

STATE OF MICHIGAN
COURT OF APPEALS

In re JOYNER/RUSSELL, Minors.

UNPUBLISHED
July 21, 2015

No. 324975
Bay Circuit Court
Family Division
LC No. 13-011462-NA

Before: SAWYER, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Respondent appeals of right an order terminating her parental rights to her three children based on MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist) and MCL 712A.19b(3)(g) (failure to provide proper care and custody). We affirm.

I. FACTUAL BACKGROUND

On December 12, 2011, respondent was sentenced to prison for the crimes of attempted kidnapping and attempted extortion. Her earliest possible release date was December 11, 2014. Respondent also has past convictions for home invasion, larceny in a building, retail fraud, drunk and disorderly conduct, and malicious destruction of property. Upon being sentenced to prison, respondent gave her parents power of attorney over all three children.

On June 13, 2011, a referral was made to the Department of Human Services (DHS) indicating that two of the children had been sexually abused by an unknown person while living with their grandparents. A forensic interview was done on July 22, 2011 and neither girl made any disclosures. Another referral was made on July 29, 2011 after the two children were overheard discussing the sexual abuse at the Salvation Army. This time, both disclosed that a boy named “Junior” (the grandfather’s nephew), who came to their grandparent’s house, had sexually abused them. DHS found that the girls had disclosed the instances of sexual abuse to their grandparents, but the grandparents had responded by merely telling the girls to avoid “Junior.” When DHS questioned the grandparents about the alleged sexual abuse, they denied that it took place. Respondent pleaded no contest to these allegations, given that she was in prison at the time. The children were then removed from the care of their grandparents.

From early on in the proceedings, the trial court emphasized the need to find an appropriate relative placement. At one hearing the trial court told the parties to “scour the face of the earth” to find such a placement. One person put forward by respondent was Lucille Moskal, whose stepfather was related to respondent’s parents. Moskal initially expressed some

interest in taking care of the children while respondent was in prison. However, she was already taking care of four children and eventually stated that she would be unable to care for three more. The only other person respondent suggested prior to the termination hearing was a person named Elton Joyner and his fiancée, Lisa McAllister. However, Elton had just recently been released from prison after serving time based on domestic violence charges.

Respondent was very proactive while in prison. She participated in alcoholics anonymous and narcotics anonymous, and completed programs addressing domestic violence, 12-step recovery, and depression, as well as Family Focus, which taught about family reunification, parenting classes, and a program called “beyond violence.” By the time of the termination hearing on November 12, 2014, it was confirmed that respondent would be paroled on December 11, 2014. However, petitioner and the agency overseeing the case on behalf of petitioner both stated that it would be a minimum of six months after respondent was released from prison before she might be in a position to be reunified with her children. The reasons for this delay were the need to find permanent housing outside of her parent’s house, from which the children had been removed and where respondent had lived since the children were born, as well as the need to find employment and the need to prove that she could stay away from drugs and crime when out of prison.

At the termination hearing, respondent’s cousin, Pamela Askew, came forward and testified that she or members of her immediate family would be willing to care for the children until respondent could be reunified with them. Askew stated that she was a corrections officer with the State of Michigan and together with her husband, who works construction, had sufficient income to not only provide for the children but to help respondent out financially with her own apartment and expenses upon her release from prison. Askew also testified that the family was very close and that she had seen respondent demonstrate proper parenting skills at family reunions. Askew testified that she had not come forward earlier because respondent’s parents had represented to her that respondent was not in that great of danger of losing her parental rights. Respondent testified that she had not mentioned Askew as a placement earlier because she was convinced that Moskal would care for her children.

At the termination hearing, there was testimony that the children were growing close to their foster family. The youngest of the three could not even remember who respondent was. All three children referred to their foster parents as mom and dad. The oldest, who had expressed skepticism about her foster family early on, had even requested that her name be changed to that of her foster family. The children all enjoyed getting letters from respondent but did not take the initiative to write her back.

The trial court found that statutory grounds to terminate respondent’s parental rights existed under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist). It reasoned that the case had begun because respondent was unable to provide an appropriate home for the children due to her incarceration and the fact that her designated home for the children was inappropriate due to a failure to protect the children from sexual abuse. The trial court stated that this condition had not been rectified because respondent was still in prison and it would be at least six months after her release before she would be in a position to be reunified with the children. The trial court also found that grounds to terminate respondent’s parental rights existed under MCL 712A.19b(3)(g) (failure to provide proper care and custody) for similar

reasons. Further, the trial court expressed concern about whether respondent would be a model citizen upon release given her past history. The trial court found that it was in the best interest of the children to terminate respondent's parental rights, noting the weakening emotional attachment the children had to respondent coupled with the strengthening emotional attachment to their foster family. The trial court also noted that the search for appropriate relatives had been going on since the case began and found it unbelievable that the grandparents would not have known about the seriousness of the situation before the termination hearing. The trial court was concerned with Askew because, while she testified that the family was close, she was not mentioned as a possible placement nor did she come forward on her own until the termination hearing. The trial court determined that the need for permanency and finality required a finding that termination of respondent's parental rights was in the best interests of her children.

II. ANALYSIS

A trial court must terminate a respondent's parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) a preponderance of the evidence establishes that that termination is in the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

A. STATUTORY BASES

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review for clear error a trial court's determination that a statutory ground has been proven by clear and convincing evidence. *Id.* "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 Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013).

The trial court terminated respondent's parental rights under MCL 712A.19(3)(c)(i) and (g), 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:

* * *

(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.

The language in subsection (c)(i) indicates "that the Legislature did not intend that children be left indefinitely in foster care, but rather that parental rights be terminated if the conditions leading to the proceedings could not be rectified within a reasonable time." *In re Dahms*, 187 Mich App 644, 647; 468 NW2d 315 (1991). The trial court must consider whether a parent can fulfill her duties to provide a child with proper care and custody through placement with a relative. *In re Mason*, 486 Mich 142, 163-165; 782 NW2d 747 (2010). The mere present inability of a parent to personally provide the necessary care for a child due to incarceration is not grounds for termination. *Id.* at 160.

We find no clear error with the trial court's finding that this statutory basis for termination was satisfied. The facts show that this case initially began because respondent had failed to find a suitable home for her children while she served her prison sentence. Up until the time of the termination hearing, respondent put forward only two names as possible caregivers despite the trial court's constant insistence that an appropriate relative placement was going to be required for respondent to avoid losing her parental rights. The first person respondent put forward, Moskal, was already caring for four children and was unable to care for three more. The second person had just been released from prison after serving time for domestic violence charges. While Askew might have been an appropriate placement, we defer to the trial court's questioning of the timing of her appearance at the termination hearing when no mention of her was ever made during the previous fourteen months since the adjudication hearing. Additionally, while we acknowledge the positive steps taken by respondent to engage in services while in prison, given that it would take at least an additional six months upon release to determine if she even could assume custody, it was not clearly erroneous for the trial court to find that respondent would not be able to rectify the conditions that caused the initial adjudication within a reasonable time.

Regarding subsection (g), we note that the failure to provide proper care because of incarceration is not dispositive. *In re Mason*, 486 Mich at 161. A parent can "achieve proper care and custody through placement with a relative." *Id.* at 161 n 11. Moreover, the latter portion of the statute is forward looking and thus a past inability to provide care is not decisive. *Id.* at 161.

The reasons for the trial court's findings on this issue closely mirror those on the previous issue, since it was respondent's inability to provide proper care and custody that caused the adjudication in the first place. Therefore, for similar reasons, we find no clear error with the trial court's conclusion that this statutory factor was met. Because the trial court had the opportunity to see and hear the witnesses and judge their credibility, we will defer to its conclusions.

B. BEST INTERESTS

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re*

Olive/Metts, 297 Mich App 35, 40; 823 NW2d 144 (2012), citing MCL 712A.19b(5). “[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence.” *In re Moss*, 301 Mich App at 90. We review the trial court’s finding for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

The trial court should weigh all the evidence available to it in determining best interests, *id.* at 356, and may consider such factors as “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 at 41-42 (citations omitted). Other considerations include the length of time the children were in foster care or placed with relatives and the likelihood that the children could be returned to their parent’s home “within the foreseeable future, if at all.” *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012).

We find no clear error in the trial court’s finding that termination of respondent’s parental rights was in the best interests of the children. Every indication was that as time went on, the children were becoming more and more bonded to their foster family and less bonded to respondent. At the time of the termination trial, it was going to be at least six more months before respondent *might* be in a position to be reunified with her children. The trial court did not err in determining that given the length of time the case had been going on and the length of time before respondent might be in a position to parent her children that the need for permanency and finality necessitated a finding that termination was in the children’s best interests. The trial court spent ample time throughout the proceedings stressing the need to find appropriate relative placements. Again, we find that the trial court’s skepticism regarding the timing of Askew’s appearance is entitled to deference. The trial court did not clearly err in its decision that termination of respondent’s parental rights was in the best interest of the children.

Affirmed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello