

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
July 19, 2012

In the Matter of N. CALVERT, Minor.

No. 308505
Jackson Circuit Court
Family Division
LC No. 11-000112-NA

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(g), (j), and (n)(ii). We affirm.

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. See MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground for termination by clear and convincing evidence, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). This Court reviews for clear error a circuit court's decision to terminate parental rights. *In re Trejo*, 462 Mich at 356; see also MCR 3.977(K). The clear-error standard controls our review of "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*, 462 Mich at 356-357. A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes this Court "as more than just maybe or probably wrong." *In re Trejo*, 462 Mich at 356. We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); see also *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

We conclude that the trial court did not clearly err in finding grounds to terminate respondent's parental rights under MCL 712A.19b(3)(j), which authorizes termination when "there 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." Evidence was presented that respondent has a long-standing, consistent history of violent and assaultive behavior, including convictions for felonious assault and malicious destruction of police property shortly after completing an anger-management course. Respondent admitted that three judges have

ordered him to attend anger-management courses due to his behavior. Respondent's violent behavior continued at sentencing for the above convictions and during his incarceration. While in prison, respondent was placed in segregation numerous times, including once for a fight that resulted in his placement in segregation for seven months and another time for possessing a tattoo gun that he made with a razor, a pen shaft, and a sewing needle. Respondent knew the tattoo gun was prohibited as it was considered dangerous contraband.

Evidence was also presented that respondent failed to participate in court-ordered services. Pursuant to the caseworker's recommendation, the trial court ordered respondent to complete anger management, participate in substance-abuse treatment, and attend Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) classes three times per week. At the termination hearing, respondent admitted that, of the court-ordered services, he only attended one AA class during the seven months between the trial court's order and the termination hearing. His failure to participate was in part due to his failure to follow through and in part due to his serial trips to segregation, both of which were caused by his own choices. Although respondent provided evidence of his participation in *other* classes, he conceded that these classes were not court-ordered services. On this record, it is clear that respondent failed to substantially participate in available court-ordered services. "Failure to substantially comply with a court-ordered case service plan is evidence that return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well being." *In re Trejo*, 462 Mich at 346 n 3 (internal quotation marks and citation omitted).

The evidence of respondent's history of assaultive behavior and inability to control his anger and the evidence of his failure to substantially participate in court-ordered services while in prison support the trial court's finding by clear and convincing evidence that there was a reasonable likelihood that the child would be harmed if she were placed in respondent's home. See *In re Sours*, 459 Mich 624, 635-636; 593 NW2d 520 (1999) (finding that the respondent's history of assaultive acts and failure to attend domestic violence counseling supported a finding of a reasonable likelihood that the children could be injured if they were returned to the respondent's home). Accordingly, the trial court did not clearly err in finding grounds for termination under MCL 712A.19b(3)(j).

We also conclude that the evidence supports the trial court's findings pursuant to MCL 712A.19b(3)(g), which authorizes termination if "the 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." There is no dispute that respondent, who has been in prison since before the child's birth, had not provided any care or custody for the child. And, the evidence of record supports that there is no reasonable expectation that respondent would be able to provide proper care or custody for the child within a reasonable time considering the child's age. At the time of termination, the trial court noted that respondent had "really not even begun services." Respondent would require successful participation in a lengthy anger-management program; given his lack of participation in services while in prison, he would likely have to complete part or all of any anger-management program after his release. The evidence presented at the termination hearing indicated that respondent would be incarcerated for at least another 11 months and potentially for over four more years. A caseworker testified that successful completion of an anger-management program would take a minimum of three to six months. Further, respondent would require a significant amount of time to secure housing and

employment after his release. On this record, we find that the trial court's conclusion that the child would remain in foster care for at least 1-1/2 years, and maybe longer, was not clearly erroneous. The trial court did not clearly err in finding by clear and convincing evidence that there is no reasonable expectation that respondent will be able to provide proper care and custody for the child within a reasonable time considering her age. See *In re LE*, 278 Mich App 1, 24-25; 747 NW2d 883 (2008) (finding no clear error where the respondent never supported the child, made no effort to find out what he needed to do to receive services, and had a history of violent criminal convictions).

