

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 21, 2010

In the Matter of K. N. TOMSHECK, Minor.

No. 297474
Berrien Circuit Court
Family Division
LC No. 2009-000141-NA

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

MEMORANDUM.

Respondents appeal as of right from a circuit court order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(g), (i), and (j). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Although both respondents argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence, we note that respondent mother conceded below that termination was appropriate under § 19b(3)(i), thereby waiving any claim of error with respect to that statutory ground. *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000). Notwithstanding that waiver, the trial court did not clearly err in finding that §§ 19b(3)(i) and (j) were both established by clear and convincing legally admissible evidence with respect to both respondents. *In re Utrera*, 281 Mich App 1, 16-17; 761 NW2d 253 (2008); MCR 3.977(E)(3) and (K). The child's siblings were previously made court wards due to physical and environmental neglect. Despite participating in multiple services designed to improve their parenting skills, neither respondent showed any significant improvement. Respondent mother did not recognize a need for improvement and respondent father's cognitive limitations impaired his ability to learn and apply the skills that were taught to him. Respondents' parental rights to those children were terminated just two months before this child was born.¹

¹ We question the trial court's reliance on § 19b(3)(g). While there was ample evidence that respondents would not be able to provide proper care and custody within a reasonable time, the child was removed from respondents' custody shortly after her birth and there was no evidence that respondents failed to provide proper care during the brief period before the child was removed. But because the trial court did not err in finding that §§ 19b(3)(i) and (j) were both established, any error in relying on § 19b(3)(g) as an additional statutory ground for termination (continued...)

Further, considering that the child was removed from respondents' custody shortly after birth and that there was no reasonable likelihood that respondents would be in a position to provide proper care and custody for the child in the foreseeable future, the trial court did not clearly err in finding that termination of respondents' parental rights was in the child's best interests. MCL 712A.19b(5).

Respondents' reliance on *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), is misplaced. That case sets forth factors to be considered in evaluating whether procedures used in a particular case satisfy constitutional due process requirements. *Id.* at 332-335. Respondents do not claim that they did not receive notice of the proceedings or that they did not have an opportunity to participate in the proceedings. Although "parents have a significant interest in the companionship, care, custody, and management of their children[, and] [t]his interest has been characterized as an element of 'liberty' to be protected by due process[.]" *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993), once clear and convincing evidence establishing a basis for termination under § 19b(3) was presented, respondents' liberty interest in the custody and control of their child was eliminated. *In re Trejo Minors*, 462 Mich 341, 355-356; 612 NW2d 407 (2000).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray

(...continued)

was harmless. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).