Court of Appeals, State of Michigan

ORDER

In the Matter of M J M LeBeau, Minor

Docket Nos. 310237

LC No. 08-000121-NA

Kurtis T. Wilder
Presiding Judge

Elizabeth L. Gleicher

Mark T. Boonstra
Judges

On the Court's own motion, we VACATE the opinion issued in this case on November 8, 2012. Pursuant to the amended opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand the case to the trial court to consider the effect of the child's placement with relatives as it relates to the best-interest analysis. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

DEC 11 2012
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 11, 2012

In the Matter of M. J. M. LEBEAU, Minor.

No. 310237
St. Clair Circuit Court
Family Division
LC No. 08-000121-NA

Before: WILDER, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

The circuit court terminated respondent-father's parental rights to his three-year-old son, M, pursuant to MCL 712A.19b(3)(c)(*i*), (3)(g) and (3)(j), based on respondent's drug use, ongoing criminal activities, and fraternization with another drug abuser. Although petitioner established a statutory ground for termination, the circuit court failed to consider whether termination was in M's best interests given that he was placed with a relative. We therefore vacate the termination order and remand for further consideration of the child's best interests.

I. BACKGROUND

M was born on November 18, 2008. Petitioner immediately took jurisdiction over M because his mother had lost custody of her older three children and was participating in reunification services. M spent one month in his maternal aunt's care and then stayed with his paternal aunt until he was returned to his mother's custody in May 2009. Respondent apparently resided with the child and his mother at that time. Because of the parents' substance abuse issues and incidents of domestic violence in the home, the court again took custody of M on July 8, 2010. Respondent did not become actively involved in the proceedings until that time. M then lived with his paternal grandparents until December 19, 2011, when petitioner returned M to respondent's custody.

In the meantime, M's mother had voluntarily relinquished her parental rights. Respondent was placed on probation for indecent exposure on March 7, 2011. Despite his probation conditions and the terms of his parent-agency agreement, respondent admittedly drank alcohol and used cocaine. Many of his random drug screens were diluted and he failed to appear for several more. He tested positive for cocaine only four days before M was returned to his care. Respondent also failed to inform his case worker that he was arrested on November 29, 2011, while fleeing the scene of a Kroger store after his girlfriend, KS, stole a woman's purse. M was returned to his paternal grandparents' care on January 30, 2012, after respondent was

arrested on suspicion of assaulting KS. M was asleep in the home at the time and officers found crack cocaine paraphernalia sitting in plain sight.

II. ANALYSIS

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground for termination by clear and convincing evidence, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). This Court reviews for clear error a circuit court's decision to terminate parental rights. MCR 3.977(K); *Trejo*, 462 Mich at 356-357. The clear error standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *Trejo*, 462 Mich at 356-357. A decision is clearly erroneous when, "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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes the Court as more than just maybe or probably wrong. *Trejo*, 462 Mich at 356.

The circuit court terminated respondent's rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), which provide:

> (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:
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> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (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.

The conditions that led to the adjudication were respondent's substance abuse and incidents of domestic violence in the home. These conditions continued to exist at the time of the termination trial. Respondent admitted that he continued to drink alcohol and use crack cocaine through December 2011, and even tested positive for cocaine on December 15. Respondent failed to appear for two drug screens while M was in his care. Respondent was arrested on January 30, 2012, for domestic violence against KS. The fact that the charges were eventually dismissed is not dispositive as the petitioner in termination proceedings need only prove by the lower preponderance-of-the-evidence standard that a respondent engaged in criminal behavior. *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004). The petitioner presented evidence that, at the time of respondent's arrest, one side of KS's face was red and respondent admitted to having a verbal altercation with her.

Moreover, respondent was unlikely to rectify the conditions that led to adjudication within a reasonable time. Petitioner had been providing services to respondent since at least July 8, 2010. Respondent continued to abuse drugs and alcohol and act violently toward women throughout the proceedings. Respondent did not rectify his behavior after initially losing custody of his child and showed no sign of commitment to change by the time of the termination. Accordingly, termination was supported by MCL 712A.19b(3)(c)(*i*).

The petitioner also established by clear and convincing evidence that respondent had not, and could not within a reasonable time, provide proper care and custody for M, supporting termination under factor (g). Respondent provided a clean home, food and clothing for his child and that is commendable. However, respondent admitted that KS used crack cocaine in his home. The circuit court found that respondent engaged in domestic violence in the home as well. Respondent engaged in other criminal behavior during the proceedings—indecent exposure and accessory after the fact of KS's larceny—and was incarcerated as a result. The dangers present in respondent's home, as well as his repeated criminal acts, supported termination.

Moreover, respondent's criminal and violent activities, drug abuse, and association with people who commit criminal acts and abuse drugs support a reasonable likelihood that the child would be harmed if he was returned to respondent's home. Thus, termination was proper under MCL 712A.19b(3)(j).

The circuit court did not, however, adequately consider the child's best interests before terminating respondent's parental rights. The entirety of the lower court's best-interest analysis was: "[G]iven that this child has been in foster care almost his whole life, I find that it is in his best interest to have some permanency and that parental rights of [respondent-father] should be terminated."

Yet, whenever M has been out of respondent's care, petitioner placed the child with relatives at his parents' request. When Port Huron police officers arrested respondent at his home on January 30, 2012, respondent immediately secured M's placements with the child's paternal grandparents. The circuit court was required to consider M's relative placement in determining whether termination was in the child's best interests. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010); *In re Olive/Metts*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306279, June 5, 2012), slip op at 4. "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 interests determination and requires reversal." *Olive/Metts*, slip op at 4. We must therefore vacate the circuit court's termination decision and remand for further consideration of M's best interests.

Vacated and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra