

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of PARKS/KENNEDY, Minors.

UNPUBLISHED
August 19, 2014

Nos. 320044 & 320061
Wayne Circuit Court
Family Division
LC No. 12-505891-NA

Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

In Docket No. 320044, respondent mother appeals as of right from the order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication still exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if children are returned to parent's home). In Docket No. 320061, respondent father appeals as of right from the same order terminating his parental rights to the minor children under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood of harm if children are returned to parent's home). The cases were consolidated for review. We affirm the termination of respondent mother's parental rights and reverse the termination of respondent father's parental rights.

A petition was filed to terminate both respondents' parental rights to the minor children in March 2012. Respondent father was unable to care for the children, having been incarcerated for probation violations including felony-firearm and failure to register as a sex offender. Respondent mother and the children had been residing in the home of a sexual predator and convicted sex offender, McGhee, who had abused respondent mother when she was a child and who recently abused respondents' then six-year-old daughter. Respondent mother also had a history of mental instability and drug and alcohol abuse. Respondent father had a history of substance abuse. The children were placed with their paternal grandmother.

The trial court took jurisdiction over the children after an adjudicative hearing in May 2012. The court found sufficient evidence to terminate respondent mother's parental rights under MCL 712A.19b(3)(j), but no grounds to terminate respondent father's parental rights. The court also determined that it was not in the children's best interests to terminate respondent mother's rights at that time. Respondents then entered into parent agency agreements (PAAs) to deal with the issues that brought the children into care. Respondent mother was required to complete parenting classes, psychological and psychiatric evaluations, individual therapy, counseling for domestic violence and anger management, and to attend AA/NA and parenting

times with the children. Respondent father was to cooperate with prison officials; undergo individual, domestic violence, and sex offender counseling; take GED classes and/or job training; and write to the children regularly. Both parents were required to eventually obtain suitable housing and income. An order of disposition was entered July 25, 2012, requiring respondents to comply with these conditions.

Over the next year, respondent mother attended psychiatric and psychological evaluations and finished parenting classes. Because of cognitive deficits and other issues, she was assigned a parent partner to help with transportation and achieving her goals. However, respondent mother missed numerous visits and the children were disappointed when she did not come. She was dropped from therapy at least twice for nonattendance. Respondent mother should have turned in approximately 75 drug screens, but she only did so twice after court hearings. And even then, those two screens were positive for marijuana and/or alcohol. Bus tickets were provided for respondent mother to get to services, visits, and drug screens. Nonetheless, her participation was inconsistent and she did not benefit sufficiently from services.

Respondent father, on the other hand, made excellent progress. He had a job in prison and completed all programs available, including classes in parenting, domestic violence and anger management, substance abuse, GED, computer skills, and building trades. Respondent father was paroled in June 2013. After this, he redid the classes and programs in the community. He also visited the children one to three times a week at his mother's house. Father and children were very bonded, and the children enjoyed the visits. Respondent father testified that he was working at a towing business, which he had owned before going to prison. He was living with his brother-in-law and did not have suitable housing for the children. Initially, he testified that he was content with having his mother adopt and raise the children. Later, though, he stated that he did not wish to give up his parental rights or have them terminated and instead wanted to be there for his children and participate in their lives. However, he tested positive for marijuana on the date of the final hearing, November 26, 2013. The court also thought he appeared to be under the influence of alcohol when testifying the previous day.

The court found that respondent father's continued use of substances showed that he had not addressed his substance abuse problem and also put him at substantial risk of further incarceration. He was not able to provide proper care or custody, and there was no reasonable expectation that he could do so within a reasonable time. He also would be unable to have suitable housing or income for a minimum of six to ten months.

As for respondent mother, the court found that she had failed to comply with her treatment plan. She missed all scheduled drug screens and tested positive for alcohol and marijuana in the screens required by the court. She failed to complete a dual diagnosis program ordered by the court that would have addressed substance abuse and mental illness. She had a "significant substance abuse and dangerously unstable mental health history." The court also found that respondent mother failed to attend AA/NA or visit the children regularly. She had insufficient proof of suitable housing. Both respondents demonstrated a "severely limited capacity to provide proper care and custody for either child." The court also found termination to be in the children's best interests under MCL 712A.19b(5).

On appeal, respondent father argues that the evidence was insufficient to terminate his parental rights under MCL 712A.19b(3)(g) and (j). Respondent mother, on the other hand, does not challenge the sufficiency of the evidence to prove that the statutory grounds for termination existed by clear and convincing evidence. But both parents contend that termination was not in the children's best interests and that the court erred in failing to explicitly weigh the fact that the children were placed with a relative against termination.

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination, and where termination is in the child's best interests. MCR 3.977(H)(3); MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000); *In re B & J*, 279 Mich App 12, 17; 756 NW2d 234 (2008). This Court reviews the lower court's findings under the clearly erroneous standard. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses. *In re Mason*, 486 Mich at 152; *In re B & J*, 279 Mich App at 17-18.

I. STATUTORY GROUNDS

In the present case, respondent father's parental rights were terminated under MCL 712A.19b(3)(g) and (j), which provide as follows:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

We conclude that the trial court erred in finding that both of these subsections were proven by clear and convincing evidence. As noted above, respondent father completed all services requested in prison and in the community. Compliance with a PAA is evidence of a parent's ability to provide proper care and custody. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). However, a parent must also benefit from services to be able to provide a safe, adequate home. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). Here, respondent father arguably did not benefit sufficiently from his substance abuse services because he tested positive for marijuana at the last hearing. As the trial court observed, with respondent father testing positive for drugs while on parole, there is a substantial likelihood of reincarceration. At the time of the termination hearing, respondent father also lacked suitable

housing and income. He was content to allow the children to stay with his mother until he “got himself together.”

Based on our Supreme Court’s opinion in *In re Mason*, we conclude that the trial court clearly erred. In particular, we are left with a definite and firm conviction that there was insufficient evidence to establish by clear and convincing evidence that “there is no reasonable expectation that [respondent father] will be able to provide proper care and custody within a reasonable time.” The *In re Mason* Court stated that the trial court erred when it

never considered whether respondent could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration. At [the mother’s] request, the children had already been successfully placed with respondent’s family—presumably the very people with whom respondent would have voluntarily placed them had the DHS already taken custody of them by the time respondent was notified of [the mother’s] neglect. [*In re Mason*, 486 Mich at 163-164.]

Similarly, in this case, the trial court never considered whether respondent father could fulfill his duties by granting legal custody to his mother, in the event that his parole violation resulted in incarceration. In addition, unlike the *In re Mason* Court, we do not need to speculate on what respondent “would have” done. Respondent father expressly stated that it was his plan to place the children with his mother until he “got himself together,” which clearly would include any time that he would be incarcerated as a result of a parole violation. Furthermore, the fact that the children were placed with a relative during these proceedings actually weighs in favor of *not* terminating parental rights. *Id.* at 164, citing MCL 712A.19a(6)(a).

Likewise, the trial court clearly erred in finding clear and convincing evidence to support termination of respondent father’s parental rights under subsection (j). Respondent father visited his children regularly, they enjoyed seeing him and were bonded to him, and there was no evidence to show that the children were likely to suffer harm in respondent father’s care. The only evidence weighing against respondent father was the fact that he had tested positive for marijuana on the drug screen, which likely would result in him being incarcerated for the parole violation. This, in of itself, does not establish that the children were likely to be harmed if put in respondent father’s care. This is especially true when considering that the father desired for his mother to have custody of the children until he was ready.

Accordingly, because the trial court clearly erred in finding that clear and convincing evidence supported termination of respondent father’s parental rights under MCL 712A.19b(3)(g) and (j), we reverse the termination of respondent father’s parental rights.

II. BEST-INTERESTS DETERMINATION

Both respondents argue that the trial court clearly erred when it found that termination of respondent’s parental rights was in the best interests of the minor children. But because we determined that no statutory grounds were proven by clear and convincing evidence with respect to respondent father, his claim is moot, and we need not consider his claim of error in the best-

interests determination. Consequently, our review will focus on respondent mother's claim that the trial court erred.

Once a statutory ground for termination is established, the trial court must determine whether termination is in the best interests of the child. MCL 712A.19b(5); *In re HRC*, 286 Mich App 444, 452-453; 781 NW2d 105 (2009). To make that determination, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The fact that a child is placed with a relative weighs against termination. *Id.* at 42-43. "[T]he preponderance of the evidence standard applies to the best-interests determination." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

Respondent mother claims that the trial court "made no mention" of why termination was in the children's best interests, considering that they were living with their grandmother. In support of her argument, respondent mother relies on cases, like *In re Olive/Metts*, 297 Mich App 35. We disagree.

In *In re Olive/Metts*, this Court held that "[a] trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Id.* at 43. The Court relied on MCL 712A.19a(6), which provides that termination is not necessary when a child is being cared for by relatives, and the Supreme Court's holdings in *In re Mason*, 486 Mich at 164, and *In re Mays*, 490 Mich 993, 994; 807 NW2d 304 (2012). *In re Olive/Metts*, 297 Mich App at 43.

In the present case, the children were placed with a relative, and MCL 712A.19a(6) applied. But the trial court did not fail to address the children's placement with a relative. The court acknowledged that both children were placed with the paternal grandmother. In finding that termination was in the children's best interests, the court noted that the children require "stability, security, permanency and finality" and that respondent mother, with all of her illustrated problems, could not meet those needs. Respondent is correct that a child's placement with a relative weighs against termination. *Id.* at 42-43. However, the other *Olive/Metts* factors supported termination. The evidence clearly established that respondent mother did not participate in or benefit from services sufficiently and was inconsistent in attending parenting times. Accordingly, we conclude that the trial court did not clearly err in finding that termination of respondent mother's parental rights was in the children's best interests.

Therefore, we affirm with respect to the termination of respondent mother's parental rights and reverse with respect to the termination of respondent father's parental rights.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra