

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

June 24, 2010

In the Matter of K. J. WELCH, Minor.

No. 295191

Muskegon Circuit Court

Family Division

LC No. 08-037579-NA

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g) and (h). We affirm.

I. FACTS AND PROCEEDINGS

This appeal involves the termination of respondent's rights to his daughter, K.J., who was just over two years old at the time the termination order was entered. Another child born to the same mother (who is not a party to his appeal), also a girl, was less than a year old at the time the termination order was entered. Any rights pertaining to that child are not at issue in this case.

The Department of Human Services filed a petition for temporary custody of K.J. in July 2008. It alleged that the mother, who was homeless, took K.J. to the local hospital and reported that she wanted to give up custody of the child. She refused a referral to a local shelter and had no relatives who were willing to help. Following the preliminary hearing, the court authorized the petition and placed the child in foster care.

At the pretrial hearing, the mother entered a plea of admission to the allegations against her and the court took jurisdiction over the child. At that time, it was reported that respondent was either in Jackson prison or in a federal penitentiary in West Virginia. At the dispositional hearing, the court adopted a parent/agency agreement for the mother and continued the child in foster care. By that time, respondent had been located in a federal facility in Bruceton Mills, West Virginia. Respondent participated by phone in the hearing.

As of the first review hearing, the mother was participating in services and being considered for unsupervised visitation. As of the second review hearing, the mother was doing well and the agency anticipated returning K.J. to her custody as soon as the mother became

settled with her new baby. Respondent was incarcerated during these two review hearings, but participated in them by phone. He requested that his sister, who attended the dispositional review hearing, be considered as a placement.¹

In April 2009, the DHS filed a petition to remove K.J. from the mother's home and to make K.J. a temporary ward. It alleged that the mother had attempted suicide in front of the children by slitting her wrists and cutting her leg, following which she was placed in a psychiatric facility. The mother entered a plea of admission to the petition and the court took jurisdiction over the younger child. Respondent was still incarcerated in West Virginia, and it was reported that his earliest release date was in 2014 and his maximum discharge date was in 2015.

At the next review hearing, it was reported that the mother had "moved to the east side of the State and is currently homeless," while respondent was still incarcerated. Participating in the hearing by phone, respondent stated that he had pleaded guilty to weapons offenses and was sentenced in June 2008 to eight years in prison. An appeal regarding the sentence was pending, which subsequently resulted in his sentence being vacated and his case was remanded for resentencing. *United States v Mosley*, 575 F3d 603 (CA 6, 2009).²

The DHS filed a supplemental petition for termination on August 14, 2009. With respect to respondent, it alleged that he was arrested on weapons charges in September 2007, that he was sentenced in June 2008, and was "serving a prison term in excess of two years." Termination was requested pursuant to §§ 19b(3)(c)(i), (g), (h), and (j).

The court received three exhibits at trial: the August 23, 2009, USP, the September 9, 2009, foster care action summary, and the October 19, 2009, CASA court report. The USP and CASA report both indicated that respondent was still incarcerated, and the CASA report also indicated that "[K.J.] has a strong bond with her baby sister [K]" and that the younger sister "has a wonderful bond with her big sister [K.J]."

Jessica Schorle, the foster care worker since April 24, 2009, testified that K.J. entered foster care in July 2008, in part because respondent was incarcerated for engaging in criminal activity. Schorle had not had any contact with respondent because of his incarceration, and although she believed his earliest release date was in 2014, she was not aware that respondent had filed an appeal in his criminal case. She did not know what respondent's plans were once he was released, and to Schorle's knowledge, respondent had not provided any monetary support, supplies, or presents for K.J.

¹ The trial court rejected that request. Although the home was approved for a placement, the trial court found that Walker and the mother did not get along, and that would interfere with the reunification efforts of the mother. Adding to that was the fact that Walker lived in Grand Rapids, while the child and mother were in the Muskegon area.

² The most recent Federal Bureau of Prisons Inmate Locator shows that respondent's projected release date is March 4, 2015.

Schorle testified that several of respondent's relatives had come forward to request placement. Home studies had been done for Shayla Walker and LeShawn Walker and both were approved for placement. To Schorle's limited knowledge, K.J. was not bonded with respondent because he had been absent most of her life. Schorle recommended termination as being in K.J.'s best interests because respondent was serving an extended prison sentence and "he has not participated in the services because he's been incarcerated throughout the duration of the case." That completed petitioner's proofs.

Shayla Walker, respondent's sister and a proposed relative placement,³ testified on behalf of respondent that she first met K.J. when K.J. was just two weeks old and had seen her several times since then, to the point of even visiting the child at the foster home. Walker testified that respondent was jailed just "a couple weeks" after K.J. was born and had been incarcerated ever since. Walker acknowledged that due to respondent's incarceration, he was not able to provide for K.J., though Walker stated that she had some money that belonged to respondent, which she spent on K.J.

Walker testified that she had requested custody of K.J. and was approved for placement following a home study before the younger child was born. According to Walker, the court denied placement because Welch "said she didn't get along with me," and later denied placement because it wanted to keep both children together. Walker was still willing to raise K.J., either until respondent was released or until K.J. turned 18.

Walker opposed termination of respondent's parental rights, opining that termination was contrary to K.J.'s best interests "[b]ecause she needs her family. And [respondent] is willing to do what he needs to do to provide for her when he gets out of prison." Walker testified that she and other relatives intended to help respondent obtain housing and employment upon his release from prison. It was her understanding that respondent wanted to go to college to earn a business degree upon his release.

Respondent testified that he was incarcerated for felony possession of a firearm. He was jailed a month after K.J. was born. He was sentenced in June 2008, but had an appeal pending and did not know when it might be decided. If he prevailed on appeal, which respondent believed was certain to occur, he would be released "within the next year." If he did not prevail, he would not be released until 2014.⁴ Despite his criminal record, respondent believed he was a good role model for K.J. because although he had made some mistakes, he was "not a bad person." Respondent testified that he visited the mother and K.J. every day during the first month of her life, and bought supplies for the child. Upon his incarceration, he left money with Walker to spend on K.J.

³ Walker also happened to be employed by the DHS as an eligibility specialist.

⁴ Actually, respondent's appeal had already been decided. At issue was whether the trial court properly determined that respondent's prior conviction for resisting or obstructing constituted a "crime of violence" for purposes of scoring the federal sentencing guidelines. The court held that the record was insufficient to make such a determination and thus vacated respondent's sentence and remanded the case to the trial court for resentencing. *Mosley*, 575 F3d at 608.

Respondent argued that instead of terminating his parental rights, Walker should take care of K.J. until he was released from prison. As long as K.J. was with respondent's family, waiting for respondent's release should not be a hardship. Respondent opined that termination was contrary to K.J.'s best interests because "she needs to be around family" and he was "willing to be in her life" once he was released from prison. Respondent stated that he would allow K.J. to maintain a relationship with her younger sister. If his parental rights were terminated, respondent wanted K.J. to be placed with Walker under a guardianship. Respondent believed that Walker would foster a relationship between K.J. and her sister.

The GAL called as a witness Chani Ellick, the foster mother. She stated that the two sisters had been with her since April 24, 2009, and during that time she had never received monetary support or supplies from respondent. Ellick also testified that the girls appeared to be bonded, enjoyed one another's company, and interacted well. Ellick confirmed that Walker visited K.J. twice a month, specifically in "the second weekend of the month she sees her for five hours. And the fourth weekend she sees her for the entire weekend." Walker was responsible for feeding the child when she had overnight visitation, and had purchased clothes for K.J.

The trial court found that termination was warranted under §§ 19b(3)(g) and (h) because respondent had been incarcerated since K.J. was one month old and, given his current sentence, he will remain incarcerated for more than two years. The court believed it unlikely that respondent would prevail on appeal.⁵ The court commended Walker for coming forward, but noted that "there's been no guardianship petition filed" and that respondent "has done nothing to accomplish that" during the pendency of the case. Regarding the child's best interests, the court stated:

Is it clearly in the best interest of this child to terminate? Well there are two competing factors here. One is, a child should be kept with the child's family as much as possible. And that's particularly true where there has been an opportunity for extensive contact with that family. The other factor is this family does not just consist of Mr. Mosley's extended family. The most immediate family for this child is her sister. That's the one person we know that she has bonded with. And we know that for certain. And that's because she's been with her sister ever since her sister was born. And we also know that the early stages of life for both of these children are the most important stages of life in terms of developing bonds. And this Court is not about to sever that bond. It's the one stable bond that this little girl has in her life. Her sister. And I'm not about to separate that one stable bond that she has. It is clearly in the best interest at this point to terminate the parental rights of Mr. Mosley. And given this child's age and the lack of bonding with him, this Court finds that an order will be entered terminating parental rights.

This appeal followed.

⁵ Again, for some reason no one involved in the proceedings realized the appeal was decided, and in favor of respondent.

II. ANALYSIS

A trial court's finding that a statutory ground for termination has been proven by clear and convincing evidence is reviewed for clear error. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

A trial court may terminate parental rights if it finds that a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(G); *In re Trejo*, 462 Mich at 355, 360. As applicable to this case, a trial court may terminate parental rights if it finds, by clear and convincing evidence, that:

1. 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. [MCL 712A.19b(3)(g).]

2. The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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. [MCL 712A.19b(3)(h).]

The trial court did not clearly err in finding that §§ 19b(3)(g) and (h) had both been proven by clear and convincing evidence. Respondent failed to provide proper care or custody for the child. He could not take care of K.J. himself because he was incarcerated. He left the child in the care of the mother, who was unable to support herself and the child and had no assistance. Respondent was serving a prison sentence and his earliest release date was in 2014, approximately five years after the supplemental petition was filed. Additionally, although Walker was made available as a home placement for K.J. until respondent was released from prison, the trial court did not clearly err in finding that the placement was not appropriate because the mother and Walker did not get along, Walker lived in another community, and the trial court wanted to maintain the only semblance of family the girls had, i.e., keeping them together. Therefore, the trial court did not clearly err in finding that respondent would not be able to provide proper care and custody for the child within a reasonable time. Therefore, the trial court properly found that termination was warranted on the grounds stated.

Our Supreme Court's recent decision in *In re Mason Minors*, __ Mich __; __ NW2d __ (2010) (Docket No. 139795, decided May 26, 2010), supports our conclusion. In that case the Court reversed the termination of an incarcerated respondent's parental rights that had been terminated under MCL 712A.19b(3)(c)(i)(g)(h) and (j). The respondent testified at the termination hearing⁶ that his release from prison was imminent, that he had employment and

⁶ The respondent in that case was not allowed to participate in any hearings for almost 16 (continued...)

housing available upon his release, and that he had completed several programs while in prison. *Id.*, slip op at 6-7. Despite this, the DHS worker had no knowledge of respondent's progress, and testified that even with those accomplishments, it would take respondent six months to comply with the service plan and parole conditions. *Id.* The trial court terminated his rights, and our Court affirmed. Respondent was released one week after this Court's decision. *Id.*, slip op at 7 n 2.

On appeal, the Supreme Court first held that because respondent was not offered an opportunity to participate by phone in each of the separate phases⁷ of the termination proceeding, his right to be offered a chance to participate under MCR 2.004 was violated, which in turn caused in part the trial court's findings to be clearly erroneous. *Id.*, slip op at 11-12. The Court then turned its focus on the failure of DHS and the trial court to offer respondent any services, or to update the case service plan. *Id.*, slip op at 11-14. The Court, citing MCL 712A.13a(8)(a), MCL 712A.18f(3)(d) and (5), MCL 712A.19(6)(a) and (c) and (7)(a) and (b), held that the DHS had an obligation to prepare a case service plan for respondent, and to update it if necessary given his incarceration. *Id.* DHS had failed to do so even after concluding that the mother had failed to comply with her plan, leaving respondent as the only remaining parent. Because it failed to provide respondent with such an updated plan or to otherwise contact him, the Court held that the trial court committed clear error in terminating his rights in part for not complying with a plan that he was never given a chance to comply with. *Id.*, slip op at 15-16.

Finally, the Court addressed what is required to terminate an incarcerated respondent's rights under MCL 712A.(3)(h), by stating:

MCL 712A.19b(3)(h) authorizes termination only if *each* of three conditions is met:

The parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years,

(...continued)

months, until the permanent planning hearing and subsequent termination trial. *In re Mason Minors*, __ Mich at __, slip op at 9. That is not the situation in the case before us today.

⁷ As the *In re Mason Minors* Court held,

[a] child protective action such as this consists of a series of proceedings, including a preliminary hearing at which the court may authorize a petition for removal of a child from his home, MCL 712A.13a(2), review hearings to evaluate the child's and parents' progress, MCL 712A.19, permanency planning hearings, MCL 712A.19a, and, in some instances, a termination hearing, MCL 712A.19b. Each proceeding generally involves different issues and decisions by the court. Thus, to comply with MCR 2.004, the moving party and the court must offer the parent 'the opportunity to participate in' each proceeding in a child protective action. For this reason, participation through 'a telephone call' during one proceeding will not suffice to allow the court to enter an order at another proceeding for which the parent was not offered the opportunity to participate. [*Id.*, slip op at 10 (footnote omitted)].

and [2] the parent has not provided for the child's proper care and custody, *and* [3] 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. [Emphasis added in *In re Mason Minors*.]

The combination of the first two criteria—that a parent's imprisonment deprives a child of a normal home for more than two years *and* the parent has not provided for proper care and custody—permits a parent to provide for a child's care and custody *although the parent is in prison*; he need not *personally* care for the child.¹¹ The third necessary condition is forward-looking; it asks whether a parent "will be able to" provide proper care and custody within a reasonable time. Thus, a parent's past failure to provide care because of his incarceration also is not decisive. [*Id.* at pp 17-18 (emphasis in original; footnotes omitted).]

Unlike in *In re Mason Minors*, the trial court's findings in this case were not clearly erroneous. For one, respondent was able to participate in these proceedings by phone, and there is no contention that he was deprived of any such opportunity or that MCR 2.004 was violated. Second, the trial court did not err in finding that the alternative family placement was not appropriate under the circumstances. Third, respondent's earliest release date is in 2015, so there can be no dispute that he will not be able to provide proper care and custody within a reasonable time. Thus, the trial court did not clearly err in finding grounds for termination under MCL 712A.3(a) and (b).

Further, because the child did not know respondent as her father and the evidence showed that respondent only had a month or two to bond with the infant child, the trial court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich at 356-357.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly