

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 17, 2012

In the Matter of HARRIS/VERSER/ESTES,
Minors.

No. 304172
Ingham Circuit Court
Family Division
LC No. 09-001691-NA

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Respondent, J. Estes, appeals as of right from a circuit court order terminating his parental rights to his child, JE, pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (the child is reasonably likely to be harmed if returned to the parent's home). We affirm.

I. FACTS

J. Harris is the mother of four children, including JE, who is the youngest.¹ In September 2009, petitioner, the Department of Human Services (DHS), filed a petition for permanent custody of the children. It alleged that the children were living with J. Harris, who had been substantiated for neglect several times in the past. In 2008, DHS opened a case after JE tested positive for marijuana and cocaine at birth, and J. Estes assaulted J. Harris with a gun while JE was present. Also, J. Estes was suspected of selling drugs out of the house.

In June 2009, a referee prohibited J. Estes from having any contact with the children, but on September 23, 2009, J. Estes drove the older children to school. He was speeding and crashed into a tree. The oldest child's arm was broken. J. Estes told the children to flee, after which he returned home and reported the car stolen. When the police came to investigate, J. Estes was arrested for possession of cocaine.

Following the preliminary hearing, the trial court authorized the petition and placed the children outside the home; JE was placed with her maternal grandmother.

¹ J. Harris' parental rights were also terminated, but she is not a party to this appeal.

In January 2010, J. Harris and J. Estes entered pleas to certain allegations in the petition in exchange for dismissal of the request for permanent custody, after which the trial court adjudicated the children to come within the jurisdiction of the court and proceeded to the initial disposition. The initial dispositional order was entered on February 4, 2010. JE remained with her grandmother, and J. Harris and J. Estes were ordered to participate in reunification services. The order called for a substance abuse assessment and treatment, random drug screens, AA/NA meetings, a psychological evaluation and counseling, parenting classes, suitable housing, a legal source of income, and parenting time.

According to the February 2010 updated service plan, J. Estes was not participating in services. He initially refused parenting time because it was to be supervised at the agency. J. Estes attended a visit on December 18, 2009, but canceled a visit on January 8, 2010. Although supervised visits were switched to the grandmother's home, J. Estes still only attended one other visit on January 19, 2010. He declined to participate in other services on the ground that he had completed the services recommended and felt that he would not benefit from participating in them again. He claimed to have completed a psychological evaluation, substance abuse assessment, and parenting classes, but he did not provide documentation to verify his claim. He did not provide random drug screens.

J. Estes ultimately completed a psychological evaluation with Randall Haugen. On the basis of that evaluation, Haugen concluded:

Mr. Estes demonstrated significant impairments in his executive functioning abilities, particularly related to planning, anticipation of consequences, problem solving[,] and generating alternatives to difficulties. He is vulnerable to repeating the same pattern of negative behavior and failing to learn from past consequences. Potentiating this is a profile of an individual who minimizes and disregards personal problems and weaknesses and attempts to present [himself] favorably. There is a lack of insight into personal behavior and motivations and a quickness to feel threatened or imposed upon. There is a resistance to external control, with tendencies to become irritable, rigid[,] and argumentative. These behavior patterns can be quite self-defeating in intimate relationships and lead to ongoing conflict.

In terms of parenting, the above difficulties will create difficulties handling the demands of children. Parenting activities are likely to be deferred to others and there is a vulnerability to become rigid and inflexible in dealing with difficulties. This could lead to a pattern of irritability, hostility[,] and stubbornness. He may fail to have an empathic understanding of his children's concerns or plight[,] which may create problem's [sic] providing adequate parenting intervention in different situations. Ongoing conflict is also likely, particularly once external supervision is decreased.

Haugen recommended counseling to address personal and parenting issues, development of a safety plan, and delivery of "a clear message from the court system related to the potential consequences for engaging in domestic violence or abuse/neglect behaviors in the future."

According to the April 2010 updated service plan, J. Estes was participating in parenting time, but his attendance was sporadic. He had completed one drug screen at which he tested positive for cocaine, in addition to “opiates and benzo,” for which he had prescriptions. He missed two other drug screens on March 26 and 27. He believed his limited progress with reunification was due to DHS having “unreasonable expectations” that he complete services already completed.

According to the July 2010 updated service plan, J. Estes had enrolled in parenting classes. However, between April 12 and May 24, he attended four sessions but missed three sessions. Between April 2 and May 24, J. Estes completed seven drug screens but missed 17 drug screens; he tested positive for cocaine on April 15 and 16. J. Estes had not gone to anger management classes as requested.

On May 26, 2010, J. Estes pleaded guilty to “Operating-License suspended, revoked, denied-causing serious injury” and was sentenced to 2 to 10 years in prison. And according to the January 2011 updated service plan, the foster care worker contacted the prison to discuss the services offered there and recommended that J. Estes “participate in services that would benefit him in the areas of parenting skills, mental health, and substance abuse.”

The DHS filed a supplemental petition for termination in February 2011. With respect to J. Estes, it alleged that he failed to obtain a stable income; that he did not provide random drug screens as requested; when he did comply, he had sometimes tested positive for cocaine; that he did not complete parenting classes or anger management classes; that he was inconsistent in attending family visits before he was imprisoned; and that he was now serving a prison sentence. DHS requested termination pursuant to §§ 19b(3)(c)(ii), (g), and (j).

At an April 2011 termination hearing, Lisa Curtis, the foster care worker from September 2009 to April 2010, testified that J. Estes was told not to use alcohol or intoxicants. But J. Estes participated in “very few” drug screens. Curtis further testified that J. Estes was offered parenting time. Visits were conditioned on not having positive drug screens. Between September 2009 and April 2010, J. Estes attended only four family visits. To her knowledge, J. Estes did not have a source of income. Curtis also testified that she referred J. Estes to parenting classes and anger management classes, but he did not attend.

Holly Crammer, the foster care worker who took over from Curtis, handled the case from approximately April 5 to September 15, 2010. While she had the case, J. Estes became incarcerated. That conviction arose out of the September 2009 car accident in which the oldest child sustained a broken arm. According to Crammer, when she took over the case, J. Estes had not been attending drug screens on a consistent basis. So she asked him to attend screens for two weeks consistently, and offered that if everything was fine, and the screens were clean, no further testing would be required. However, J. Estes tested positive for cocaine on the first screens. Because parenting time was contingent upon negative drug screens for two weeks and because J. Estes missed so many screens and had tested positive, he did not have any family visits while Crammer handled the case. Crammer also testified that J. Estes was referred to parenting classes, but he missed most of them due to his incarceration. Crammer was unable to “locate any programs” that were available to him in prison.

Crammer recommended termination of J. Estes' parental rights as being in JE's best interests. She explained that J. Estes made "very minimal effort" and was inconsistent in attending classes. According to Crammer, "[H]e . . . never really engaged in services in order to attempt to parent his child."

Stephanie Brown, the foster care worker who took over from Crammer, handled the case from approximately September 17 to December 9, 2010. Brown recommended termination of J. Estes' parental rights as being in JE's best interests. She based this opinion on the fact that he did not fully complete services prior to his incarceration, and "he is not able to show benefit from services due to his incarceration." J. Estes' early release date was in May 2012 and his maximum discharge date was in 2020. DHS requested termination because JE needed stability and a suitable long-term home and permanency.

J. Estes testified that he was not aware that a no-contact order had been issued before the September 2009 petition was filed. He admitted that he missed some of his drug screens because he was having financial difficulty paying for his attorney and getting transportation. J. Estes also admitted that he tested positive for cocaine two times, but said he had not actually used the drug; he was only "chopping it up" to sell and "it had seeped through my pores." J. Estes claimed that he was never given a referral for counseling or for anger management classes. The only things requested of him were "drops and parenting classes." J. Estes admitted that he was referred to Cristo Rey for parenting classes, but he claimed that he did not complete them because he did not have transportation. J. Estes testified that he had had a learning disability since the age of 16 and that he was receiving disability benefits of \$700 a month before he went to prison. However, he earned an additional \$1,000 to \$2,000 a month by selling cocaine.

The trial court disbelieved J. Estes' testimony about not being aware of what was required of him because he attended the initial dispositional hearing and although he had slept through most of the hearing, he received a copy of the order, which listed the services to be completed. The trial court found that parenting classes were important because the car accident showed that J. Estes "really lacks insight into some of the issues that brought him here[.]" It rejected his complaint about lack of transportation, reasoning that if he was "out selling cocaine to make money to pay for a lawyer," he could "pay for some transportation" as well. It also noted that the fact J. Estes was selling cocaine "shows a really huge lack of insight, too, as to some of the reasons that led him here that results in criminal activity and criminal behavior to make money to pay for a lawyer." The trial court continued:

[A]s the [psychological] evaluation indicates, he does have a desire to maintain a parental role with his daughter.

* * *

However, when the father did have the ability to comply with services, . . . the Court finds that the father absolutely substantially failed to do that, to participate in those services on any kind of regular basis to show that any of those conditions that led to the removal of the children or those barriers have been removed at this time. Obviously, his incarceration complicates things as well. But to be able to look at the future, the best guide that this Court has is to look at

the past. And in the past, when he had the ability, when he was not incarcerated, when he was involved in Court proceedings, he still failed to participate substantially in services to benefit from any of those services. . . . But, again, the father even knew he was facing a possible prison sentence, and still even looking at not just his parental rights were on the line or the relationship with his daughter, but his personal freedom as well and still made poor judgment calls.

Regarding the statutory grounds for termination, the trial court found that clear and convincing evidence had been presented to terminate J. Estes' parental rights under MCL 712A.19b(3)(g). The trial court explained:

And as to Mr. Estes, I know that he's incarcerated now. Obviously, he's unable to provide proper care or custody for her at this time. However, even the fact that he might be released from incarceration and [sic] just a little bit over a year, there is still no reasonable likelihood or expectation that he'd be able to provide proper care or custody within a reasonable time. Certainly, not just from today into the next year, but even beyond that. Because, once again, when Mr. Estes was out and had the ability to participate in services, he failed to substantially do that or show that he's benefitted from that.

The trial court also found that clear and convincing evidence had been presented to terminate J. Estes' parental rights under MCL 712A.19b(3)(j). The trial court explained that obviously JE could not be returned to J. Estes' home because he was incarcerated. And even looking ahead to his early release date, "there's still so much work to be done that there's no reasonable likelihood, again, based upon that past conduct . . . to show that [JE] wouldn't be harmed if she were returned to his care."

The trial court further found that termination was in JE's best interests, explaining as follows:

The Court finds, as it did, that barriers still remain to the reunification of Mr. Estes with [JE]. She will be three coming up here in May. However, her father has been out of her life now for a significant part of her life. It will be a year almost, and there will be at least another year. . . . I found it interesting that Mr. Estes' mother wasn't here to testify, and I think that he could have subpoenaed her and had her here and talk about how much they talk on the phone, how much he saw her, how much he visited her, and that didn't occur. And I understand that she's going to be three, and she may know that Mr. Estes is her dad, but she doesn't physically see him. He doesn't provide any physical support to her. . . . [T]he SSI that he's receiving doesn't narrow it to her benefit which is unfortunate for her. Again, Mr. Estes is currently incarcerated, with shortly, a little bit over a year to go on his minimum sentence and a long time to go on his maximum depending on when his date of release is, and to be able to provide stability and permanence for her is impossible, obviously, for the next year. And, again, based upon the lack of participating in services and where we were up to the point of incarceration leads this Court to conclude that it would be at least a

year or two after that of Mr. Estes complying with all of the services which, again, historically, he's shown that he will not do.

He doesn't have a stable income to support [JE] when he is released. Again, it appeared that he still had a substance abuse issue . . . right up to the middle or end of April, shortly before his incarceration. He hasn't participated in parenting classes. . . . And up to the point that Mr. Estes could be released from prison, that would be basically about one-half of [JE's] life. She would be four when he would be released, if he's released next year. And, you know, he would be incarcerated for two years of that life. The Court does not find any tremendous bond that has been shown that exists between [JE] and her dad. The fact that [JE] is with his mother, and, again, I guess, this is a relatively recent placement, so we're not sure if this is going to be the permanent placement for [JE], but she needs permanence. She needs stability. She needs to know who mom is. She needs to know who dad is. She needs to be able to rely on those people right now to take care of her, to keep her safe.

J. Estes now appeals.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence.² We review for clear error a trial court's decision terminating parental rights.³ A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.⁴ We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁵

B. ANALYSIS

J. Estes, while prohibited from having contact with JE and her siblings, involved the children in a car accident and then neglected to obtain medical treatment for one child to avoid discovery. When he was arrested, he left JE with her mother, who was not a suitable caretaker. During the eight months that J. Estes was available to participate in reunification services, he made little progress and insisted that he did not need services because he had completed them in

² MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

³ MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

⁴ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁵ MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

the past. J. Estes missed most drug screens and tested positive for cocaine more than once. He began but did not complete parenting classes, did not begin anger management classes, and missed most family visits due in part to his failure to comply with or pass drug screens. Although he made an effort to participate in some services after he was incarcerated, he had not yet started counseling or substance abuse classes, and parenting classes were unavailable. J. Estes would not be released from prison until May 2012 at the earliest, by which time his child will have been in foster care for 2-1/2 of her four years of life. Accordingly, we conclude that the trial court did not clearly err in finding that the evidence supported termination under §§ 19b(3)(g) and (j).

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

Once DHS has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is in JE's best interests, then the trial court is required to order termination of parental rights.⁶ There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available.⁷ We review for clear error the trial court's decision regarding JE's best interests.⁸

B. LEGAL STANDARDS

In determining the child's best interests, a trial court may consider a variety of factors including the parent's history, unfavorable psychological evaluations, the child's age, inappropriate parenting techniques, and continued involvement in domestic violence.⁹ A trial court may also consider the strength of the bond between the parent and child, the visitation history, the parent's engaging in questionable relationships, the parent's compliance with treatment plans, the child's well-being while in care, and the possibility of adoption.¹⁰ A trial court may also consider the child's need for permanence and the length of time the child may be required to wait for the parent to rectify the conditions, which includes consideration of the child's age and particular needs.¹¹

C. ANALYSIS

⁶ MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich at 351.

⁷ *In re Trejo Minors*, 462 Mich at 353.

⁸ *Id.* at 356-357.

⁹ See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

¹⁰ See *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

¹¹ See *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).

There was no evidence that JE was bonded to J. Estes. J. Estes lacked commitment to JE when he was available to parent and lacked availability to parent JE due to his incarceration. JE needed permanency and stability. Accordingly, we conclude that the trial court did not clearly err in finding that termination of J. Estes' parental rights was in JE's best interests.¹²

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly

¹² MCL 712A.19b(5); *In re Trejo*, 462 Mich at 356-357.