STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DI, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KEVIN L. POLK,

Respondent-Appellant.

UNPUBLISHED
September 29, 2009

No. 290717
Kent Circuit Court
Family Division
LC No. 06-051052-NA

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor child. We affirm.

Respondent argues that the prosecutor did not provide clear and convincing proof to establish the statutory grounds for termination under MCL 712A.19b(3)(c)(ii) or (g). We review a finding regarding a statutory ground for termination for clear error. MCR 3.977(J). Such a finding can be set aside only if, although there was evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000), quoting *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

We conclude that there was not clear and convincing evidence to support termination of respondent's parental rights based on cocaine use. The last cocaine use was documented as having occurred on January 28, 2008. Respondent was provided services and there were at least one if not two determinations that he did not have a substance abuse problem. He apparently attended therapy for substance abuse counseling in any event, in order to comply with the parent/agency agreement. Even if he had used cocaine in January 2008, there was no basis to presume that he had continued use since he subsequently had three negative tests. Thus, presuming that respondent did use cocaine, this problem was by all accounts apparently rectified.

Regarding respondent's readiness and ability to parent, it appears that any concerns regarding respondent's abilities were rectified. The concern regarding parenting ability was with

respondent's fiancée, with whom he lived. The primary concern appeared to be her emotional stability, depression, and the concern that she had not significantly bonded with and did not interact with the child as desired. We find no evidence of record detailing the fiancée's emotional instability.[1] However, there was evidence that she had a flat affect and mood, and that this affected her ability to bond and appropriately interact with the child. The evidence of record does clearly and convincingly establishes that, if respondent's fiancée were the child's parent, her condition would have resulted in a determination that she was not ready to assume care for the child. Respondent received recommendations to rectify the condition in that he was encouraged to leave her, a recommendation he would not heed. However, the fiancée's continuing condition and the failure to rectify this condition was a sufficient basis to establish grounds for termination under § (13)(c)(ii). Moreover, to the extent the fiancée would be living with respondent, there was no clear error in determining that her condition and limitations would interfere with proper care; accordingly, grounds for termination were established under § (3)(g).

We note that respondent's Vicodin use was not a proper basis for terminating rights under § (3)(c)(ii). Since the use had never been identified as a concern, respondent had received no recommendations to rectify it and, coextensively, he received no opportunity to rectify it. However, this use could have been a basis for finding an inability to provide proper care and custody under § (3)(g). We note that the evidence regarding Vicodin abuse was contradicted by testing showing no substance abuse problem, observations of the therapist that respondent did not present as a drug abuser, and the fact that the caseworker had observed visitations with the child but had developed no concerns in this regard. Nonetheless, the expert's opinion was evidence of substantial excessive use. Given the deference we are required to accord a trial court's judgment regarding credibility of witnesses, we cannot say that the decision was a clear error.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[1] The record suggests that evidence pertaining to this issue may have been presented at an August 18, 2008, hearing. The transcript of this hearing is not part of the record. Moreover, although there is an indication that the fiancée went off her medication for a period during the summer of 2008, there is nothing in the record that speaks to the effect that this had on her. While a complete record might substantiate this information, the present record does not.