

Court of Appeals, State of Michigan

ORDER

In re A L Collier Minor

Docket No. 330018

LC No. 2014-043766-NA

Kathleen Jansen
Presiding Judge

Peter D. O'Connell

Michael J. Riordan
Judges

The Court orders that the June 21, 2016 opinion is hereby AMENDED. The opinion contained the following clerical error: The court name shown in the header on the first page should read Muskegon Circuit Court.

In all other respects, the June 21, 2016 opinion remains unchanged.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 22 2016

Date

Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

In re COLLIER, Minor.

UNPUBLISHED
June 21, 2016

No. 330018
Calhoun Circuit Court
Family Division
LC No. 2014-043766-NA

Before: JANSEN, P.J., and O’CONNELL and RIORDAN, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (3)(j) (reasonable likelihood of harm).¹ We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In August 2014, the Department of Health and Human Services (“DHHS”)² filed a petition pursuant to MCL 712A.2(b) for the removal of the minor child from respondents’ care. At the time, respondent-father, who had a prior felony record, was incarcerated at the Muskegon County Jail for convictions of third-degree home invasion and possessing a firearm during the commission of a felony (“felony-firearm”). With regard to respondent-mother, the petition alleged that the child should be removed from her care in light of her marijuana use during the pregnancy, her lack of income, her unknown living situation, her outstanding warrant for a probation violation, and her tendency to leave the child with a maternal aunt while her whereabouts were unknown and without returning for significant periods of time. As to respondent-father, the petition alleged that the home environment was unfit due to criminality, he was currently incarcerated, and he had not provided any support for the child since her birth. Both respondents waived a probable cause determination at the preliminary hearing.

¹ During the termination proceedings, the child’s mother voluntarily released her rights to the child, and she is not a party to this appeal. Thus, we will refer to respondent-father as “respondent” in this opinion. Where relevant, we will refer to the child’s mother as respondent-mother and both parents jointly as “respondents.”

² References to DHHS include its predecessor, the Department of Human Services (“DHS”).

In September 2014, respondent entered a plea of admission to the petition as amended to state that he was incarcerated following his July 2014 conviction of third-degree home invasion and felony-firearm, and he was unable at that time to provide proper care and custody for the child due to his incarceration. That month, a parent-agency treatment plan was prepared for him. Later, in March 2015, he signed and returned a parent-agency agreement with corresponding requirements, under which he was required, among other things, to abstain from prison misconduct, enroll in counseling and other services, relinquish any money deposited in his prison account so that it may be applied toward the minor child's care and support, and obtain appropriate housing and employment upon his release from prison.

Between September 2014 and the termination hearing in October 2015, respondent attended three separate prison facilities after leaving the Muskegon County Jail. He committed multiple prison misconducts, including refusing to follow directions, failing to attend a scheduled work assignment, using verbally abusive language toward prison staff, and threatening prison staff with violence. Two of these instances occurred after he signed the parent-agency agreement. He was informed that services were available at his various places of incarceration—even though those services became limited after his security status was increased from Level 2 to Level 4 due to his repeated prison misconducts—and he failed to participate in those services as recommended by his parent-agency agreement. During his incarceration, respondent completed a one-page summary of a 60-page parenting booklet at the request of the caseworker. Additionally, at the time of the termination hearing, he was in the job pool and waiting for a job placement at his current prison facility. At some point during the proceedings, he gave the caseworker the names of three relatives with whom he would like the minor child to be placed, but these placement possibilities proved nonviable, and the caseworker was left with no reason to believe that any of the three relatives were willing or able to provide proper care and custody while respondent was incarcerated.

Following her removal from respondents' care, the child remained placed with her maternal aunt. The aunt was very bonded to the child and expressed an interest in adopting her. Testimony confirmed that the placement was stable, the child's needs were being met there, and the maternal aunt was able to provide for the child until she reached adulthood.

On July 30, 2015, petitioner filed a petition requesting termination of respondents' parental rights under MCL 712A.19b(3)(g) and (j). Most relevant to this appeal, the petition alleged that termination was proper under MCL 712A.19b(3)(g) because (1) respondent had been incarcerated since the child protective proceedings were initiated, with an expected release date of August 26, 2016; (2) to the caseworker's knowledge, respondent had not participated in any services during his incarceration and had not provided any documentation confirming that he completed any programs; (3) respondent had remained at a Level 4 security level for several months, which may have affected his ability to participate in services; and (4) he never provided any financial support for the child during his incarceration. The petition also alleged that termination was proper under MCL 712A.19b(3)(j) because respondent had no bond with the child due to his incarceration, and he "ha[d] not articulated any plans for after his release from the Michigan Department of Corrections nor ha[d] he articulated how he would be able to provide safe care for the child." The petition further alleged that termination was in the best interests of the child because she shared a strong bond with her maternal aunt, the child would

suffer emotionally if the current structure were destroyed, and termination would ensure a stable, permanent, and nurturing environment.

On October 23, 2015, the court found that petitioner had proven, by clear and convincing evidence, that a statutory basis for termination of respondent's parental rights existed under both MCL 712A.19b(3)(g) and (3)(j). The court also found, by a preponderance of the evidence, that termination of respondent's parental rights was in the best interests of the child. Accordingly, it entered an order terminating his parental rights.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent first argues that the trial court clearly erred in finding a statutory basis for the termination of his parental rights under MCL 712A.19b(3)(g) and (j). We disagree.

A. STANDARD OF REVIEW

In order to terminate parental rights, the trial court must find that a statutory basis for termination under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). "A finding is clearly erroneous [if] 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 made." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted; alteration in original). Further, this Court gives "deference to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

B. ANALYSIS

The record does not support respondent's claim that the child protective proceedings were initiated *solely* due to the inability of *respondent-mother* to care for the minor child. As expressly stated in the petition, the child was removed due to allegations related to respondent-mother as well as respondent, including that (1) he failed to provide any support for the child since her birth, (2) the home was unfit due to criminality, and (3) respondent was incarcerated and unable to provide proper care or custody for the child. Likewise, the caseworker testified at the termination hearing that the reasons for the child's removal, specifically related to respondent, were his inability to care for the child due to his incarceration and the fact that he had not named any relatives who were willing and able to care for the child. Additionally, the termination petition alleged, *inter alia*, that (1) respondent had been incarcerated since August 2014, (2) the caseworker was not aware of any services in which respondent had participated at the prison, he had not provided any documentation of completed services, and his ability to participate in services may have been affected by his Level 4 security status, (3) respondent never provided any financial support for the child during his incarceration, and (4) respondent has not identified any plans for safely caring for the child upon his release.

The trial court did not clearly err in finding a statutory basis for termination. Under MCL 712A.19b(3)(g), a court may terminate a respondent's parental rights if it finds, by clear and convincing evidence, that "[t]he parent, without regard to intent, fails to provide proper care and

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." "[A] parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child." *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

Here, respondent was incarcerated since before the child's birth. It is undisputed that he never directly provided care or custody for the child. Although "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination," *In re Mason*, 486 Mich at 161, there is no indication that he played any role whatsoever in making arrangements for the care and custody of the child during his incarceration, see *id.* at 161 n 11 (stating that a parent may provide proper care or custody through placement with a relative). It is undisputed that respondent never provided any financial assistance for the child, even though he had a commissary account at the prison. Given his complete lack of involvement in securing the child's placement with her maternal aunt, we conclude that the mere fact that the maternal aunt provided proper care and custody for the child does not support respondent's claim that *he* provided proper care and custody for the child during his incarceration.

The record also supports the trial court's conclusion that there is no reasonable expectation that respondent will be able to provide proper care and custody within a reasonable time considering the child's young age. Respondent testified that he has a chauffeur's license and could obtain employment as a taxicab driver upon his release from prison, explaining that he could easily work as an independent contractor and did not need to apply for such a position because "[a]ll you have to do is come down with your driver's license and . . . rent." However, the trial court found that there was no certainty that respondent had a job lined up upon his release given the nature of his testimony and the lack of any independent verification that such a job was available. Consistent with the trial court's determination, respondent never provided support or documentation to confirm his testimony, and he testified that he only had driven a taxicab *occasionally* in the past when he was in between jobs prior to his incarceration. His testimony was bereft of any basis for concluding that he could secure sufficient employment as a taxicab driver to support himself and the minor child. Additionally, when he was arrested, respondent was unemployed, as he had been recently "released" from his temporary employment "at Shape hanging bumpers." This fact undermines his claim that he could easily and quickly secure employment as a taxicab driver upon his release. Again, we defer "to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App at 459.

With respect to housing, respondent testified that he planned to stay with his aunt, but his aunt testified at the termination hearing that he may not be able to stay with her because she is a licensed child care provider, and his criminal history may jeopardize her licensure. Although she indicated that she had learned the previous evening that her sister was willing to allow respondent to stay with her in the event that there was a licensing issue, respondent never mentioned this plan to the caseworker or during his testimony at the termination hearing. The record also includes no testimony from the sister confirming that respondent and the child could stay with her, or any evidence whatsoever confirming that her home was suitable and appropriate for the child. As the trial court found, the record does not show that respondent's plans were concrete or viable.

Although there appears to have been some confusion regarding the time at which the caseworker expected respondent to provide housing and employment information, there is clear evidence that respondent failed to comply with his parent-agency agreement, which further demonstrates respondent's failure, and inability, to provide proper care and custody for the child. See *In re JK*, 468 Mich at 214; *In re Trejo*, 462 Mich 341, 360 n 16, 360-361; 612 NW2d 407 (2000), abrogated in part by statute on other grounds as stated in *In re Moss*, 301 Mich App 76, 83 (2013). There is no support for respondent's assertion on appeal that "[i]t is clear from the record that [he] did do whatever [the caseworker] requested to the best of his ability."

Respondent was disciplined for multiple misconducts while in prison, which, among other things, included threatening prison staff with violence and exhibiting verbally abusive behaviors. Even though he agreed to abstain from prison misconduct under the parent-agency agreement, he continued to commit misconduct after signing the agreement. He expressly confirmed at trial that he was unable to move from a Level 4 security level, the highest level, down to a Level 2 security level due to his misconduct. Although an assistant resident unit supervisor confirmed that respondent was disqualified from participating in some services due to his high security status, his elevated security level—and, consequently, his inability to participate in necessary services—is solely attributable to his own actions and wrongdoing.

Even though he agreed in the parent-agency agreement to relinquish any money deposited into his prison account to contribute to the child's needs, he confirmed at trial that he did not send any of his "commissary money" to the child's caregiver because he "wasn't aware [he] had to" and believed that he was relieved from providing for the child while he was in prison. He failed to enroll in or request information regarding counseling services through the prison, even though he confirmed at trial that he was aware that enrolling in counseling services was an express requirement of his parent-agency agreement. He was recommended by the prison system to participate in a violence prevention program on two occasions, but he declared at the termination hearing that he felt no need to take the class and never finished the program. He repeatedly stated at the hearing that he notified his caseworker that parenting classes were not offered at the prison, but he never informed her that he was unable to participate in other services or requested guidance in enrolling for other services. The record shows that an updated service plan was prepared for respondent in light of the lack of parenting classes available to respondent. He subsequently provided a one-page summary of a parenting booklet, but he did not continue to comply with the caseworker's recommendation that he read and provide additional summaries of parenting books available to him in the prison library.

Although respondent testified that he believed that he could not sign up for a service in the prison unless it was recommended for him, this belief is expressly contradicted by the introductory pamphlet that prisoners receive when they arrive at his prison facility. Moreover, the record shows that petitioner repeatedly investigated services available to respondent at the various prison facilities and continually made an effort to notify him of available services, which would facilitate reunification with the child. Respondent was informed, at various points throughout the proceedings, that these services were available and that it was his responsibility to take advantage of them, both on the record and in correspondence sent by the caseworker. Notably, in February 2015, petitioner specifically informed respondent on the record that services, including counseling, were available at his current prison facility and that he needed to

seek them out on his own volition because the caseworker was unable to facilitate them at the prison. The trial court specifically confirmed on the record that respondent understood this fact.

Although respondent testified that he periodically called the maternal aunt to check on the child, he largely failed to take advantage of the written communication available for him to directly foster a relationship with the minor child. He claims that he never received her address, and that he attempted to send one letter and one picture, in total, to the child through respondent-mother and another aunt. There is no indication in the record that he ever requested the child's address or that he asked the caseworker to pass on any correspondence.

Given the uncertainty of respondent's plans upon his release from prison and his failure to comply with and benefit from the parent-agency agreement, there is clear and convincing evidence that he would be unable to provide proper care and custody within a reasonable time considering the child's young age. Therefore, because we are not left with a definite and firm conviction that a mistake has been made, we conclude that the trial court did not clearly err in finding that there was sufficient evidence to establish a statutory basis for termination under MCL 712A.19b(3)(g). See *In re Mason*, 486 Mich at 152; *In re White*, 303 Mich App at 709.³

Respondent, however, contends that this case is analogous to *In re Mason*, 486 Mich at 146, and that termination was improper for the reasons stated in that case. We disagree. Here, unlike the respondent in *In re Mason*, respondent participated in nearly all the hearings held during these proceedings, and he received a copy of his parent-agency agreement, which he signed and returned to the caseworker. Cf. *id.* at 147-149, 150. Although respondent emphasizes that he was not involved in two hearings, one of those hearings was respondent-mother's dispositional hearing, and the trial court did, in fact, attempt to arrange for respondent's participation at that time. Later, respondent received his own dispositional hearing. The other hearing was a pretrial conference during which respondent-mother was adjudicated; respondent-

³ Only one statutory ground must be established to support termination of a respondent's parental rights, *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009), but we also have reviewed the trial court's finding that termination was proper under MCL 712A.19b(3)(j). The trial court's determination was not clearly erroneous. Termination is proper under MCL 712A.19b(3)(j) when "[t]here 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." The likelihood of harm to the child may be physical or emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Here, the record confirms the trial court's finding that respondent did not demonstrate viable plans for providing housing for the child or stable employment. Additionally, as the trial court concluded, he exhibited unresolved violence issues, both before and during his incarceration, as evidenced by his previous criminal convictions, misconducts while in prison, and failure to complete any violence prevention programs or counseling. In making this conclusion, we are mindful that "termination *solely* because of a parent's past violence or crime is justified only under certain enumerated circumstances" under MCL 712A.19a(2) and MCL 722.638, but that is not the case here. See *In re Mason*, 486 Mich at 165.

father was adjudicated separately at a later date. Thus, with regard to participation in the proceedings, respondent's case is clearly distinguishable from *In re Mason*. Cf. *id.* at 144-145.

Moreover, petitioner did not fail to evaluate him or fail to offer services that were reasonable in light of the circumstances of this case. Cf. *id.* at 162 (explaining that “throughout the proceedings the DHS and the court failed to evaluate respondent’s parenting skills or facilitate his access to services”). When petitioner fails to offer services or provide a reasonable opportunity for a respondent to participate in services, the result is a gap in the evidentiary record that renders termination of parental rights improper and premature. *Id.* at 152, 158-160. However, petitioner only has a duty to expend reasonable efforts to rectify the conditions that led to removal and reunify the child with respondent. See MCL 712A.18f(4); MCL 712A.19(12) and (13); MCL 712A.19a(2). As discussed *supra*, the services available to respondent were limited by his incarceration and elevated security status, and petitioner had no control or authority over his placement, the services available at a particular facility, and respondent’s behavior. The record confirms that the caseworker contacted the prison facilities where respondent was located on numerous occasions in an attempt to remain in contact with respondent and to confirm that services were available, even in light of his elevated security level. Under the circumstances of this case, it was reasonable for petitioner to require him to investigate and enroll in such services himself. If respondent believed that petitioner’s efforts were inadequate to facilitate reunification with his child, it was his responsibility to assert the need for further accommodations. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012).

Further, unlike the instant case, the respondent in *In re Mason*, 486 Mich at 148-149, 162-163, actively participated in numerous services offered by the prison—which “amounted to compliance with elements of the service plan”—and provided documentation of these efforts. The respondent in *In re Mason* “remained in contact with his children through cards,” cf. *id.* at 163, but, here, respondent failed to take advantage of this avenue of communication, even though it was expressly available to him. Moreover, this case is distinguishable given the fact that there was no clear evidence, apart from respondent’s doubtful testimony which the trial court implicitly discredited, that respondent “arranged for a home and legal income upon his release from prison.” *Id.* at 163; see also *id.* at 167-178. Additionally, because the child was involuntarily placed with the maternal aunt, it is apparent that respondent failed to make any arrangements for her proper care and custody with a relative. Cf. *id.* at 163-164.

In sum, this is not a case where the trial court terminated respondent’s parental rights “on the basis of circumstances and missing information directly attributable to respondent’s lack of meaningful prior participation,” or a situation where there was a hole in the evidence due to respondent’s *inability* to participate. *Id.* at 159-160 (quotation marks and citation omitted). Reversal is not required based on the facts of *In re Mason*.

Respondent argues that this case should be remanded so that he has additional time to participate in services, seemingly on the basis that the trial court failed to hold a dispositional

hearing within 28 days of adjudication, as required under MCR 3.973(C).⁴ MCR 3.973 provides no remedy for a trial court's failure to hold a timely dispositional hearing. When a statute or court rule fails to provide a sanction for its violation, we will not "impose sanctions that the Legislature and the Supreme Court have declined to impose." *In re Jackson*, 199 Mich App 22, 28-29; 501 NW2d 182 (1993); see also *In re Kirkwood*, 187 Mich App 542, 545-546; 468 NW2d 280 (1991) ("While the statute and court rule both require that the time limits be met, neither provides any sanction for such a violation, and we decline to add any sanction which the Legislature and the Supreme Court declined to provide. Such a procedural defect, standing alone, will not cause us to dismiss the case or set aside the termination order.") (citation omitted). Moreover, respondent did not object to the trial court's failure to hold a disposition hearing within 28 days. Thus, this claim is forfeited, and given respondent's failure to exhibit any progress in the subsequent months before the termination hearing, we discern no error affecting respondent's substantial rights. See *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

III. BEST INTERESTS

Respondent contends that the trial court erred in concluding that termination of his parental rights was in the child's best interests. We disagree.

A. STANDARD OF REVIEW

We review for clear error a trial court's best-interest determination. *In re White*, 303 Mich App at 713, citing MCR 3.977(K).

B. ANALYSIS

Pursuant to MCL 712A.19b(5), "[t]he trial court must order the parent's rights terminated if the [petitioner] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests." *In re White*, 303 Mich App at 713 (footnotes omitted).

To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "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." The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*Id.* at 713-714 (footnotes omitted); see also *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).]

⁴ MCR 3.973(C) provides, "When the child is in placement, the interval may not be more than 28 days, except for good cause." Respondent makes no argument regarding whether the trial court had good cause in this case.

The minor child—not the parent—is the focus of a trial court’s best-interest determination. *In re Moss*, 301 Mich App at 87.

The trial court did not clearly err in concluding that termination of respondent’s parental rights was in the best interests of the child. The record confirms the trial court’s determination that respondent did not share a bond with his daughter. He was incarcerated when the child was born, and he only met her once while he was in jail. Although he was denied visitation with the child while in prison, it was his own poor choices that prevented him from playing a role in the child’s life, including the fact that he largely failed to take advantage of the written communication available to him, which the child’s maternal aunt could have shared with her. On the other hand, the caseworker testified that the aunt shared a very strong bond with the child, which undoubtedly arose from the fact that the child had spent the vast majority of her life in the aunt’s care.

As the trial court reasoned, the child’s young age warranted stability and permanence. Here, the maternal aunt was willing to adopt the child, and the caseworker confirmed that the aunt was in a position to provide stability and permanence for the minor child. Because respondent’s ability to provide housing and income for the child in the future was uncertain, the evidence does not clearly demonstrate that he could provide greater stability and permanence for the child than her maternal aunt. The record also shows that respondent failed to comply with his case service plan and had unresolved violence and anger issues, which had resulted in multiple criminal convictions and prison misconducts.

The trial court explicitly considered the fact that the child was placed with a relative, but still concluded that termination was in the best interests of the child in light of these factors. Given the strong bond between the child and the aunt, the child’s need for stability and permanence, the length of the proceedings, and the facts that respondent met the child once and did not have a stable plan for the future, a preponderance of the evidence in the record supported the trial court’s finding that termination of respondent’s parental rights was in the best interests of the child. See *In re Mason*, 486 Mich at 152; *In re White*, 303 Mich App at 713.

IV. CONCLUSION

The trial court did not clearly err in concluding that a statutory basis for termination existed under MCL 712A.19b(3)(g) and (3)(j), or that termination of respondent’s parental rights was in the child’s best interests.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O’Connell
/s/ Michael J. Riordan