

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of VANVALKENBURG/LOVERN,
Minors.

UNPUBLISHED
October 8, 2013

No. 315311
Ingham Circuit Court
Family Division
LC No. 12-000144-NA

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Respondents, father and mother of the minor children,¹ appeal as of right from the order terminating their parental rights to their respective children. We first hold that the court did not commit clear error in finding statutory grounds to terminate respondents' parental rights under subsections (c)(i), (g), and (j) of MCL 712A.19b(3). But the court failed to make all the requisite findings of fact necessary to support its best-interest determination as to each child. Therefore, we vacate the order terminating parental rights and remand for a redetermination of best interests as required by *In re Olive/Metts*, 297 Mich App 35, 42-44; 823 NW2d 144 (2012).

I. STATUTORY GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

Respondents first argue that the lower court committed clear error in finding that petitioner proved, with clear and convincing evidence, statutory grounds to terminate their parental rights to the minor children. This Court reviews for clear error the trial court's factual findings and determination that a statutory ground for termination has been established by clear and convincing evidence. MCR 3.977(E)(3); MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). The court found that petitioner proved the following statutory grounds in MCL 712A.19b(3):

(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

¹ Respondent mother is the mother of all five of the minor children. Respondent father is the father of four of the minor children, TL, AL, DL, and CL. The father of the fifth minor child, NV, is not a party to this action, and no proceedings have been initiated against him.

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.

Petitioner bore the burden of establishing the above statutory grounds by clear and convincing evidence. *In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003). Clear and convincing evidence creates in the mind of the fact-finder "a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009).

A. MCL 712A.19b(3)(c)(i)

The lower court did not clearly err in finding that petitioner proved, with clear and convincing evidence, this statutory ground. The initial dispositional order was issued on May 21, 2012, and the termination order was issued on February 26, 2013. Plainly, more than 182 days passed since the court issued the initial dispositional order. The conditions that led to adjudication were respondents' frequent homelessness and unstable living conditions and respondents' untreated substance abuse problems. Both respondents reported that they obtained a permanent residence and gainful employment. However, they never provided any documentation to petitioner that verified these unsupported assertions even though they were asked for such documentation on a number of occasions. Moreover, respondent mother reported that they were living with a friend, strongly indicating that their living situation was temporary.

Additionally, respondents failed to address their outstanding substance abuse problems. Respondent mother tested positive for opiates on October 4, 2012. Although they completed their substance abuse assessments, respondents failed to complete most of their scheduled drug screens and did not comply with the recommended services, which resulted in termination of respondent father's substance abuse treatment programs in August and September of 2012. Also, petitioner submitted evidence suggesting that respondent father was doctor shopping in order to obtain prescription medications. Respondents were still abusing drugs, avoiding services, and failing to provide proof that they had obtained gainful employment and a

permanent residence, after receiving services for several months. Thus it was reasonable for the court to conclude that respondents failed to overcome the conditions that led to adjudication, and that they could not do so within a reasonable amount of time given the ages of their children.

B. MCL 712A.19b(3)(g)

The lower court also did not clearly err in finding that petitioner proved, with clear and convincing evidence, this statutory ground. A parent's failure to comply with the required services in their parent-agency agreement may be used as evidence of his or her failure to provide proper care and custody for the children. *In re JK*, 468 Mich at 214. Also, a parent's failure to overcome his or her addiction, "despite extensive treatment and counseling," is clear and convincing evidence of a parent's failure to provide proper care and custody, as well as the parent's inability to do so within a reasonable amount of time. *In re Conley*, 216 Mich App 41, 44; 549 NW2d 353 (1996).

Per the parent-agency treatment plan and later recommendations by the foster care workers, respondents were ordered to participate in the following services. Respondent mother was required to participate in substance abuse treatment, participate in therapy, work with the foster care worker to improve her support system, and obtain employment and appropriate housing. Respondent father was required to participate in substance abuse treatment, obtain employment and appropriate housing, and work with the foster care worker to improve his budgeting and financial management skills, as well as his support system. Both respondents were also required to complete psychological evaluations.

Respondents failed to complete, and benefit from, the above services. Respondents' psychological evaluations were completed, although untimely. Respondents also started regularly attending therapy sessions, which was commendable for respondent father because this service was optional for him. But respondents did so only after many months of noncompliance, and only after the court authorized petitioner to file a termination petition during the permanency planning hearing on October 11, 2012. Further, respondents failed to take most of their scheduled drug screens and did not participate in substance abuse treatment through New Directions. Neither respondent provided petitioner with proof of employment or residency, and respondent father offered no proof that he had improved his financial management skills.

Notably, respondents consistently demonstrated apathy towards the needs of their children. Respondents did not attend medical appointments, and respondent father only attended a single school activity for one of the children. Neither respondent provided financial or material support for the children after they came into care. Before petitioner filed the termination petition, respondents only attended 11 of 105 parenting time sessions. Moreover, neither parent was available to give consent for CL to obtain emergency medical treatment, which was necessary to save his life. Also, neither respondent appeared for the dispositional hearing or the termination hearing. Their conduct and lack of participation consistently indicated that they were unconcerned about their children.

By failing to comply with their court-ordered services plan and by failing to address their substance abuse problems after being provided comprehensive treatment for their addictions, respondents demonstrated that they could not provide proper care and custody for the children.

Moreover, the record contained clear and convincing evidence that that they were unlikely to be able to do so within a reasonable period of time.

C. MCL 712A.19b(3)(j)

The lower court did not clearly err in finding that petitioner proved this ground with clear and convincing evidence. The record indicates that respondents were frequently homeless or living in hazardous conditions for young children. Although respondents ultimately obtained a place to stay, they moved three different times during the proceedings and failed to establish that their most recent residence was anything other than a temporary residence. While the children were in respondents' care, respondents did not obtain medical treatment for the children and lacked a source of income. Throughout these proceedings, respondents did not attend medical appointments for the children, did not provide material or financial support for them, and never provided petitioner with proof of employment. Respondents made no significant improvements in overcoming their substance abuse problems during the pendency of this case. Based on their history, it was reasonable for the lower court to conclude that the children, if returned to respondents' care, would be subjected to the same harmful and hazardous conditions that they were exposed to prior to their removal.

II. BEST-INTEREST DETERMINATION

Respondents next argue that the court erred in finding that termination of respondents' parental rights was in the best interest of the minor children. While we agree that the court erred, the error requires a remand but not reversal. This Court reviews for clear error the lower court's determination regarding whether termination of a person's parental rights is in the best interests of the children. MCR 3.977(K); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

Once the petitioner establishes a single statutory ground under MCL 712A.19b(3) to terminate a parent's parental rights, the lower court must do so if it finds that termination is in the best interests of the children. MCL 712A.19b(5); MCR 3.977(H)(3)(b); *In re Jones*, 286 Mich App at 129. "[W]hether termination of parental rights is in the best interests of the child[ren] must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 336 NW2d 182 (2013). The court must weigh all evidence in the whole record to determine whether termination of parental rights is in the best interests of the children. *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000). The court should consider the parent's capacity to care for children, as well as the children's "need for permanency, stability, and finality." *In re Olive/Metts Minors*, 297 Mich App at 42.

The record contained sufficient evidence from which the court could have found, by a preponderance of the evidence, that termination of respondents' parental rights was in the best interests of the minor children. But MCL 712A.19a(6)(a) explicitly states that termination of a respondent's parental rights is not required when children are already in the care of a relative. The court may still terminate the parent's parental rights while the children are in a relative placement if the court finds that termination is in the best interests of the children. *In re IEM*, 233 Mich App 438, 453-454; 592 NW2d 751 (1999), overruled on other grounds in *In re Morris*, 491 Mich 81, 122; 815 NW2d 62 (2012). But the court must explicitly consider the issue when a child is placed with a relative; failure to do so results in legal error requiring remand.

In *In re Mason*, 486 Mich at 163-164, our Supreme Court noted that a parent can “fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives,” and that “a child’s placement with relatives weighs against termination under MCL 712A.19a(6)(a).” Our Supreme Court held that the failure to consider this alternative is grounds for a remand. *Id.* at 164.

This Court has also addressed the issue as follows:

[B]ecause “a child’s placement with relatives weighs against termination under MCL 712A.19a(6)(a),” the fact that the children are in the care of a relative at the time of the termination hearing is an “explicit factor to consider in determining whether termination was in the children’s best interests[.]” 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. [*In re Olive/Metts*, 297 Mich App at 43 (citations omitted).]

If a lower court fails to consider this matter when making its best-interest determination, the remedy is to vacate the court’s best-interest determination and remand for consideration of this factual question. *Id.* at 44. This Court also noted that “the trial court has a duty to decide the best interests of each child individually.” *Id.* at 42.

Under *In re Olive/Metts*, courts are obligated to consider and state, at a minimum, why termination of a respondent’s parental rights remains appropriate when the children are placed with relatives, given the needs of each individual child. Here, the court failed to engage in the required analysis. It did not articulate any consideration of the children individually, or individually address their needs, their current placements, or whether termination of respondents’ parental rights remained an appropriate goal given their placements with relatives (including, in one instance, another parent). Given this error, the lower court’s best-interest determination cannot stand and is therefore vacated. However, the error does not warrant outright reversal or a new termination hearing. Rather, we remand with instructions to consider explicitly the best interests of each individual child, given the placements with relatives, and to issue a new best-interests determination.²

² On remand, the trial court should therefore consider the fact that NV was placed with his legal father (against whom no termination proceedings were initiated) throughout the trial court proceedings, that TL was placed with a maternal aunt and uncle, and that AL, DL and CL were placed with the maternal grandmother. With respect to NV, we note that the original termination order committed NV to petitioner for “permanency planning, supervision, care, and placement under MCL 400.203.” Such placement effectively commits NV as a state ward to the Michigan Children’s Institute, the state guardian for children, in order to arrange child adoptions. Such an action is inappropriate where the child still has a legal parent. See *In re Keast*, 278 Mich App 415, 423; 750 NW2d 643 (2008). On remand, the trial court should explicitly consider the NV’s

Affirmed in part, and vacated and remanded in part for additional proceedings consistent with this opinion. We retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause

/s/ Mark T. Boonstra

placement with his legal father both in determining if termination is in NV's best interest as well as in wording its orders with respect to NV.