Court of Appeals, State of Michigan

ORDER

In Re Pierson/Berry, Minors

Docket No. 328599; 328675

LC No. 02-002014-NA

Michael J. Talbot
Presiding Judge

Joel P. Hoekstra

Douglas B. Shapiro
Judges

In light of this Court's opinion in *In re D Gach*, ___Mich App___; ___NW2d___ (Docket No. 328714, April 19, 2016), the Court, on its own motion, orders that this Court's April 19, 2016 opinion and concurrent order are hereby VACATED. A new opinion and order is attached.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 26 2016

Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

In re PIERSON/BERRY, Minors.

UNPUBLISHED
April 26, 2016

No. 328599
Jackson Circuit Court
Family Division
LC No. 02-002014-NA

In re PIERSON/BERRY, Minors.

No. 328675
Jackson Circuit Court
Family Division
LC No. 02-002014-NA

Before: TALBOT, C.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 328599, respondent father appeals as of right the trial court's order terminating his parental rights to five minor children, NP, MB, RBI, RBII, and AB, pursuant to MCL 712A.19b(3)(c)(*i*) (the conditions leading to the adjudication have not been rectified), (3)(g) (parent fails to provide proper care or custody), and (3)(j) (reasonable likelihood of harm if child is returned to the parent). We affirm the trial court's order with respect to respondent father.

In Docket No. 328675, respondent mother appeals as of right the same order, which terminated her parental rights to the children pursuant to MCL 712A.19b(3)(c)(*i*), (3)(g), (3)(j), and (3)(l) (prior termination). We affirm the trial court's order in part, vacate in part, and remand for further proceedings consistent with this opinion.

DOCKET NO. 328599

We first address respondent father's arguments that the trial court clearly erred when it found statutory grounds existed to terminate his parental rights to the children and that termination of his parental rights was in the children's best interests. "The trial court must order the parent's rights terminated if [petitioner] has established a statutory ground for termination by

clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests."[1] "We review 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[ren]'s best interest[s]."[2] To be clearly erroneous, the trial court's decision must be more than possibly or probably incorrect.[3] A finding is clearly erroneous if "the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made."[4]

Termination is appropriate under MCL 712A.19b(3)(g) if "[t]he 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." At the time of the termination hearing, which took place over two years after the children came into care, respondent father had no income, and his home, a one-bedroom apartment, was not suitable to raise five children. Respondent father admitted that he lived in poverty, yet he had not obtained employment or applied for government assistance. Rather, he seemed content to pursue his appeal of a denial of social security disability benefits, despite acknowledging that he was able to work.

Further, "a parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child."[5] While he did participate in a few services, respondent father did not participate in the majority of the services that comprised his treatment plan. He failed to participate in individual counseling, failed to participate in drug screens, missed a substantial number of parenting time sessions, did not attend medical appointments, and failed to obtain suitable housing or income. The trial court did not clearly err when it found that the statutory ground provided by MCL 712A.19b(3)(g) was established by clear and convincing evidence.

"Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds."[6] Thus, it is unnecessary for us to consider the additional grounds relied on by the trial court. That said, we reject respondent father's arguments regarding the remaining statutory grounds relied on by the trial court.

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[1] *In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014).

[2] *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

[3] *Id*. at 356.

[4] *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted).

[5] *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

[6] *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

Termination is appropriate under MCL 712A.19b(3)(c)(*i*) if "[t]he 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 . . . [that t]he 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." Respondent father argues that the only condition leading to the adjudication was domestic violence between himself and respondent mother, and that their divorce has resolved this issue. Clearly, an incident of domestic violence was the specific event that caused the children to be removed from respondents' care. But the record demonstrates that this was not the only condition that led to the adjudication. Rather, the adjudication was premised on respondent father's plea. He admitted not only to the incident of domestic violence, but to his use of alcohol and an incident of physical abuse causing injury to one of his children. Respondent father's argument lacks merit.

Termination is appropriate under MCL 712A.19b(3)(j) if "[t]here 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." As the trial court noted, respondent father failed to address his alcohol use, and instead claimed that he was only required to be sober at parenting time sessions. He failed to complete the majority of his treatment plan. He also lacked appropriate housing and financial resources. Under the circumstances, the trial court's conclusion that there was a reasonable likelihood of harm if the children were returned to his care was not clearly erroneous.

We likewise find no clear error with respect to the trial court's best interests finding. We first note that respondent father does not contest the fact that termination of his parental rights is in the best interests of AB, his youngest child, who suffers from a serious medical condition. Respondent father acknowledges that AB's foster family is better able to care for her medical needs, and only asks that this Court "reverse the order of the lower court terminating his parental rights to his [four] older children." Thus, the question he places before the Court is whether termination was in the best interests of the four older children.

When making a best-interests determination, "the trial court may consider 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."[7] "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption."[8] Respondent father contends that the trial court did not consider the relevant factors, and instead, considered only the length of time the children had been in care. This is simply false. The trial court discussed respondent father's bond to the children. It also noted his inability to comply with his treatment plan or address his own shortcomings, and found it unlikely that he would be able to address the emotional needs of the children. The trial court

[7] *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted).

[8] *White*, 303 Mich App at 714.

discussed the length of time the children had been in care and their need for a resolution. It also considered, and rejected, a main contention made by respondent father: that his children should be raised by a parent of the same race. Thus, and contrary to respondent father's assertion, the trial court did consider the relevant factors when it made its best interests determination.

Respondent father also raises specific arguments regarding whether certain factors would weigh in favor of termination. Respondent father contends that the children were bonded to him. The trial court agreed that there was some level of bonding between the children and respondent father. However, the children's bond to respondent father is but one of many relevant factors. Respondent father contends that there could be no question regarding his parenting ability because he raised all of the children, with the exception of AB, since birth. If the fact that respondent father raised four of the children until they were removed from his care was sufficient to demonstrate his parenting ability, one would question how he, or any parent for that matter, could ever come to have his or her parental rights terminated. Regardless, the children came into care because of respondent father's shortcomings as a parent. He admitted to being involved in domestic violence and using physical discipline against at least one child that caused injury. His use of alcohol was also clearly a factor. The record established that respondent father had done little to address these issues. The trial court concluded that respondent father had not addressed his shortcomings as a parent and could not provide for the children's emotional needs. While respondent father might disagree with this assessment, he has not shown it to be clearly erroneous.

Respondent father contends that the children would be better off in his home rather than be moved between foster care placements. Respondent father lacks an appropriate home for the children. And while the male children have had several foster homes in the past, the testimony established that they would potentially face one more move: to the same home where their sisters are placed. This family wished to adopt all five children. The record does not establish that respondent father could offer a more suitable or stable home than would be available to the children if respondent father's rights were terminated.

Respondent father also briefly cites *In re Olive/Metts* for the premise that "the trial court has a duty to decide the best interests of each child individually."[9] After *Olive/Metts*, this Court explained that *Olive/Metts* does not require the trial court to make specific, individualized factual findings in all cases. Rather, "if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests."[10] Respondent father points to no significant differences between the children that would require the trial court to make individualized findings. He has not demonstrated error.

Respondent father also challenges the constitutionality of the trial court's order, contending that it violates his constitutional right to parent his children. Without question, parents have a constitutional right to parent their own children, a right that "does not evaporate

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[9] *Id*. at 42.

[10] *White*, 303 Mich App at 715-716.

simply because they have not been model parents or have lost temporary custody of their child to the State."[11] But this right is not absolute, "as the state has a legitimate interest in protecting 'the moral, emotional, mental, and physical welfare of the minor' and in some circumstances 'neglectful parents may be separated from their children.' "[12] "Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under [MCL 712A.]19b(3), the liberty interest of the parent no longer includes the right to custody and control of the children."[13] In this case, the trial court concluded that statutory grounds to terminate respondent father's parental rights were demonstrated by clear and convincing evidence. That conclusion was not clearly erroneous. Thus, respondent father's right to parent his children "g[ave] way to the state's interest in the child[ren]'s protection."[14] Respondent father's argument lacks merit.

DOCKET NO. 328675

In Docket No. 328675, respondent mother contends that the trial court clearly erred when it found statutory grounds existed to terminate her rights. She also takes issue with the trial court's best-interests determination, as well as with the conduct of counsel in the best-interests phase of the proceeding. While we find no clear error with respect to the trial court's statutory grounds determination, the trial court's best-interests findings are insufficient to permit meaningful appellate review.

We first address respondent mother's contention that the trial court's statutory grounds determination was clearly erroneous. The trial court found termination of respondent mother's parental rights appropriate under the same grounds cited with respect to respondent father, as well as under MCL 712A.19b(3)(l). Under MCL 712A.19b(3)(l) grounds to terminate parental rights exist solely because the respondent's parental rights to another child were previously terminated. Very recently, this Court held that MCL 712A.19b(3)(l) "fails to comport with due process in light of the fundamental liberty interest at stake."[15] Thus, although there is no doubt that this ground was satisfied with regard to respondent mother, in light of *D Gach*, we cannot affirm the trial court's statutory grounds ruling on this basis.

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[11] *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). See also *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (recognizing the liberty interest "of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court.").

[12] *In re Sanders*, 495 Mich 394, 409-410; 852 NW2d 524 (2014), quoting *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972).

[13] *Trejo*, 462 Mich at 355.

[14] *Id*. at 356.

[15] *In re D Gach*, ___Mich App___, ___; ___NW2d___ (Docket No. 328714, April 19, 2014), slip op at 8.

However, we conclude that the trial court did not clearly err with respect to the remaining statutory grounds. As the trial court explained, respondent mother had not fully complied with her treatment plan. Rather, she would choose the services in which she wished to participate. Despite knowing that she was required to participate in drug and alcohol screening, she moved to a different county, without notice to her caseworker, and stopped participating in court-ordered screens, believing that testing performed at a homeless shelter where she was staying would suffice. After finally notifying her caseworker that she had moved, respondent mother requested that she be allowed to test at the foster care agency. Even after this was arranged, respondent mother still missed screens. But rather than accept responsibility for her errors, she blamed the foster care workers for failing to remind her of the need to comply with these screens.

There were also substantial concerns regarding respondent mother's personality disorders. Respondent mother's psychologist explained these disorders and testified that one consequence was a tendency to react aggressively to being challenged or questioned. Although it appeared respondent mother was beginning to understand these problems, despite the length of time of the proceedings in the trial court, she had not demonstrated that these concerns had been rectified. Rather, her presentation at trial, along with her conduct with respect to her service plan, indicated that her personality deficits were still very much present. These issues are particularly concerning, given that domestic violence, precipitated by alcohol abuse, caused the children to come into care.

In addition, respondent mother had lived in several homes during the pendency of this case, none of which were found to be suitable for the children. While respondent mother testified that she had recently moved to a new residence, her caseworker, despite contacting respondent mother several times, had been unable to arrange a visit to evaluate the home's fitness. And in any case, respondent mother's testimony was that this home had only two bedrooms, and that she would need a larger residence if the children were returned to her. Under these circumstances, we cannot conclude that the trial court clearly erred when it found that the grounds stated for termination in MCL 712A.19b(3)(c)(*i*), (3)(g), and (3)(j) were proven by clear and convincing evidence.

Respondent mother's arguments with regard to the trial court's best-interests determination begin at the statutory grounds phase of the proceeding. The trial court conducted a bifurcated proceeding, in which it would first determine whether statutory grounds existed to terminate respondents' parental rights, and then, after providing the opportunity to present additional evidence and arguments, determine whether termination was in the children's best interests. When the trial court explained its findings regarding the statutory grounds to terminate respondent mother's parental rights, among other findings, the court discussed the testimony of the children's therapist. The trial court stated:

> She did say, however, which was bothersome to me, she didn't find out the plan . . . was reunification until December of 2014, which is a huge fault on the part of the agency. But, is that the reason I'm going to terminate your parental rights? No, I'm not, because she said things about you in therapy. Yes, I'm going to terminate your parental rights, but not under that basis.

After concluding that statutory grounds existed to terminate respondent mother's parental rights, petitioner presented a witness who testified regarding the children's best interests. When asked if she wished to cross-examine this witness, respondent mother's counsel stated, "Your Honor, I hesitate to ask any questions since you've already indicated to my client that you are intending on terminating her parental rights. . . . It seems a waste of time." Counsel did not cross-examine respondent father, who also testified at this stage of the proceeding. Counsel presented no witnesses, and when asked if she wished to make any argument regarding the best interests of the children, stated:

> Unfortunately, Your Honor, I believe this court has pre-determined what it's going to do with my client's parental rights before the end of testimony, so there's no need for me to make an argument on best interest, because you made up your mind before the end of evidence. Thank you.

In announcing its best-interests determination, the trial court stated:

> [Counsel] is correct I guess it being a burden [of proof] so low she didn't really get an opportunity to present any evidence on the best interest factor because I did indicate I would be terminating her client's parental rights. I think the [r]ecord is clear as to why I would be terminating her parental rights, and given the fact that there was already some presentation by the prosecutor, and given the fact that I don't find [respondent mother] to be a credible person, I stand by that finding. I will sign an order that her parental rights are terminated to all five children.

Respondent mother argues that the trial court made no best-interests determination, having decided at the statutory grounds stage that it would terminate her parental rights to the children. She also argues that counsel was ineffective for failing to contest whether termination was in the best interests of the children. We cannot agree that the trial court made no best-interests determination whatsoever. Notwithstanding the trial court's comment at the statutory grounds phase, the trial court provided respondent mother with the opportunity to present evidence and additional argument regarding the children's best interests. While counsel chose not to take advantage of this opportunity, the fact that the trial court provided the opportunity demonstrates that it did not decide to terminate her parental rights without considering the children's best interests.

Further, the trial court did at least attempt to provide an explanation of its best-interests determination. However, the trial court's explanation lacks sufficient detail to withstand appellate review. When explaining its findings, "[t]he trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions . . . are sufficient."[16] In this case, the trial court vaguely alluded to the entire record and the testimony of the children's therapist and respondent mother. It did not, however, provide any

[16] *Foskett v Foskett*, 247 Mich App 1, 12-13; 634 NW2d 363 (2001). See also MCR 2.517(A)(2).

explanation of how this record or testimony demonstrated that termination was in the children's best interests. The trial court also briefly referenced respondent mother when it discussed whether termination of respondent father's parental rights would be in the best interests of the children. However, these comments, made only after the trial court had clearly concluded that termination of respondent mothers' parental rights was in the children's best interests, offered little insight into the trial court's decision. On the whole, the record is insufficient to allow meaningful appellate review of the trial court's best-interest determination.

Respondent mother requests that this Court remand the matter for rearticulation of the trial court's statutory grounds determination and its best-interests determination. While the latter is required, there is no need for the trial court to rearticulate its findings with regard to the statutory grounds for termination. The trial court adequately explained its statutory grounds decision, and as explained, its conclusions were not clearly erroneous. Ordering the trial court to rearticulate its findings regarding the statutory grounds would be a needless waste of judicial resources.

However, because the trial court's findings regarding the children's best interests are inadequate, we must remand the matter for rearticulation in this regard. And while we need not reach the question of whether trial counsel was ineffective, we are nonetheless disappointed that counsel, rather than attempt to mount any sort of challenge, essentially forfeited the issue. Under the circumstances, we find it appropriate for respondent mother to be provided the opportunity to present evidence and argument, limited to the question of whether termination was in the children's best interests. On remand, respondent mother shall, within 14 days of issuance of this opinion, inform the trial court whether she wishes to pursue a new hearing. If respondent mother declines the opportunity, the trial court may rely on the existing record. In any event, the trial court must rearticulate its best-interests determination with respect to respondent mother. The trial court shall file a supplemental best-interests determination with this Court within 42 days of the date of this opinion.

CONCLUSION

In Docket No. 328599, we affirm the trial court's order to the extent it terminates respondent father's parental rights to the children. In Docket No. 328675, we affirm the trial court's order to the extent it found statutory grounds existed to terminate respondent mother's parental rights. We vacate the trial court's best-interests determination and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

In Re Pierson/Berry, Minors

Docket No. 328675

LC No. 02-002014-NA

Michael J. Talbot
Presiding Judge

Joel P. Hoekstra

Douglas B. Shapiro
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand shall commence within 7 days after the Clerk's certification of this order and they shall be given priority on remand until they are concluded. Within 14 days of issuance of this opinion, respondent mother shall, in writing, notify the trial court whether she wishes to pursue a new evidentiary hearing regarding whether termination of her parental rights is in the children's best interests. If respondent mother exercises this right, the trial court shall hold an evidentiary hearing as soon as possible, after which the trial court shall submit its findings of fact and conclusions of law regarding the children's best interests to this Court. If respondent mother waives her right to a new evidentiary hearing, or if she fails to timely notify the trial court of her decision, the trial court may base its best-interests decision on the existing record. In any event, the trial court must submit its findings of fact and conclusions of law to this Court within 42 days of issuance of this opinion. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within 7 days after entry, respondent mother shall file with this Court copies of all orders entered on remand.

The transcript of any proceedings held on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR 26 2016
Date

Chief Clerk