

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 23, 2010

In the Matter of TISDALE-DAWSON/TISDALE,
Minors.

No. 296682
Genesee Circuit Court
Family Division
LC No. 07-123026-NA

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (g), and (j).¹ We affirm.

The trial court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence. See *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K). The children came into care in part because respondent was using cocaine, was unable to maintain suitable housing, and was living in a place that was admittedly unfit for the children. Respondent was provided with services between November 2007 and April 2008, but made little effort to treat her substance abuse problem or lack of housing. She denied that she had a substance abuse problem. Respondent was incarcerated from May 2008 to January 2010 and participated in a 12-step program while in prison, but promptly used an unprescribed narcotic medication upon her release and then denied testing positive for the drug. She did not have housing and was living in transitional housing as part of her parole. The trial court did not clearly err in finding that respondent failed to provide proper care and custody for her children and that there was no reasonable expectation that she would be able to do so within a reasonable time. See § 19b(3)(g). Further, the fact that respondent had an opportunity to participate in services before her incarceration and her circumstances following her release from prison are sufficient to distinguish this case from *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010). Here, unlike in *In re Mason*, termination did not result from respondent's "mere present inability to personally care for [her] children as a result of incarceration." *Id.* at 160.

¹ Although respondent also refers to § 19b(3)(c)(i), there is no indication in the trial court's decision that it relied on that subsection as an additional basis for termination.

With respect to the children's best interests, the trial court applied an incorrect legal standard when, instead of affirmatively finding that termination of respondent's parental rights was in the children's best interests, it merely found that termination was "not contrary to the children's best interests." MCL 712A.19b(5) formerly provided that once a court found a statutory basis for termination, it "shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." However, the statute was amended by 2008 PA 199, effective July 11, 2008, to require the court to affirmatively find that termination of parental rights is in the child's best interests. Nonetheless, respondent does not challenge the trial court's reliance on the pre-amendment version of § 19b(5), and the record clearly shows that termination of respondent's parental rights was in the children's best interests. At the time of the hearing, the children had been in foster care for 2-1/2 years. Respondent made little progress toward reunification during the first six months the children were in care and then went to prison. Although respondent engaged in services in prison, it was clear that her substance abuse problem still presented a barrier to reunification, given her quick relapse upon discharge and her subsequent denial of the relapse in court. Further, respondent had no apparent source of income and was residing in transitional housing. Because the evidence clearly showed that termination of respondent's parental rights was in the children's best interests, the trial court's reliance on an erroneous legal standard was harmless. See MCR 2.613(A).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Jane M. Beckering