

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ADRIAN GUY BINGHAM,
JORDAN LEVI BINGHAM, SVNOYI
ANISGVSDEE CEANDREA JOBE, and ISAYA
DOHSA EDI BIGMEAT, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MELISSA LYNN JOBE,

Respondent-Appellant.

UNPUBLISHED
February 12, 2008

No. 277862
Genesee Circuit Court
Family Division
LC No. 04-118926-NA

In the Matter of ISAYA DOHSA EDI BIGMEAT,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JAMES BIGMEAT II,

Respondent-Appellant.

No. 277863
Genesee Circuit Court
Family Division
LC No. 04-118926-NA

In the Matter of ADRIAN GUY BINGHAM and
JORDAN LEVI BINGHAM, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

No. 278103

TRACY BINGHAM,

Respondent-Appellant.

Genesee Circuit Court
Family Division
LC No. 04-118926-NA

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIUM.

In these consolidated appeals, respondents Melissa Jobe, James Bigmeat II, and Tracy Bingham appeal as of right from the trial court's order terminating their parental rights to the minor children. The court terminated the parental rights of Jobe, the mother of all four children, pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). The parental rights of respondent Bigmeat, the father of Isaya, were terminated pursuant to MCL 712A.19b(3)(a)(ii), (g), and (j). Finally, the parental rights of respondent Bingham, the father of Adrian and Jordan, were terminated pursuant to MCL 712A.19b(3)(a)(ii), (c)(ii), (g), and (j). We affirm.¹

All three appellants argue that the trial court erred in finding that a statutory ground for termination was established by clear and convincing evidence. We disagree.

A petitioner must prove a statutory ground for termination in MCL 712A.19b(3) by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Only a single statutory ground need be established to terminate parental rights. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). One of the children, Isaya, is an Indian child. To terminate parental rights to an Indian child, in addition to proving a statutory ground for termination by clear and convincing evidence, a petitioner is required to present evidence, supported by the testimony of a qualified expert witness, that proves beyond a reasonable doubt that continued custody by the parent is likely to cause serious emotional or physical damage to the child. *In re SD*, 236 Mich App 240, 246; 599 NW2d 772 (1999); MCR 3.980(D); 25 USC 1912(f).

This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Deference must be accorded to the trial court's assessment of the credibility of the witnesses before it. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

Once a statutory ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo, supra* at 354. The court should decide the "best interests" question based on all of the evidence, without regard to

¹ The court also terminated the parental rights of Svnoyi's father, Michael French, but he is not a party to this appeal.

which party produced the evidence. *Id.* at 352-354. The court's best interests decision is also reviewed for clear error. *Id.* at 356-357.

I. Docket No. 277862

The trial court did not clearly err in finding that §§ 19b(3)(c)(i), (c)(ii), (g), and (j) were each established by clear and convincing evidence with respect to respondent Jobe.

The trial court assumed jurisdiction over the three oldest children because of Jobe's heroin addiction and use of marijuana while pregnant with Isaya. The court later assumed jurisdiction over Isaya after he was born addicted to drugs and suffered from severe symptoms of withdrawal at birth. Jobe had just begun methadone treatment for her heroin addiction when the original petition was filed in November 2004. According to Jobe's counselor, Jobe would not be able to successfully overcome her heroin addiction until she was no longer using methadone. At the time of the termination hearing, approximately 2-1/2 years later, Jobe was still using methadone and her methadone dosage had remained substantially the same throughout the pendency of the case. Moreover, she was continuing to take methadone despite her more recent pregnancy, just as she did when she was pregnant with Isaya, and she again failed to obtain appropriate prenatal care. The court found that Jobe's unsupported testimony that the results of her drug tests were altered was not credible. Considering Jobe's lack of progress in treating her substance abuse problem, the trial court did not clearly err in finding that § 19b(3)(c)(i) was established by clear and convincing evidence.

With regard to § 19b(3)(c)(ii), the trial court referred to Jobe's continued use of methadone, but also appeared to rely on Jobe's failure to understand or accept the children's needs, particularly with regard to health matters, throughout this case. Her continued smoking posed a risk of harm to Isaya and Svnayi, as well as her unborn child. There were many other instances in which Jobe ignored recommendations or orders regarding the children's medical care, which placed the children at risk of harm. This evidence supports the trial court's finding that termination was warranted under § 19b(3)(c)(ii). Even if the court erred in relying on this statutory ground, however, the error was harmless because there were other statutory grounds to support termination of Jobe's parental rights.

Jobe argues that her compliance with the parent-agency agreement precluded a finding that § 19b(3)(g) was established. We disagree. Although a parent's compliance with a parent-agency agreement is evidence of her ability to provide proper care and custody, *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), the evidence here showed that Jobe did not successfully comply with critical aspects of her treatment plan. Jobe completed parenting classes, but failed to show that she benefited from them. She had housing at the time of the termination hearing, but had lived there only a short while and was unable to consistently maintain housing throughout the case. She participated in psychological and psychiatric evaluations and counseling, but did not successfully complete the recommended counseling. She also failed to show that she had steady employment and relied on Bigmeat's father for support. Most significantly, she failed to resolve her substance abuse problem. The trial court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence.

Further, Jobe's failure to show progress in resolving her substance abuse problem also supports the trial court findings with regard to § 19b(3)(j). Contrary to what Jobe argues, it was

immaterial that she had never physically harmed her children in the past. Section 19b(3)(j) does not require physical abuse, but only a likelihood that the child will be harmed if returned to the parent's home. We also disagree with Jobe's argument that the trial court erred by failing to consider Dr. Forrer's psychiatric evaluation. Although Dr. Forrer believed that Jobe was capable of caring for the children, his assessment was based on information that Jobe provided during the evaluation. Further, the counselor who worked the longest with Jobe in individual therapy believed that Jobe required more psychiatric help than she could offer, but Jobe refused to obtain the recommended psychiatric treatment. A counselor who subsequently worked with Jobe reached the same conclusion, but Jobe again refused to participate in the recommended counseling. In light of this evidence, the trial court did not clearly err in rejecting Dr. Forrer's testimony that Jobe did not pose a risk of harm to the children. The trial court did not clearly err in finding that § 19b(3)(j) was established by clear and convincing evidence.

Jobe next argues that termination of her parental rights was not in the children's best interests. We disagree. Contrary to what Jobe argues, the evidence did not show that she had especially strong bonds with the children. Although there was a bond between Jobe and the two older boys, it was not so strong that termination of Jobe's parental rights was clearly not in their best interests. There was a lesser bond between Jobe and the two younger children because of their young ages when they were removed. However, Jobe also contributed to this by failing to bond with the children during visits. Indeed, petitioner allowed Jobe to participate in extended visits with Isaya so they could develop a bond, but this was unsuccessful. Also, Svnayi and Isaya both had medical problems that were not likely to be adequately addressed by Jobe considering her history of failing to acknowledge the children's needs.

Because the evidence did not clearly show that termination of Jobe's parental rights was not in the children's best interests, the trial court did not err in terminating her parental rights to the children.

II. Docket No. 277863

The trial court found that termination of Bigmeat's parental rights was warranted under §§ 19b(3)(a)(ii), (g), and (j).²

We agree with Bigmeat that termination was not justified under § 19b(3)(a)(ii). Despite his incarceration for substantial periods of time, the record establishes that he consistently maintained contact with the caseworker and attempted to work on the parent-agency agreement while incarcerated. The evidence does not support a finding that he deserted the children for a period of 91 or more days without seeking custody.

However, the trial court did not clearly err in finding that §§ 19b(3)(g) and (j) were each established by clear and convincing evidence. The evidence disclosed that Bigmeat had an even more serious heroin addiction than Jobe, which led to his repeated bouts of imprisonment for

² Although Bigmeat asserts that the trial court also terminated his parental rights under § 19b(3)(c)(i) and (c)(ii), our review of the trial court's decision discloses that the court did not rely on these two statutory grounds.

violating his parole. Although Bigmeat was receiving treatment for his drug abuse while in prison and expected to be released in the near future, it was not reasonably likely that he could provide a safe and stable home for Isaya, who had special medical needs, especially considering Bigmeat's cycle of addiction and imprisonment. Indeed, applying the heightened standard for Indian children, the trial court found beyond a reasonable doubt that Isaya would suffer serious emotional or physical damage if returned to Bigmeat's custody. Because of his imprisonment, Bigmeat made no real progress in addressing the other terms of his parent-agency agreement. Accordingly, the trial court did not clearly err in terminating his parental rights under §§ 19b(3)(g) and (j).

Bigmeat also argues that termination of his parental rights was not in Isaya's best interests. We disagree. Although Bigmeat argues that he was not responsible for the child's drug addiction, it was Bigmeat who introduced Jobe to heroin and facilitated her addiction while she was pregnant with Isaya. Further, it was his drug addiction and continued imprisonment that prevented him from being able to physically care for his child. He admitted at the time of the termination hearing that he was not prepared to care for Isaya because of his need to obtain treatment for his drug dependency. Considering Isaya's extensive medical needs, Bigmeat would not be able to devote the time and attention the child needed anytime soon.

We disagree with Bigmeat that the trial court ignored the child's Indian heritage by not considering relative placement. A trial court is not required to place a child with a relative, but the court may allow relative placement in lieu of terminating parental rights if it is in the child's best interests. *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999); *In re McIntyre*, *supra* at 52.

The record discloses that Bigmeat's mother was considered for possible placement, but her home was determined to be inappropriate. Additionally, the Michigan Indian Child Welfare Agency attempted to contact Bigmeat's brother to investigate placement with him, but was never able to contact him. Bigmeat also contends that Rashonda Bigmeat Walter was also willing to accept placement of the child. An expert witness on the tribe's practices in child neglect matters testified that Walter came forward approximately a month before the termination hearing. Over objection, she was allowed to testify that Walter was being considered for possible placement of the child. It appears, however, that Walter was being considered for possible permanent placement of the child or adoption if Bigmeat's parental rights were terminated. Bigmeat never argued that the child should be placed with Walter temporarily until he could care for the child on his own. Accordingly, the trial court did not err in refusing to consider Walter as a possible placement for the child in lieu of terminating Bigmeat's parental rights.

In sum, the evidence did not clearly show that termination of Bigmeat's parental rights was not in Isaya's best interests. Thus, the trial court did not err in terminating Bigmeat's parental rights to Isaya.

III. Docket No. 278103

The trial court found that termination of Bingham's parental rights was warranted under §§ 19b(3)(a)(ii), (c)(ii), (g), and (j).

Termination was proper under § 19b(a)(ii) because the evidence showed that Bingham never participated in services or attempted to come forward to obtain custody of the children at any point while this matter was pending. Although he contacted at least one caseworker, he chose not to participate in the matter to request custody because of concern that he would be arrested on an outstanding warrant for nonpayment of child support. Bingham was present for a visit with the boys in April 2006, but admitted that he never intended to visit the children that day and that it was contrary to the trial court's order. Even then, however, that visit occurred approximately a year before the termination hearing, and Bingham made no effort to seek custody during the interim.

We question the trial court's reliance on § 19b(3)(c)(ii) as a statutory basis for termination. That subsection requires that the parent be given a reasonable opportunity to rectify conditions after notice and a hearing. Because Bingham never appeared in this matter and never received a parent-agency agreement, we believe that termination under § 19b(3)(c)(ii) was inappropriate. But because other statutory grounds supported termination, any error was harmless.

Termination of Bingham's parental rights was also justified under §§ 19b(3)(g) and (j). The trial court found that Bingham had a criminal history that was linked to drug abuse, and that he had not sufficiently addressed his drug abuse problem to break this pattern of criminal behavior. The record does not support Bingham's argument that he was unable to participate in services because the caseworkers would not work with him and threatened him with his outstanding warrant. Rather, it was Bingham who decided not to come forward because of the warrant. Moreover, Bingham failed to participate in services even after he resolved the situation with the warrant.

Bingham also argues that the trial court erred by failing to distinguish between "legally admissible evidence" and "relevant and material" evidence when deciding his case. When termination of parental rights is requested in a supplemental petition and is based on allegations that were proven at the adjudicative phase, the Michigan Rules of Evidence do not apply, except with respect to privileges, and all relevant and material evidence, including oral and written reports, may be relied upon by the court. *In re CR*, 250 Mich App 185, 201; 646 NW2d 506 (2002); MCR 3.977(G)(2). Conversely, if termination is sought on the basis of new or changed circumstances, legally admissible evidence is required. *In re CR, supra*; MCR 3.977(F)(1)(b).

The trial court acquired jurisdiction over Adrian and Jordan, Bingham's children, only on the basis of admissions by Jobe, which did not involve Bingham. Therefore, Bingham is correct that the trial court could only consider legally admissible evidence in deciding his case. However, Bingham does not indicate what evidence the trial court considered that was not legally admissible. Accordingly, we find no error.

Bingham also argues that his attorney was ineffective for not objecting to evidence on the basis that it was not legally admissible. To prevail on a claim that counsel was ineffective, Bingham must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that it deprived him of a fair trial. *In re CR, supra* at 198. Because Bingham does not indicate what evidence the trial court considered that was not legally admissible, there is no basis for concluding that counsel was ineffective.

Bingham also argues that termination of his parental rights was not in his children's best interests. We disagree.

Initially, the record does not support Bingham's claim that the trial court improperly shifted the burden of proof when considering this issue. We find nothing in the trial court's decision to indicate that it required Bingham to come forward with evidence to prove that termination of his parental rights was not in the children's best interests, contrary to *In re Trejo*, *supra* at 352-353. A trial court's best interests decision may be based on evidence on the whole record, even if no evidence is offered regarding the children's best interests. *Id.* at 353. Here, the trial court only commented that there was no evidence from either side to clearly show that termination of Bingham's parental rights was not in the children's best interests.

Although Bingham had a good relationship and bond with his children in the past, he had little contact with them in preceding two years and admitted that he had not provided for their support since 2003. He opted not to come forward to plan for the children. Termination of his parental rights was not contrary to the children's best interests.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello