

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 21, 2010

In the Matter of E. R. RUPERT, Minor.

No. 296270
Branch Circuit Court
Family Division
LC No. 08-003988-NA

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Respondent mother appeals as of right from the trial court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii). We affirm.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence and that termination is in the best interest of the child. MCL 712A.19b(5); *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). The trial court's decision terminating parental rights is reviewed for clear error. MCR 3.977(K). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Termination of respondent's parental rights was proper under MCL 712A.19b(3)(b)(i), (j), and (k)(ii) because respondent perpetrated criminal sexual conduct involving penetration against the infant minor child, and the minor child would likely be harmed if returned to respondent's care. The trial court properly found that respondent sexually abused her daughter to gain advantage in a custody dispute with the child's father. Her psychological evaluation verified the manipulative nature of her personality. Moreover, respondent's Child Protective Services (CPS) history includes allegations of sexual abuse made by her then five-year-old son who was also removed from her custody. Given respondent's history of sexual abuse, the minor child would be at risk of harm if returned to respondent's care. Respondent's explanation that she sexually abused her daughter to protect her from an inappropriate environment in the care of her father demonstrates her poor judgment, which poses a risk of harm to the minor child.

Termination of respondent's parental rights was also proper under MCL 712A.19b(3)(g). Respondent is incarcerated and unable to care for her daughter. Her earliest release date is not

until March 2012. Even before respondent was incarcerated, she did not have suitable housing. Her living environment was inappropriate for a child because her most recent roommates were sex offenders. Respondent also has a chaotic history that includes several unstable relationships, and she would have difficulty meeting the needs of a young child because she is vulnerable to lapses into problematic behavior. For example, although respondent claimed to have stopped using marijuana, there is no evidence that she addressed her substance abuse. Respondent's drug use would interfere with her properly caring for a minor child. Likewise, respondent's mental health issues were untreated, rendering her unable to properly care for a minor child. Respondent's lack of parenting ability and strained relationship with her daughter were visible during visits with the minor child, who cried through her entire visit. Respondent failed to engage or soothe her. Thus, the trial court did not err in its finding that pursuant to MCL 712A.19b(3)(g), termination was appropriate because respondent failed to provide care and custody for her child, and there was no reasonable expectation that she would be able to do so in the future.

Respondent argues that Trooper Fouty's testimony cannot support a finding of clear and convincing evidence of abuse because the confession she made to him was not recorded. Respondent fails to provide support for this assertion. At the jurisdictional hearing, Fouty's testimony about respondent's admission met the legally admissible evidentiary standard set forth in MCR 3.972(C)(1) and was enough to support the jury's verdict and trial court's finding terminating her parental rights. Moreover, there is no reason to doubt Fouty's credibility as a witness. Respondent's recorded admission was not necessary given that Fouty was able to testify with regard to what respondent said to him. MRE 801(d)(2).

Respondent also argues that the testimony regarding her confession was only given at the jurisdictional trial when clear and convincing evidence was not the standard of proof required. She argues that the jury's finding of jurisdiction by a preponderance of the evidence does not determine that respondent was shown to have abused her child by clear and convincing evidence, as required when the trial court terminates parental rights.

Petitioner filed an amended petition seeking permanent custody of the minor child, as required by MCL 722.638(1)(a)(ii) in cases where there is severe physical abuse involving sexual penetration. A request for a jury trial was made. At the trial, the jury determines the facts, the rules of evidence for a civil proceeding apply, and the standard of proof is a preponderance of the evidence. After the trial, "the verdict must be whether one or more of the statutory grounds alleged in the petition have been proven." MCR 3.972(E). That is, the verdict must be whether the child comes within the jurisdiction of the court, which the jury found in this case. Once the trial court acquires jurisdiction over the child, the dispositional phase follows. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006).

In this case, the dispositional issue whether to terminate respondent's parental rights was properly heard before the judge, without the jury. MCR 3.977(A)(3). The trial court applied the appropriate standards of proof at each hearing. According to MCR 3.977(E), the trial court shall order termination of parental rights at the initial dispositional hearing if "the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial . . . that one or more facts alleged in the petition" are true and establish statutory grounds for termination of parental rights, and if termination of parental rights is in the child's best interests. Thus, respondent's claim that in terminating her parental rights the trial court erroneously relied

on facts and evidence from the adjudicative trial where the standard of proof was not clear and convincing evidence is without merit.

Affirmed.

/s/ Peter D. O'Connell

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro