STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of YUSUF RALEI BROWN, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MACEIO BROWN,

Respondent-Appellant.

UNPUBLISHED
December 6, 2007

No. 278697
Genesee Circuit Court
Family Division
LC No. 01-113534-NA

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Respondent appeals as of right from the order of the family division of the circuit court terminating his parental rights to the child under MCL 712A.19b(3)(c)(*i*): Conditions of adjudication continue to exist, (c)(*ii*) failure to rectify other conditions that warrant the court's jurisdiction, (g) failure to provide care and custody, (h) parent is imprisoned, (j) child will likely be harmed if returned, and (n)(*ii*) parent committed a violent crime subjecting the parent to habitual-offender sentencing.[1] For the reasons more fully set forth in this opinion, we affirm.

Respondent argues that the trial court clearly erred in holding that clear and convincing, legally admissible evidence warranted termination of his parental rights, and that termination was in the best interests of the child.

I. Facts.

The child, born May 12, 2005, initially became a ward of the court in January 2006, in response to his mother's admission of having neglected his serious medical needs. Respondent was not a legally recognized parent, and thus not a respondent, until April 2006, when he signed

[1] The trial court also terminated the parental rights of the child's mother, but she is not appealing that decision.

an affidavit of paternity from the county jail, where he was awaiting sentencing for several felonies. Participating in the May 2007 termination hearing from prison by telephone, respondent admitted that he was serving prison sentences for possession of cocaine, felonious assault, felon in possession of a firearm, and possession of a firearm during the commission of a felony, and that his earliest release date was April 22, 2009. Respondent further admitted that he was convicted of both armed and unarmed robbery in 1990.

II. Standards of Review.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). An appellate court "review[s] for clear error 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." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). See also MCR 3.977(J). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A reviewing court must defer to the special ability of the trial court to judge the credibility of witnesses. *Id.*

III. Statutory Factors.

MCL 712A.19b(3)(n)(*ii*) authorizes a court to terminate parental rights upon finding, by clear and convincing evidence, that

> (n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:
>
> * * *
>
> (*ii*) A violation of a criminal statute, an element of which is the use of force or the threat of force, and which subjects the parent to sentencing [as a habitual offender].

Respondent tacitly concedes that his conviction of felonious assault qualifies as an offense involving force or the threat of force, but argues that this factor cannot be satisfied unless he was sentenced for that conviction as a habitual offender, and points out that there was no evidence that he had that status in connection with his current convictions. However, the statute does not require actual habitual offender sentencing, or even a conviction. Instead it requires a finding, on clear and convincing evidence, that the parent violated a criminal statute an element of which was force or the threat of force, and that that violation was one "which subjects the parent" to habitual offender sentencing. Respondent's robbery convictions from 1990 caused his current felonious assault conviction to *subject* him to, or cause him to be eligible for, habitual offender sentencing, whether or not the prosecutor, and thus the sentencing court, elected to proceed on that basis. Consequently, the trial court did not clearly err in concluding that termination was appropriate under § (3)(n)(*ii*).

MCL 712A.19b(3)(h) authorizes a court to terminate parental rights upon finding, by clear and convincing evidence, that

> [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

Respondent points out that he will be eligible for parole on April 22, 2009, which is less than two years after the May 9, 2007, termination hearing and order that followed. Respondent relies on *In re Perry*, 193 Mich App 648; 484 NW2d 768 (1992), where this Court stated that the focus of this inquiry "is 'whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home.'" *Id.* at 650, quoting *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987).

However, the two-year facet in this statute concerns how long the child will be deprived of a normal home because of the parent's imprisonment, not necessarily how long the parent's sentence has yet to run. Imprisonment obviously destroys a parent's ability to provide a normal home during the period of incarceration. But parole, being a manifestation of imprisonment, can lessen the parolee's likelihood of establishing a normal home for a child. A newly paroled prisoner must suddenly readjust to life in society at large, including by finding suitable housing and a legal source of income, along with attending to the reporting obligations, mobility restrictions, and other burdens parolees must endure. The hasty establishment of a normal home for a child under those circumstances is hardly assured.

Respondent cites no authority for the proposition that a court adjudicating this factor must presume that an imprisoned parent will both win parole at the earliest possible date, and immediately thereafter be completely unhindered by that recent term of incarceration in providing a normal home for a child. Moreover, in making this argument, respondent neither disputes that he has heretofore failed to provide proper care and custody, nor addresses his prospects for doing so after his release from prison. For these reasons, we reject this challenge.

Only a single factor for termination validates a decision to do so. MCL 712A.19b(3); *In re McIntyre*, *supra*. Because we are satisfied that the trial court correctly concluded that respondent's penal circumstances well satisfied two bases for termination, we will affirm that aspect of the decision on that basis, and thus consideration of respondent's remaining arguments in connection with the other factors is deemed unnecessary.

IV. Best Interests.

The referee stated from the bench that termination was in the child's best interests. In fact, the inquiry is not whether it is in the child's best interests to terminate, but whether termination is "clearly not" in the child's best interests. MCL 712A.19b(5); *In re Hall-Smith*, 222 Mich App 470, 472-473; 564 NW2d 156 (1997). The trial court thus found a higher standard than what the law requires.

Respondent points out that the child has two siblings who reside with respondent's mother in Maryland, whom the instant child has now joined, and that the evidence indicates that respondent's mother provides proper care for all. Respondent argues that guardianship with the mother is thus best for the child. However, eventual placement with respondent's mother is neither assured if respondent retains his parental rights, nor necessarily precluded in the event of termination. The major difference is that, with termination, respondent has no say in the decision. At issue is respondent's parental fitness, not that of his mother.

For these reasons, respondent has failed to show that termination was clearly contrary to the child's best interests.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher