STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
July 15, 2010

In the Matter of JONES/JENKINS Minors.

No. 295827
Van Buren Circuit Court
Family Division
LC No. 08-016310-NA

In the Matter of JONES Minors.

No. 295932
Van Buren Circuit Court
Family Division
LC No. 08-016310-NA

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal by right the trial court's order terminating their parental rights to the minor children under MCL 712A.19b(3)(g) and (j). We affirm in Docket No. 295827 and reverse in Docket No. 295932.

I. DOCKET NO. 295827

Respondent-mother contends that her due process rights were violated, based on the factors set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), because the trial court failed to give sufficient weight to the evidence of her poverty and homelessness and used her poverty as a basis to terminate her parental rights. We disagree.

Respondent-mother was unemployed except for three weeks during this case. She did not have custody of her children and, thus, did not have any responsibilities for their care. However, instead of complying with court-ordered services, respondent-mother asserted that she did not need the services and that she was too busy to wait for the bus or to attend the court-ordered services. Poverty does not prevent a person from attending and participating in services that are ordered by the court, especially when gas money, bus tickets, and rides are offered. Thus, contrary to respondent-mother's assertion, it was not her poverty that led to the termination of her parental rights, but her refusal to participate in services, which demonstrated an unwillingness to put forth effort to regain the care and custody of her children. See *In re JK*, 468

Mich 202, 214; 661 NW2d 216 (2003); *In re Trejo Minors*, 462 Mich 341, 360-363; 612 NW2d 407 (2000). Accordingly, we find no merit to respondent-mother's claim that she was denied her substantive due process rights. We also conclude that the trial court did not clearly err in finding clear and convincing evidence to support termination of respondent-mother's parental rights under MCL 712A.19b(3)(g) and (j). MCR 3.977(J); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999).

Respondent-mother also contends that the trial court clearly erred in finding that termination of her parental rights was in the best interests of the children. MCL 712A.19b(5). We disagree. Respondent mother demonstrated over the course of two years that she would not comply with court-ordered services, cooperate with the workers, or accept any responsibility for her situation. The children needed permanency and stability. Under these circumstances, the trial court did not clearly err in finding that termination of respondent-mother's parental rights was in the children's best interests.

II. DOCKET NO. 295827

Respondent-father contends that he was denied his substantive due process rights because the trial court failed to give him an opportunity to prove that he could provide a proper home for his children. Our analysis of the claim is governed by our Supreme Court's recent decision in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), wherein the Court stated that neither incarceration nor a criminal history, by itself, is a sufficient reason for termination of parental rights.

Respondent-father was incarcerated in November 2002, for engaging in improper sexual contact with a 14-year-old girl. He was convicted of second-degree criminal sexual conduct. At the time of the improper sexual contact, respondent-father was on parole for possession of cocaine. Because of his incarceration, respondent-father had not seen his daughter since she was eleven months old and had never seen his son. However, respondent-father periodically wrote letters to his children. The children sent him pictures they had drawn, along with letters, and, according to respondent-father, the children were not shy in expressing their love for him. While incarcerated, respondent-father took parenting classes. He also took custodial maintenance classes in order to obtain the skills necessary for him to enter the workforce when released from prison. Respondent-father had signed up for a computer class, and led a "study group" that taught men how to be positive pillars in the community. At the termination hearing, respondent-father testified that his out date was March 2010, but if he was "flopped," it would be March 2011.[1]

Under MCL 712A.19b(3)(g), a court may terminate parental rights if it finds by clear and convincing evidence that "[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." This ground for

[1] According to the Offender Tracking Index System, respondent-father was paroled on January 6, 2010.

termination requires "proof that the parent has not provided proper care and custody *and* will not be able to provide proper care and custody within a reasonable time." *In re Mason*, 486 Mich at 164-165 (emphasis added). Thus, a parent's past failure to provide proper care because of his incarceration is not decisive. *Id.* at 161. The second requirement of MCL 712A.19b(3)(g) is "forward-looking; it asks whether a parent 'will be able to' provide proper care and custody within a reasonable time." *Id.*

The record indicates that petitioner sought termination of respondent-father's parental rights solely because respondent-father was incarcerated. The only allegation concerning respondent-father in the supplemental petition for removal of the children from the home was that he was in prison for criminal sexual conduct and his release date was unknown.[2] The references to respondent-father in a termination report submitted by petitioner were few and generally limited to his incarceration.[3] At the termination hearing, the caseworker testified:

> *Q.* And in most of the reports through this case the main mention about [respondent-father] has been that he's incarcerated. Is that your only issue with his parenting?
>
> *A.* Um -- although I don't know what his parenting skills would be at this time, yes.

The caseworker further testified that if respondent-father were released tomorrow, he would be offered services, petitioner "would want to see progress," and his criminal sexual conduct conviction would need to be addressed. There is no indication in the record that petitioner provided respondent-father with any services, or even provided him with a case service plan, in contravention of its statutory duties. See *In re Mason*, 486 Mich at 156-157.

The trial court, in terminating respondent-father's parental rights, focused on the fact that respondent-father was in prison. It engaged in no sufficient inquiry of the "forward-looking" requirement of MCL 712A.19b(3)(g). It summarily answered the question whether respondent-father, whose release from prison was potentially imminent, would be able to provide proper care and custody to the children within a reasonable time by stating that "even if [respondent-father] is released [in March 2010], it will take him several months to stabilize his life and be ready to care for his children." However, because petitioner and the trial court never facilitated access to services for respondent-father or evaluated his parenting skills, this finding by the trial court was based on a largely undeveloped record. See *In re Mason*, 486 Mich at 162. Accordingly, we conclude that the trial court's order terminating respondent-father's parental rights under MCL 712A.19b(3)(g) was premature and clearly erroneous. *Id.* at 165.

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[2] The termination petition merely listed the statutory grounds for termination of respondent-father's rights. It contained no factual allegations.

[3] The report also noted that respondent-father believed he would be paroled within 10 to 15 months, he had sent letters to the children, who enjoyed hearing from him and had sent letters back, and that the children had not seen respondent-father during his incarceration.

The trial court also terminated respondent-father's parental rights under MCL 712A.19b(3)(j). Pursuant to MCL 712A.19b(3)(j), a court may terminate parental rights 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." Regarding MCL 712A.19b(3)(j), our Supreme Court has stated:

> Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of a 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. MCL 712A.19a(2); MCL 722.638(1) and (2). [*In re Mason*, 486 Mich at 165.]

The grounds for termination of parental rights based solely on the parent's past violence are limited to situations where the parent has harmed "another child of the parent," "the child," or "a sibling of the child." See MCL 712A.19a(2); MCL 722.638(1), (2). Although defendant sexually abused a 14-year-old girl, there is no evidence indicating that respondent-father ever harmed either of the two children, any sibling of the two children, or any other child belonging to him.

There was no evidence presented that the two children would be harmed if they lived with respondent-father upon his release. Petitioner presented no evidence regarding respondent-father's parenting abilities, and no evaluation was ever conducted to determine whether respondent-father would be likely to offend again. The trial court terminated respondent-father's parental rights under MCL 712A.19b(3)(j) simply because of his past criminal record. Thus, pursuant to the Supreme Court's statement in *In re Mason*, we conclude that the trial court clearly erred in terminating respondent-father's parental rights under MCL 712A.19b(3)(g).

Because the trial court clearly erred in terminating respondent-father's parental rights under MCL 712A.19b(3)(g) and (j), we reverse the order terminating respondent-father's parental rights. We, therefore, need not address respondent-father's argument that he was denied his substantive due process rights. See *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (a constitutional issue should not be addressed where the case may be decided on nonconstitutional grounds).

Affirmed in part, reversed in part.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering