also infra* note 5. Moreover, appellant's counsel made a minimal and somewhat uncertain request for a continuance during the hearing and only now argues, after the fact, that the hearing should have been continued.[5]

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[5] The opening statement presented by counsel at the hearing included the following limited remarks related to continuance:

> MS. TOFFLEMIRE: I would state that my client has asked me to dispute the permanency plan and disagrees with the adoption. She has maintained visits, regular visits with [redacted] she has a bond with [redacted], and she would like this matter to be continued.
>
> THE COURT: And when you say –sorry—when you say that she would like the matter to be continued, do you mean the hearing today or do you mean that she be allowed to continue to receive services for reunification?

Ultimately, appellant was provided notice and the opportunity to be heard prior to the decision of the Trial Court. The appellant bears the responsibility to appear and it was not unreasonable for the Trial Court to proceed with the hearing. Poor planning on behalf of a party is not a compelling justification for a continuance, especially for a party in appellant's position where she was experienced with court proceedings and aware of the gravity of this particular hearing. Therefore, the Trial Court did not abuse its discretion in proceeding with the hearing.

### II. The CHILD WELFARE CODE does not require a judge to first consider guardianship before terminating parental rights, and it does not require Meskwaki Family Services pursue guardianship before initiating a petition for termination of parental rights.

Appellant's counsel argues that it was error for the judge to grant termination of parental rights instead of considering guardianship. In the Amended Notice of Appeal, counsel set forth: "[T]he Tribe failed to show why guardianship was not considered versus adoption for[redacted]" *Am. Not. of Appeal,* APP-2024-0001, at 1 (Sac & Fox Tr. of the Miss. Ct. of App. Jan. 2, 2024). This argument has no basis in existing statutory law. The CHILD WELFARE CODE does not require pursuit of guardianship by MFS prior to commencing proceedings for termination of parental rights, nor is a judge required to address guardianship as an initial matter.[6] Indeed, there are times when it could be futile, illogical or otherwise unnecessary to do so.

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> MS. TOFFLEMIRE: I would say both. However, I would ask the Court to consider, if permanency is entered, to consider – so she has maintained visits and they have a bond, so some sort of visitation schedule for them.

*H'rg Tr.* at 11.

Appellant's inability to attend due to lack of gas was not addressed until her attorney's closing statement.

> MS. TOFFLEMIRE: My client would resist the permanency motion. However, I would also state that she has texted and stated that she does not have gas to come, so she is communicating, you know, regarding this.

*Id.* at 58.

[6] Appellant has four older children who have been placed in guardianship with two different relatives during the pendency of this case. Order of Permanency for[redacted], and Order of Review for[redacted], CINA-2019-0025; -0026; -0027; -0028, CINA 2021-005, at 5 (Sac & Fox Tr. of Miss. Tr. Ct. June 29, 2022). During oral

### III. The Trial Court correctly determined severe neglect occurred through the repetitive drug use and abuse by appellant.

A "neglected child" is defined under the Code in a number of ways. Relevant to our determination is the definition provided under section 7-1105(h)(6), which defines a "neglected child" as any child "[w]hose parent, guardian, or custodian engages in conduct . . . dangerous to life or limb or injurious to the health or morals of such child." Section 7-2301(c) states that parental rights may be terminated "only against a person who has been convicted of the sexual or physical abuse or child endangerment, or repetitive instances of severe neglect which have a demonstrable negative impact on the welfare of a child in his or her custody." The CHILD WELFARE CODE does not define "severe neglect." However, we can interpret this term by resort to its plain meaning. Severe is defined as "of a great degree."[7] Therefore, severe neglect here would require the parent, guardian or custodian to engage in conduct dangerous to life or limb or injurious to the health or morals of such a child to a great degree.

The facts of this case clearly demonstrate severe neglect, and the record indicates that the Trial Court did not err in finding that the appellant's conduct met the threshold of severe neglect through clear and convincing evidence. *In Re the Matter of J.A., J.A., J.A., and L.A.*, JA-CV-APP-2022-02-368; 03-369; 04-370; 05-371, at 3. This case spans years, starting with the birth of [redacted] and in utero exposure to methamphetamine. While [redacted] was placed in appellant's care for a period of time, the failed and no-show UAs demonstrate appellant's ongoing refusal to address her substance abuse. This is an extremely dangerous situation for [redacted], who is a young child

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argument in this matter, the Court inquired why guardianship was pursued for the four older children, but not in the case of [redacted] Attorney Larson indicated a number of reasons, including the young age of the child, the uncertainty that can surround guardianship and the subsequent emotional toll such uncertainty may have on a child with respect to permanent placement. *Tr. of Oral Arg.: In Re the Matter of: M.S., DOB 12/6/20*, at 27-28, Apr. 24, 2024. This is consistent with values expressed in the introduction of the CHILD WELFARE CODE, highlighting the court's role in "protect[ing] the child's sense of belonging to the family and the Tribe." SAC & FOX TR. OF MISS. CODE § 7-1101. Counsel also identified the existing length of physical placement with the caretakers and the caretaker preferences in determining to pursue termination of parental rights instead of guardianship for M.S. *Tr. of Oral Arg.* at 27-28.

[7] Merriam-Webster Dictionary defines "severe" as "of a great degree." MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com (last visited May 7, 2024).

unable to protect [redacted] from the risks and harms that exist when a caretaker uses and abuses drugs.

Appellant also failed to demonstrate a commitment to reunification because the goals of the permanency plan could not be achieved, despite the ample resources and services provided to her. Reunification is the goal of the family court system. However, that goal shifts where it is evident the safety and stability of the child will not be met through reunification. While substance abuse is a devastating affliction that plagues Native Americans at a disproportionate rate,[8] we cannot sacrifice the safety and stability of the child where a parent demonstrates ongoing use and abuse coupled with a refusal to address it in meaningful way. At some point, the best interests of the child gravitate from reunification to permanency achieved through other means to ensure the child's safety and stability, and in the case of [redacted], who has not had a permanent home since [redacted] birth, that time is overdue.[9]

## CONCLUSION

There is a unique bond between a parent and a child that survives outside of any judicial decree. However, children deserve an opportunity to thrive in a safe and stable home, and it is in the best interests of [redacted] that [redacted] is raised in an environment free from ongoing drug use and abuse. Consequently, the order terminating parental rights of appellant [redacted] is **AFFIRMED.**

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[8] National Congress of American Indians, *Methamphetamine in Indian Country: An American Problem Uniquely Affecting Indian Country* (Nov. 2006) at 1; *see also* Indian Health Service, *Disparities* (Oct. 2019), *available at* https://www.ihs.gov/newsroom/factsheets/disparities/.

[9] The CHILD WELFARE CODE addresses "Best interest of the child" within the definitional section, positing: "A best interest determination must be grounded in the concept of family preservation." SAC & FOX TR. OF MISS. CODE § 7-1105. However, as expressed elsewhere:

> The Court shall make such orders for the commitment, custody and care of the child and take such other actions as it may deem advisable and appropriate in the best interests of the child. . . . The Court shall have authority to receive, consider and render judgment on petitions for termination of parental rights only against a person who has been convicted of the sexual or physical abuse or child endangerment or repetitive instances of severe neglect which have a demonstrable negative impact upon the welfare of a child in his or her custody.

*Id.* § 7-2301(a), (c).

IT IS SO ORDERED. Dated this 17th day of May 2024.

Tricia A. Zunker

Hon. Tricia A. Zunker, Chief Justice
Meskwaki Court of Appeals

Chad M. Gordon

Hon. Chad M. Gordon, Associate Justice Pro Tempore
Meskwaki Court of Appeals

Hon. Todd R. Matha, Associate Justice Pro Tempore
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