We further conclude that the trial court did not clearly err in terminating respondent's parental rights under MCL 712A.19b(3)(n)(ii), which provides grounds for termination where

(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 that includes as an element the use of force or the threat of force and that subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

Respondent's conviction for felonious assault, MCL 750.82, includes as an element the use or threat of force, and he was subject to sentencing under MCL 769.10. As previously noted, evidence was presented of respondent's history of assaultive behavior and angry outbursts and also his failure to participate in court-ordered services due in part to engaging in fights that landed him in segregation. In light of this evidence, the trial court did not clearly err in finding that termination was in the child's best interests and, as a result, that grounds for termination existed under MCL 712A.19b(3)(n)(ii).

Respondent also challenges the trial court's best-interest determination; however, respondent has abandoned this issue by giving it only cursory treatment. See *Ykimoff v WA Foote Mem Hosp*, 285 Mich App 80, 106; 776 NW2d 114 (2009) ("An appellant may not merely announce his position and . . . give issues cursory treatment with little or no citation of supporting authority."). Notwithstanding respondent's abandonment of this issue, we nevertheless conclude that extensive evidence established that termination of respondent's parental rights was in the child's best interests. See MCL 712A.19b(5). The child has never met and therefore has no bond with respondent, who has been in prison since before the child's birth. Respondent made no effort while in prison to contact or support the child. Respondent is currently incarcerated, having been convicted of two violent crimes, and will not be released until December 2012 at the earliest, at which time the child will be about two years old and will have spent nearly all of her life in foster care. Evidence was presented that the child is doing well in foster care, that the child's foster mother has expressed an interest in adopting her, and that termination would provide the child with the permanence and stability that she needs. See *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011) (considering child's need for stability and permanency). Accordingly, the trial court did not clearly err in finding that termination was in the child's best interests.

Respondent relies on *In re Mason*, 486 Mich 142, 165; 782 NW2d 747 (2010), to argue that the trial court clearly erred by terminating his parental rights because his criminal history alone does not justify termination. We conclude that respondent's reliance on *Mason* is misplaced. In *Mason*, 486 Mich at 146, the Michigan Supreme Court found that "[t]he [trial] court effectively terminated [the] respondent's parental rights merely because he was incarcerated during the action" The Court held that the trial court clearly erred in terminating the respondent's rights for failure to comply with the service plan where "[t]he state failed to involve or evaluate [the] respondent." *Id.* at 159. The Court also held that "[t]ermination [under MCL 712A.19b(3)(j)] was clearly erroneous because no evidence showed that the children would be harmed if they lived with [the] respondent upon his release." *Id.* at 165. The Court emphasized that "a criminal history alone does not justify termination." *Id.*

Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including where the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. [*Id.*, citing MCL 712A.19a(2); MCL 722.638(1)-(2).]

The *Mason* Court opined that the DHS did not present evidence of such enumerated circumstances. See *id.* ("The DHS did not present any evidence suggesting that respondent had ever harmed a child.").

The present case is unlike *Mason*. While the respondent in *Mason* was unable to participate in services as a result of the state's failure to involve him in the proceedings, respondent in this case was involved in the proceedings and provided with a service plan based on the services available to him in prison. To the extent that respondent was unable to participate in services, the evidence indicated that this inability was due in large part to his placement in segregation as a result of prison misconduct and not on the agency's failure to provide services to him. Further, unlike the respondent in *Mason*, respondent participated in the majority of the proceedings either in person or by telephone, and he acknowledged that the caseworker communicated with him during the review period. Moreover, termination of respondent's parental rights under MCL 712A.19b(3)(j) is not solely on the basis of his criminal history and without evidence that his child would be harmed if she lived with respondent upon his release from prison; several factors in addition to respondent's criminal history provide the basis for termination: respondent's anger-management issues, his improper behavior in prison following the June 2011 adjudication, and his failure to substantially participate in available court-ordered services while incarcerated to address anger-management, substance-abuse, and parenting issues.

Accordingly, we conclude that the trial court did not clearly err when it terminated respondent's parental rights.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Henry William Saad

/s/ Jane M. Beckering