

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 23, 2010

In the Matter of MAYS, Minors.

No. 297446
Wayne Circuit Court
Family Division
LC No. 09-485821

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Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, respondent parents, U. Mays and W. Philips, appeal as of right from the trial court's order that terminated their parental rights to their two minor children.¹ We affirm.

I. BASIC FACTS

A. EVENT THAT LED TO PETITION FOR INITIAL JURISDICTION

Department of Human Services (DHS) foster care worker Carolyn Moore testified that she was the worker on the case from the time the two minor children came into care in March 2009 until October 2009. She drafted the December 2009 termination petition. The trial court adjudicated the children to come within the jurisdiction of the court in April 2009, after U. Mays admitted that she left the children home alone to go to her sister's house. The two children were nine years old and seven years old, respectively, at the time of the incident. It is not clear from

¹ MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist); (3)(g) (failure to provide proper care and custody); and (3)(j) (reasonable likelihood of harm if child is returned to parent).

the record how long U. Mays left the children alone, but U. Mays' former boyfriend found them alone at 1:00 a.m. and took them to the police station. The children divulged that this was not the only time U. Mays had left them alone.

B. TESTIMONY REGARDING U. MAYS

The trial court ordered U. Mays to comply with a treatment plan. U. Mays' treatment plan included individual counseling, parenting classes, drug screens, a Clinic for Child Study evaluation, suitable housing, and a legal source of income. Because of admitted marijuana use, U. Mays was also required to submit to drug testing.

Moore testified that U. Mays did not comply with the treatment plan. U. Mays did attend the Clinic for Child Study evaluation in July 2009. However, although Moore had provided U. Mays with bus passes, U. Mays attended only three of 12 parenting classes. U. Mays never followed through on rescheduling the classes. U. Mays was also referred for individual therapy, and although there was no set number of sessions that U. Mays was expected to attend, she only attended approximately two sessions. Because U. Mays admitted to marijuana use, she was expected to submit to drug screens. However, she did not follow through with those. U. Mays never maintained suitable housing. She lived in a rental home owned by the maternal grandmother, and U. Mays reported that her utilities had been turned off. Her uncle had to help her get the utilities turned back on. U. Mays did not have a source of income. She was unemployed and did not receive disability benefits.

Moore believed that termination of U. Mays' parental rights was warranted based on her failure to comply with the court order. Moore did not believe that anything in U. Mays' daily activities prevented her from complying with her treatment plan. She did not believe that additional time would result in compliance.

Moore testified that the children were placed with their maternal grandmother and that U. Mays and W. Phillips could have visited as frequently as they wanted. The grandmother reported that U. Mays visited with the children once a week and that W. Phillips visited "sometimes," but Moore did not know how often. During cross-examination, Moore indicated that U. Mays used to visit more frequently but had visited less over time.

U. Mays testified that she did not take the time to consider the consequences of her actions when she left the children home alone. She did not believe that she was unable to care for her children: "I never thought I was a bad parent." She believed that her lack of education was the only problem. She started school in June 2009, just a few months after the children were removed. And she believed that it was her way of obtaining a better life for her children.

U. Mays claimed that her attendance at business school affected her ability to complete the treatment plan. However, U. Mays admitted that she understood that she needed to attend and benefit from services under the treatment plan in order to be reunified with her children. She also admitted that she understood that her attendance at business school was not part of the treatment plan. U. Mays denied having transportation issues visiting the children. She relied on her mother for transportation to see the kids and used the bus card provided by DHS to get to school. She admitted that she could have used the card to go to therapy and parenting classes.

She admitted that she attended school more regularly than she attended parenting classes or counseling. U. Mays conceded that she never asked anyone to accommodate her schedule.

U. Mays admitted that she would drink on the weekend and that she used marijuana, but not very often. She last used marijuana a month before the termination hearing. U. Mays used to receive food stamps and a weekly cash payment. However, at the time of the termination hearing, she had no income and was no longer receiving temporary assistance.

C. TESTIMONY REGARDING W. PHILLIPS

Moore testified that, like U. Mays, W. Phillips' treatment plan included individual counseling, parenting classes, housing, and income. However, he did not have to submit to drug screens. W. Phillips missed a few parenting classes, but Moore acknowledged that W. Phillips did receive a certificate of completion the parenting classes in December 2009. Nevertheless, Moore did not believe that W. Phillips benefited from the classes. W. Phillips attended a few counseling sessions but did not appear to benefit from those either. W. Phillips lived with a relative. He worked part time with a moving company. W. Phillips provided the children with some income. Placement in W. Phillips' home was not an option because some work needed to be done to the home. Moore believed that termination of W. Phillips' parental rights was necessary.

W. Phillips testified that he was no longer in a relationship with U. Mays. They separated approximately eight years ago. Since that time, W. Phillips maintained regular contact with the children and visited them after work and on the weekends. He provided whatever U. Mays told him the children needed. W. Phillips was not living with U. Mays at the time she left the children unattended. He had nothing to do with the incident.

U. Mays testified that W. Phillips had been involved with the children while they were in her care. He visited three or four times a month. She felt she could depend on him for support. She believed he visited as often as he could and would buy them clothes and shoes, but "I basically take care of my own children."

W. Phillips testified that he was aware he needed to complete parenting classes and individual counseling. He completed the parenting classes but admitted that he did not attend individual counseling. W. Phillips did not have a car, so he needed to take three different buses home from work. W. Phillips claimed that his bus schedule would often make him late for his counseling appointments, resulting in the counselor leaving before he got there. Because he worked for a moving company, his work hours varied based on the jobs he was assigned. He might be done with work as early as 3:00 p.m. or as late as 9:00 p.m. W. Phillips believed he attended only three therapy sessions. He never told anyone that the sessions conflicted with his work schedule or that transportation was an issue. W. Phillips admitted that he missed some court hearings because of work and scheduling errors.

W. Phillips explained that U. Mays' sister would usually bring the children to U. Mays' house in order for U. Mays and W. Phillips to visit with them. W. Phillips never visited the children at the maternal grandmother's home because of work and the bus schedule. He last saw the children two weeks ago at U. Mays' house.

W. Phillips lived with his half-sister, her husband, and their 15-year-old daughter in a home owned by the half-sister's mother. He had been living there for the past two years. The house was suitable for the children to come and live in, but W. Phillips admitted he never expressed any desire for them to do so. "[I]f it came down to that, yes, they could come live with me." He believed his sister would approve. Still, W. Phillips believed that the children were better off where they were with the maternal grandmother.

D. THE TRIAL COURT'S RULING

The referee recommended termination of U. Mays' and W. Phillips' parental rights, and the trial court adopted the referee's findings of fact and conclusions of law. U. Mays and W. Phillips now appeal as of right.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

U. Mays, W. Phillips, and the children's lawyer guardian ad litem (L-GAL) argue that the trial court erred in terminating U. Mays' and W. Phillips' parental rights.

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence.² We review for clear error a trial court's decision terminating parental rights.³ 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.⁴ Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁵

B. TERMINATION OF U. MAYS' PARENTAL RIGHTS

U. Mays claims that the trial court erred in terminating her parental rights because she just needed some additional time. We disagree that additional time was warranted. A full year transpired between the time the children were initially removed in March 2009 and the time of the termination hearing in March 2010. Still, during that period of time U. Mays only minimally complied with her treatment plan. She complains that she was provided *only* two referrals, but the fact remains that she did not complete parenting classes, individual counseling, or drug screens and provided no valid explanation. There is no basis to conclude that the passage of additional time would have been beneficial.

² MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

³ MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Sours*, 459 Mich at 633.

⁴ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁵ MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

While it was admirable that U. Mays sought to better herself through additional education, attending school was not a component of her treatment plan. Additionally, U. Mays admitted that her class work took place in the afternoons from 1:00 p.m. until 5:00 p.m. and that the parenting classes took place in the morning. Other than stating that the individual counselor would not come out to the house after 6:00 p.m., U. Mays provided no explanation for why she could not attend counseling. While U. Mays' attorney intimated that transportation was an issue, U. Mays' own testimony refutes that. She admitted that DHS provided her with bus passes that she used to attend school and that she could have used those same passes to attend the sessions required under the treatment plan.

The L-GAL cites MCL 712A.19a(1)⁶ and MCR 3.976,⁷ which address the timing of permanency planning hearings, to argue that the trial court's decision to initiate proceedings to terminate U. Mays' parental rights when the children had only been in foster care for seven months was premature. More specifically, the L-GAL argues that "the court . . . [did] not have to consider the question of a permanent plan, particularly termination of parental rights until the child(ren) have been in foster care for 12 months." The L-GAL adds that, under MCL 712A.19a(6)(a), "The court is not required to order the agency to initiate proceedings to terminate parental rights if . . . [t]he child is being cared for by relatives." We find no merit to the L-GAL's contention. Neither the statute nor the court rule require the trial court to wait until the children have been in foster care for 12 months before initiating proceedings to terminate parental rights, especially when it is obvious that the parent is not invested in the treatment plan. The fact that relatives were caring for the children does not alter this conclusion.

The L-GAL also cites *In re Newman*⁸ for the proposition that U. Mays should have been given additional time. In *Newman*, this Court found that the parents had not been given a reasonable amount of time to improve the condition of their home, even after the passage of 26 months.⁹ However, *Newman* is distinguishable from this case. In *Newman*, the primary reason for removal was the unsanitary condition of the home. The mother in *Newman* was intellectually challenged, and this Court found that the services offered to the family were not reasonably calculated to assist the family toward reunification.¹⁰ Here, U. Mays does not argue that she was of below average intelligence or that the services offered were not reasonably calculated to facilitate reunification. Instead, U. Mays admits that she failed to timely comply with the terms of the treatment plan and is simply seeking more time.

⁶ MCL 712A.19a(1) provides, in pertinent part: "[I]f a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home."

⁷ MCR 3.976(B)(2) provides, in pertinent part: "[T]he court must conduct an initial permanency planning hearing no later than 12 months after the child's removal from the home, regardless of whether any supplemental petitions are pending in the case."

⁸ *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991).

⁹ *Id.* at 70-71.

¹⁰ *Id.*

The L-GAL additionally cites *In re Boursaw*¹¹ and *In re Hulbert*¹² for the proposition that U. Mays' potential for neglect or abuse was merely speculative and not grounded in any evidence. The L-GAL notes that what brought the children into care was an isolated incident in which U. Mays left the children unattended. He argues that any claim that the children would be at risk of future harm for abuse or neglect was conjecture. At the same time, the L-GAL acknowledges that U. Mays could have done more to comply with her treatment plan. Indeed, a parent's failure to comply with the terms of a court-ordered treatment plan is indicative of neglect.¹³

In addition to the fact that U. Mays failed to comply with parenting classes, individual therapy, and drug screens, there was also evidence that U. Mays was without a legal source of income and housing. The L-GAL makes the bald assertion that U. Mays had adequate housing; however, U. Mays lived in a home that the maternal grandmother owned. She had her utilities turned off at one point, but her uncle helped her with the payment to have them restored. And U. Mays testified that she was no longer eligible for temporary assistance. It was clear that U. Mays relied on family for her needs. She could not provide for herself, let alone a child. Notably, U. Mays also has two other children who are not in her care.

We conclude that the trial court did not clearly err in finding that DHS established by clear and convincing evidence sufficient grounds for termination of U. Mays' parental rights.

C. TERMINATION OF W. PHILLIPS' PARENTAL RIGHTS

With regard to W. Phillips, the L-GAL argues the trial court erred in failing to first determine whether U. Mays was legally married to another man and whether the children were born during the marriage. If so, the children were presumed to be the children of U. Mays' husband, and a biological father cannot be considered even a putative father.¹⁴ U. Mays did not raise this issue before the trial court and it is therefore not preserved for appellate review. Although the L-GAL argues that unpreserved issues of law may be considered by this Court, this is only true when all the facts necessary for the resolution of the issue have been presented.¹⁵ In this case, there was one statement in U. Mays' testimony that she was married, but there was no further indication in the record that she was ever in fact married or that such a marriage existed at the time these children were born. Therefore, the facts necessary for the resolution of this issue were not presented to the trial court or this Court, and we decline to further consider this argument.

¹¹ *In re Boursaw*, 239 Mich App 161; 607 NW2d 408 (1999), rev'd on other grounds 462 Mich 341 (2000).

¹² *In re Hulbert*, 186 Mich App 600; 465 NW2d 36 (1990).

¹³ *JK*, 468 Mich at 214; *Trejo*, 462 Mich at 346 n 3, 360-363, 361 n 16.

¹⁴ *In re KH*, 469 Mich 621, 624; 677 NW2d 800 (2004).

¹⁵ *In re BAD*, 264 Mich App 66, 72; 690 NW2d 287 (2004).

Like U. Mays, W. Phillips' treatment plan included a Clinic for Child Study evaluation, individual counseling, parenting classes, housing, and income. W. Phillips completed the parenting classes. However, although W. Phillips was aware that he also needed to complete individual counseling in order to be reunited with the children, he admitted that he did not attend individual counseling due to conflicts with work and the bus system. W. Phillips never told anyone that the therapy sessions conflicted with his work schedule or that transportation was an issue. Incredibly, W. Phillips denied that he was required to attend a Clinic for Child Study evaluation, testifying that his parenting instructor told him not to worry about it.

As discussed above with regard to U. Mays, W. Phillips' failure to comply with the treatment plan provided evidence of neglect. The demands of the treatment plan were very basic. There was no valid excuse for W. Phillips to fail to attend individual therapy after at least two referrals.

In addition to W. Phillips' failure to comply with the treatment plan, he was not in a position to provide for the children. W. Phillips lived with his half-sister, her husband, and their 15-year-old daughter in a home owned by the half-sister's mother. He had been living there for the past two years. And although W. Phillips believed that his half-sister would allow the children to live in the home, he believed that the children were better off living with the maternal grandmother. W. Phillips did not really indicate a desire to care for the children. He considered himself the last resort. Additionally, like U. Mays, he lived at the mercy of family members and had two other children, neither of whom was in his care.

Based on the foregoing, we conclude that the trial court did not clearly err in finding that DHS established by clear and convincing evidence sufficient grounds for termination of W. Phillips' parental rights.

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

U. Mays, W. Phillips, and the children's L-GAL argue that the trial court erred in its best interests analysis.

Once the DHS has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is clearly in the child's best interests, then the trial court shall order termination of parental rights.¹⁶ There is no specific burden on either party to present evidence of the children's best interests;

¹⁶ MCL 712A.19b(5); *Trejo*, 462 Mich at 350.

rather, the trial court should weigh all evidence available.¹⁷ We review the trial court's decision regarding the child's best interests for clear error.¹⁸

B. ANALYSIS

Even if it is assumed that U. Mays shared a bond with the children, that bond did not prevent termination. Again, U. Mays was aware that the only way she would be reunified with the children was if she complied with the terms of her treatment plan. She did not do so. In addition to the lack of effort to attend parenting classes and individual therapy, U. Mays was without income or stable housing, relying upon family for her maintenance. The trial court reasonably concluded that the children had been in care for a year and were entitled to permanence and stability.

Likewise, even if it is assumed that W. Phillips shared a bond with the children, that bond did not prevent termination. Again, W. Phillips was aware that the only way he would be reunified with the children was if he complied with the terms of his treatment plan. Yet he did not do so. The trial court reasonably concluded that the children had been in care for a year and were entitled to permanence and stability.

Accordingly, we conclude that the trial court did not clearly err in finding that termination of both U. Mays' and W. Phillips' parental rights was in the children's best interests.

We affirm.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

¹⁷ *Trejo*, 462 Mich at 353.

¹⁸ *Id.* at 356-357.