

STATE OF MICHIGAN
COURT OF APPEALS

In re E D JOHNSON, Minor.

UNPUBLISHED
December 15, 2015

No. 326096
Wayne Circuit Court
Family Division
LC No. 94-313903-NA

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

Respondent mother appeals as of right an order terminating her parental rights to minor child EDJ pursuant to MCL 712A.19b(3)(b)(i), (g), (i), and (j). We affirm.

Respondent first argues that the trial court erred in finding that a statutory ground for termination was proved. We disagree.

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction a mistake has been made." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). For termination of parental rights, the trial court must find that at least one of the statutory grounds set forth in MCL 712A.19b has been met by clear and convincing evidence. *In re Terry*, 240 Mich App 14, 21-22; 610 NW2d 563 (2000).

A trial court may 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) termination is in the child's best interest. MCR 3.977(F); *In re Fried*, 266 Mich App 535, 540-541; 702 NW2d 192 (2005). In relevant part, MCL 712A.19b(3) states:

(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:

* * *

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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.

* * *

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(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.

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

The trial court did not clearly err when it found clear and convincing evidence to support termination under subsection (b)(i).¹ MCL 712A.19b(3)(b)(i) supports termination of parental rights when (1) the child or a sibling of the child has suffered physical injury, (2) the parent's act caused the physical injury, and (3) the court finds that there is a reasonable likelihood that the child will suffer from injury in the foreseeable future. MCL 712A.19b(3)(b)(i).

Respondent admitted to ingesting opiates, cocaine, and marijuana during her pregnancy with EDJ. Prenatal drug use constitutes neglect, *In re Nash*, 165 Mich App 450, 456; 419 NW2d 1 (1987), and the positive toxicology screen was sufficient to establish that respondent's actions caused EDJ physical harm under MCL 712A.19b(3)(b)(i). Evidence of the way respondent treated her other eight children prior to the termination of her rights to each is probative of how she would treat EDJ. See *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). Her history of allowing her children to suffer demonstrates a likelihood that EDJ would suffer future injury if left in her care. Respondent's decision not to obtain prenatal services during her pregnancy and her treatment of her eight older children—including physical abuse, failure to obtain medical care for her children, failure to obtain prenatal services during multiple pregnancies, and an inability to control her drug habit—supported the trial court's conclusion that EDJ was reasonably likely to suffer further injury if returned to respondent. Therefore, the lower court

¹ Although on appeal petitioner expressed the opinion that subsection (b)(i) was not applicable to respondent, EDJ's guardian ad litem agreed that the trial court properly terminated respondent's parental rights under MCL 712A.19b(3)(b)(i). We agree with the GAL.

properly found clear and convincing evidence to support termination under MCL 712A.19b(3)(b)(i).

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

Termination of respondent's parental rights was also proper under MCL 712A.19b(3)(g), which requires clear and convincing evidence that (1) respondent has failed to provide proper care and custody and (2) there is no reasonable likelihood that respondent will be able to provide proper care and custody within a reasonable time. Respondent clearly failed to provide proper care and custody for EDJ when she neglected to obtain prenatal care for herself or the child and voluntarily ingested opiates, cocaine, and marijuana during her pregnancy. "[A] child has a legal right to begin life with a sound mind and body" and prenatal drug use is evidence of neglect. *In re Baby X*, 97 Mich App 111, 115–116; 293 NW2d 736 (1980). Respondent has repeatedly failed to address her substance abuse issues and, during her 20-year history with DHHS, has never obtained employment or adequate housing. Although there is some evidence of enthusiastic participation in past substance abuse treatment programs, respondent has never completed a substance abuse treatment program or maintained substantial compliance with a parent-agency agreement.

Respondent argues that the trial court's determination that she would be unable to provide proper care and custody within a reasonable time was "mere speculation." However, respondent's history and patterns were very relevant for purposes of determining under MCL 712A.19b(3)(g) whether there was a reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time, and the referee properly relied on respondent's history to reach the decision to terminate. Respondent's parenting history and patterns of behavior strongly supported the conclusion that a change in conduct and behavior relative to providing proper care and custody in the future was highly unlikely. Respondent made no plans for the child when she became pregnant and admitted to a DHHS representative that nothing had changed as far as her substance abuse since any of the prior termination orders were entered. It was only when respondent was actually faced with a termination petition and learned that her mother would not be approved as a caregiver for EDJ that she voluntarily sought out services. By the date of the termination hearing, respondent had only attended a few weeks of therapy and completed one parenting class, and her prior failure to follow through with any reunification services indicated that she was not likely to complete the current treatment program. Further, while substance abuse was one of the primary reasons for EDJ's removal, the decision to terminate was also based on the prior removal of all eight of EDJ's siblings for physical abuse and neglect and respondent's failure to obtain independent housing or employment. The record establishes through clear and convincing evidence that respondent was not reasonably likely to be able to provide care and custody within a reasonable time, and the trial did not clearly err in finding that termination was warranted under subsection (g).

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

Much of the evidence discussed concerning MCL 712A.19b(3)(g) establishes a reasonable likelihood that EDJ would suffer harm if returned to respondent's home, and also supports termination of respondent's parental rights under MCL 712A.19b(3)(j). Respondent's untreated substance abuse would certainly expose EDJ to risk of harm. Additionally, respondent

has a history of perpetrating physical abuse on her children and failing to protect her children from the abuse of others. The trial court did not clearly err when it found clear and convincing evidence that, especially without a stable living environment, EDJ would risk harm if returned to his mother's care. Therefore, termination of respondent's parental rights was proper under subsection (j).

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

The trial court did not clearly err when it found clear and convincing evidence to support termination of respondent's parental rights under subsection (i), which requires that (1) respondent's parental rights to one or more of the child's siblings have been terminated for chronic neglect or physical abuse, and (2) prior attempts to rehabilitate respondent were unsuccessful.

Respondent does not dispute the fact that her rights to eight other children had been terminated prior to the filing of the instant petition. The trial court took judicial notice of all termination orders and properly considered the circumstances surrounding each. Respondent's parental rights to her first three children were terminated on the basis of neglect and physical abuse, as were her rights to her fourth, fifth, and sixth children. Additionally, respondent's parental rights to her seventh and eighth children were terminated under MCL 712A.19b(3)(i), which requires a factual finding that prior terminations were due to chronic abuse and neglect.

Respondent argues that the trial court erred when it found clear and convincing evidence that prior attempts to rehabilitate respondent were unsuccessful. Respondent argues that she should have been allowed additional time in which to prove the success of the substance abuse treatment program she had enrolled in during the one month period between the instant petition and the termination hearing. Respondent's argument fails in light of the clear language of subsection (3)(i), which does not provide a parent time in the future to establish the success of rehabilitation attempts. When interpreting statutes, a reviewing court is to give effect to the intent of the Legislature and, if the language of the statute is clear, it is assumed that the Legislature intended the plainly expressed meaning. *Maxwell v Citizens Ins Co of America*, 245 Mich App 477, 482; 628 NW2d 95 (2001). The clear language of MCL 712A.19b(3)(i) directs the court to determine the success of prior rehabilitation efforts as of the date of the termination hearing only.

DHHS provided substantial services and attempted to achieve reunification of respondent and each of her nine children. Prior to the court's termination of respondent's parental rights with respect to her first three children—AJ, CJ, and DJ—DHHS spent nearly two years assisting respondent and working toward reunification. Their efforts included referrals for services, transportation, phone calls and letters, schedule adjustments for visitation, and paid drug and alcohol screens. Though respondent enthusiastically participated during the first few months, her enthusiasm waned and her participation became "sporadic" before stopping completely. Despite respondent's continuous failure to comply with her parent-agency agreement or benefit from treatment, the court twice denied DHHS's petitions for permanent custody of these three children. Indeed, the court ordered further services for a full year after an agent of Parents and Children Together, an agency providing services on behalf of DHHS, recommended termination of respondent's parental rights, before finally ordering termination in 1996.

Less than two years later, respondent's chronic neglect led to termination of her rights to three more children. Preventive services were again ordered and respondent had more than a year to comply before her rights were terminated. In fact, it was a year after DHHS filed a petition seeking permanent custody of CH and BH and during the period in which respondent was receiving court ordered services that MH was born testing positive for marijuana. MH's birth prompted the court to cut off services for respondent and terminate her parental rights to CH, BH and MH in April, 2000.

But DHHS's attempts to assist respondent did not stop there. Despite the fact that they were no longer obligated to do so, DHHS held family team meetings with respondent prior to filing petitions for permanent custody of KJ in 2009, EJ in 2013, and EDJ in 2014. These meetings were intended to notify respondent of the pending petition and allow her the opportunity to show that she could provide proper care and custody. Though DHHS made repeated attempts to reunify respondent with her children prior to seeking termination of her rights, respondent simply refused to be rehabilitated. Clear and convincing evidence existed to support the conclusion that respondent's parental rights to EDJ's siblings had been terminated due to neglect and prior attempts to rehabilitate respondent were unsuccessful. Therefore, the trial court did not clearly err when it ordered termination of respondent's parental rights under MCL 712A.19b(3)(i).

Next, respondent argues that the trial court and DHHS failed to make reasonable efforts toward reunification prior to the termination of her parental rights. We disagree.

Respondent failed to preserve this issue by raising an objection with the trial court. *Loutts v Loutts*, 298 Mich App 21, 23; 826 NW2d 152 (2012) (quotation marks and emphasis omitted). Ordinarily, this court reviews for clear error the trial court's finding that DHHS engaged in reasonable efforts to reunify a child with his or her parent. *In re Mason*, 486 Mich at 152. However, "[r]eview of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Under this standard, relief may be granted if "(1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Development, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

A parent has a fundamental liberty interest in the care and custody of his or her children under the Fourteenth Amendment of the United States Constitution. *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). To protect this interest, DHHS generally must make reasonable efforts to reunify a child with his or her family prior to the court's termination of parental rights. MCL 712A.19a(2); *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). However, DHHS "is not required to provide reunification services when termination of parental rights is the agency's goal." MCL 712A.18f(1)(b); *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). Additionally, reasonable efforts for reunification are not required when aggravating circumstances are present, such as when "[t]he parent has had rights to the child's siblings involuntarily terminated." MCL 712A.19a(2)(c); *In re Mason*, 486 Mich at 152.

Respondent argues that petitioner failed to make reasonable efforts to rectify the conditions leading to termination of her parental rights and failed to justify its decision not to

provide services. Respondent's argument fails. Because respondent's parental rights to eight of EDJ's siblings were involuntarily terminated, and termination of respondent's parental rights was DHHS's goal from the outset, DHHS was not required to provide respondent with services or attempt reunification with EDJ prior to requesting termination of her parental rights. See MCL 712A.19a(2)(c); *In re Smith*, 291 Mich App 621, 623; 805 NW2d 234, amended 291 Mich App 801 (2011).

Respondent correctly asserts that, although DHHS is not required to provide services in all circumstances, the decision not to provide services must be justified. MCL 712A.18f(1)(b); *In re Terry*, 240 Mich App at 26 n 4. However, contrary to respondent's assertion on appeal, an agent properly justified DHHS's decision not to provide services when she explained at the termination hearing that, in light of respondent's past terminations, DHHS was no longer obligated to provide services for respondent. As previously discussed, DHHS provided numerous services prior to the court's termination of respondent's rights to her first eight children. Respondent failed to benefit from these services and continued using drugs for more than 20 years, including during her pregnancies for at least four of her nine children. DHHS was not required to provide further services under these circumstances. Therefore, the trial court did not err when it found that, in light of the eight prior terminations, DHHS was not required to make any efforts toward reunification of EDJ and respondent prior to requesting termination of her parental rights.

Finally, respondent argues that the trial court clearly erred when it found that termination was in EDJ's best interests. Again, we disagree.

This Court reviews a trial court's decision for clear error regarding whether termination is in the child's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Whether termination of parental rights is in the children's best interest must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

Once a statutory ground has been proven, the trial court must find that termination is in the child's best interest before it can terminate parental rights. MCL 712A.19b(5); MCR 3.977. In considering whether termination of parental rights is in the best interests of the child, all available evidence on a wide variety of factors should be considered. *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). These factors include the existence of a bond between the child and the parent, the parent's ability to parent, the child's need for permanency and stability, the advantages of a foster home over the parent's home, the parent's compliance with his or her service plan, the parent's visitation history with the child, the child's well-being, and the possibility of adoption. *Id.* at 713-714.

We are not definitely and firmly convinced that the trial court made a mistake when it found that termination of respondent's parental rights was in EDJ's best interests. The trial court considered a wide variety of factors including respondent's ability to parent, EDJ's need for permanency and stability, and the fact that EDJ's foster parents had already expressed a willingness to adopt. The referee noted that, despite EDJ's young age, he was in need of permanency and stability that he would be more likely to find with his foster parents, who had already expressed a willingness to adopt. He reasoned that respondent's prior terminations for chronic neglect and physical abuse, and her inability to properly protect her children from other

perpetrators, evidenced an inability to engage in proper parenting. Additionally, the referee found that respondent's inability to comply with past parent agency agreements and work toward rehabilitation weighed in favor of termination. Finally, the referee explained that it was contrary to EDJ's well-being to be placed in a home with a parent that has a long history of substance abuse, and that EDJ's interests would be better served in a substance-free home. The trial court adopted these findings in its written order, further noting that permanent planning was essential at this stage of EDJ's life to promote "continued growth and development."

Respondent unpersuasively argues that the trial court terminated her rights prematurely and failed to give proper weight to her recent attempts to address her substance abuse through the Positive Images inpatient program. Contrary to respondent's assertion, the trial court was not required to provide respondent with further opportunities to demonstrate that termination was against the child's best interests, and DHHS was not required to facilitate treatment in light of respondent's previous failures. Respondent had ample opportunity to correct the problems that had led to the termination of her rights to the eight prior children, and she repeatedly failed to make any real steps toward achieving the capability to provide her children with proper care and custody.

It is admirable that respondent enrolled herself in the Positive Images program after the petition was filed and, by the time of the termination hearing, had completed a five-day detoxification and a six-week parenting class. However, termination may be in a child's best interests even in instances where the parent makes some progress in addressing her substance abuse issues when the evidence shows that it is unlikely that the child could be returned to the parent's home within the foreseeable future. See *In re Frey*, 297 Mich App at 248–249. Respondent has a long history of receiving treatment and failing to follow through with plans to beat her substance abuse problem. Respondent's most recent three children had each been born testing positive for cocaine and marijuana despite respondent receiving substance abuse treatment services prior to the termination of her parental rights to her first five children. Respondent was certainly aware that continued drug use could lead to termination of her parental rights to subsequent children, including EDJ, and she did not make any effort to control her addiction until she became aware that DHHS had petitioned for permanent custody of EDJ, and found respondent's mother an unsuitable caregiver.

Although the Positive Images report indicated some progress on respondent's part, it did not speculate as to respondent's future with the program, or provide support for respondent's assertion that she would be able to provide proper care and custody for EDJ within a reasonable time. Respondent admitted at the termination hearing that she still had not obtained employment or adequate housing, and did not offer any documentary evidence that either of these pursuits were in progress. Indeed, there was little evidence on the record that termination of respondent's parental rights would not be in the best interests of the child. The preponderance of the evidence

therefore supports the referee's recommendation and the trial court's conclusion that termination of respondent's parental rights was in EDJ's best interests.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher