

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of A.S.B. and N.S.B., Minors.

ABBIE SHUMAN,

Guardian Ad Litem/Petitioner-
Appellee,

V

TIMOTHY ALLEN BANKS,

Respondent-Appellant.

UNPUBLISHED

May 22, 2003

No. 243144

Oakland Circuit Court

Family Division

LC No. 02-662084-NA

Before: Whitbeck, C.J., and White and Donofrio, JJ.

MEMORANDUM.

Respondent appeals as of right from an order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(f)(i) and (ii). We affirm.

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Our review of the record, giving due deference to the special ability of the trial court to judge the credibility of the witnesses before it, reveals that in the two years prior to the filing of the termination petition, respondent failed to provide any financial support for the children and failed to regularly visit with the children. *Miller, supra*, 433 Mich 337.

The evidence demonstrated that, in regard to MCL 712A.19b(3)(f)(i), respondent did not provide “regular and substantial support” for the minors during the period of two years or more before the filing of the petition. In fact, the record clearly shows respondent paid no child support and incurred an arrearage of child support payments in excess of \$50,000.

In regard to MCL 712A.19b(3)(f)(ii), respondent did not “regularly and substantially” maintain contact with the children during the period of two years or more before the filing of the petition. The two children had spent several years, over nine years for one child and over five years for the other child, in a guardianship with their maternal grandmother. The children’s maternal grandmother originally filed for guardianship because the children’s parents would leave them with her or with others for extended periods of time and fail to pick them up. She was also concerned about respondent’s drug use, propensity to reside in a van, and periods of

incarceration. Although there was evidence in the record that respondent's last physical contact with the children was in June 2000, less than two years prior to the filing of the petition in this case on February 13, 2002, the record is clear that prior to that time contact was at best sporadic, and certainly was not regular and substantial. Since that time, physical contact has been nonexistent.

We have also considered evidence regarding phone contact between respondent and the children and respondent's argument that his telephone communications with the children were enough to satisfy the requirements of MCL 712A.19b(3)(f)(ii). Regarding the conflicting testimony offered below involving frequency of phone calls and call initiation, we leave credibility determinations regarding conflicting testimony to the trial court to resolve. *Miller, supra*, 433 Mich 337. Therefore, the record supports the finding that the telephone calls initiated by the children were made more in the nature of inquiring about the well-being of younger siblings rather than to communicate with respondent. Due to the lack of meaningful physical and telephonic communication, we find respondent did not "regularly and substantially" maintain contact with the children during the period of two years or more before the filing of the petition.¹

Additionally, the evidence did not show that termination of respondent's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). In termination proceedings, the burden of proof always remains with the party seeking to terminate the respondent's rights to the child at issue. *In re Boursaw*, 239 Mich App 161, 178-179; 607 NW2d 408 (1999). We find it evident from the record that, contrary to respondent's assertions on appeal, the trial court did not impermissibly shift the burden of proof to respondent during the hearing.

At the hearing, both the guardian ad litem and the guardian were confident that all of the prior testimony supported termination and did not feel compelled to introduce testimony that may have been redundant. The mere fact that the guardian ad litem chose not to present additional testimony did not result in an additional burden to respondent. The trial court was within its right to consider all testimony presented in prior hearings to determine the children's best interests.

Our review of the record reveals that there was substantial evidence to support the trial court's finding that termination was in the children's best interests. That testimony supported termination of respondent's parental rights. Respondent failed to provide for the children or maintain a relationship with them. Respondent also had an on-going substance abuse problem and a criminal history. Having found that MCL 712A.19b(3)(f)(i) and (ii) were proven by clear and convincing evidence, the trial court was required to terminate respondent's parental rights unless there was clear evidence on the whole record, that termination was not in the children's best interests.

¹ Because the record fully supports our findings in this regard, we need not reach the question of whether telephone contact alone would excuse physical contact with the children where respondent lived near the children.

Finally, the trial court did not err in sua sponte amending the termination petition to correct minor defects. The Juvenile Code provides that “[a] petition or other court record may be amended at any stage of the proceedings as the ends of justice require.” MCL 712A.11(6). Therefore, contrary to respondent’s argument, the court was empowered to sua sponte amend the petition after the close of the proofs to correct non-substantive errors and conform it to the proofs. We also note that the changes were immaterial to the allegations contained therein, and respondent’s due process rights were in no way compromised. In any event, he failed to show the amendments prejudiced his case.

Affirmed.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Pat M. Donofrio