STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 16, 2010

In the Matter of D. MCJENNETT, Minor.

No. 297465
Macomb Circuit Court
Family Division
LC No. 2009-000152-NA

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Respondent-father G. McJennett appeals as of right from a trial court order terminating his parental rights to the minor child, D. McJennett.[1] We affirm.

I. FACTS

In March 2009, the Department of Human Services ("DHS") petitioned for temporary custody of D. McJennett, then aged 14. The petition alleged that D. McJennett was placed with a legal guardian, L. Martinez (a paternal aunt), in June 2000. Problems had recently developed, as a result of which D. McJennett refused to return to L. Martinez's home, and L. Martinez was no longer willing to care for D. McJennett and had petitioned to terminate the guardianship. The whereabouts of D. McJennett's mother, C. Wilcox, were unknown and G. McJennett was incarcerated. G. McJennett had been convicted of second-degree criminal sexual conduct in June 2004 and was incarcerated "for failure to register/sex offender." After the guardianship was terminated, the trial court authorized the petition. It was reported that D. McJennett had recently been admitted to a psychiatric hospital.

Because the guardianship had been terminated, C. Wilcox's whereabouts were unknown, and G. McJennett was incarcerated, the DHS filed an amended petition for permanent custody.

[1] MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist) and (g) (failure to provide proper care and custody). Although the trial court also made reference to § 19b(3)(c)(*ii*) (other conditions that would bring the child within the court's jurisdiction are not rectified), it relied solely on the statutory language of § 19b(3)(c)(*i*).

At the time of the first pretrial hearing, D. McJennett had been released from the hospital and was staying at Let's Talk About It, a girls home in Kalamazoo, Michigan. At the time of the second hearing, G. McJennett reported that he was serving a sentence of 5 to 15 years, but had just appeared before the parole board and expected a favorable decision within 45 days. D. McJennett was still at the girls home and was reported to be doing well.

On the scheduled trial date, the parties reached a plea agreement. G. McJennett agreed to plead no contest to the allegations in exchange for dismissal of the request for permanent custody. Because C. Wilcox had not been located and G. McJennett was still incarcerated, the trial court took jurisdiction over D. McJennett. At that time, D. McJennett was scheduled to be transferred to Vista Maria in Dearborn, Michigan. G. McJennett reported that he was still incarcerated and could not be released until he completed six months of sex offender group counseling. The parent/agency agreement included a psychological evaluation, a substance abuse assessment, random drug screens, parenting classes, sex offender counseling, housing, and no further legal issues. D. McJennett advised the trial court that she had last visited G. McJennett "the day before his birthday with my uncle."[2] The trial court denied visitation. The initial order of disposition was entered in August 2009.

At the first review hearing, G. McJennett was still incarcerated; there was no report regarding his progress with the parent/agency agreement. D. McJennett had been diagnosed with major depressive disorder, obsessive compulsive disorder, posttraumatic stress disorder, and was on medication and in therapy. She was placed in a special care unit at Vista Maria. She had behavioral problems and was known to be destructive and to engage in self-mutilating behavior.

At the next review hearing in February 2010, it was reported that G. McJennett was still incarcerated and it was not known when he might be released. His attorney reported that she had not heard from him since November 2009.

The DHS filed a supplemental petition for termination in February 2010. It contained no factual allegations and simply requested termination of G. McJennett's parental rights.

Michelle Mitzel, the foster care worker since January 2010, testified that she was familiar with the history of the case. Mitzel testified that G. McJennett was still incarcerated. To Mitzel's knowledge, G. McJennett had not completed a psychological evaluation, nor had he completed parenting classes. Regarding a legal source of income, G. McJennett had been encouraged to apply for disability or other assistance, but due to his incarceration, he had not done so. Further, G. McJennett was unable to seek housing due to his incarceration. Further, according to Mitzel, G. McJennett had failed to maintain contact with the caseworkers as required. G. McJennett had also not participated in random drug screens, but given his incarceration, it was assumed that "he did not use any substance." Mitzel opined that termination was in D. McJennett's best interests because her mother was gone and she did not think that G. McJennett was a "safe person" "due to the nature of [his] criminal charges[.]"

[2] Respondent's birth date is June 26. Because visitation had been suspended during the pendency of this case, it appears the visit took place in June 2008.

The trial court received two judgments of sentence from G. McJennett's criminal cases. In one case, G. McJennett pleaded guilty to second-degree criminal sexual conduct in exchange for dismissal of a charge of first-degree criminal sexual conduct and was sentenced in June 2004 to three years' probation with the first year in jail. In another case, G. McJennett was convicted of failure to register as a sex offender and was sentenced in April 2006.

G. McJennett testified that he had been incarcerated since November 2005, and that he was scheduled to appear before the parole board in May 2010. He claimed that according to his score on a "grid system," he had a "high probability of parole." He stated that if he were not granted parole, he did not know when he might be released. G. McJennett testified that he obtained a psychological evaluation in prison in March or April 2009. But he admitted that he had not notified the foster care worker because he did not have an address or phone number. G. McJennett stated that he was "in the process of trying to get the documentation" to verify his participation and that he had just received a copy of the psychologist's report, but he had not brought it with him because he claimed he only had a few hours' notice of the hearing. G. McJennett also claimed that, regardless of notice, "when I get writted out, I cannot bring any papers with me unless you order that I can bring the papers with me."

G. McJennett testified that he attended parenting classes in April 2009. G. McJennett had been trying without success to obtain the paperwork to verify his attendance at the classes. He claimed that he was also scheduled to be placed in a program called, Fathers That Care Read, as soon as there was an opening. G. McJennett admitted that he had not given this information to the foster care worker.

G. McJennett testified that prior to termination of the guardianship he maintained contact with D. McJennett by telephone calls, cards, and letters. He stated that he spoke to D. McJennett twice a month. G. McJennett's sister also brought D. McJennett to the prison for visits once or twice a year until the guardianship was terminated. According to G. McJennett, D. McJennett "enjoyed herself. She enjoyed seeing her dad again." However, G. McJennett admitted that he had not had any contact with D. McJennett since the guardianship ended. And G. McJennett admitted that he had not done anything to arrange for D. McJennett's care and custody after learning that the guardianship ended because "I have not been able to do anything. I was incarcerated."

G. McJennett testified that before he went to prison, he drove taxi cabs, worked at carnivals, and received state disability payments. He contributed to D. McJennett's support. G. McJennett currently worked as a unit porter in prison and earned $1.31 a day. G. McJennett expected to be able to obtain a source of income and suitable housing if and when he was released from prison. G. McJennett stated that the owner of the cab company had said that he could return to work when he was released from prison. G. McJennett expected that he would earn enough money to obtain suitable housing within a short period of time after his release. Until then, he could stay with relatives. G. McJennett further testified that he did not use drugs or alcohol. The prison required him to submit to random drug screens, and he had never tested positive.

The trial court found that the DHS had met its burden of proof with respect to § 19b(3)(c)(*i*). The trial court explained:

[T]here was some testimony and the petition that was filed at the time of the removal of the child stated that the child had basically been in a guardianship with relatives since about the age of one. The child is about . . . 15 right now. And so for the past 14 years, she's been basically cared for by relatives. The father stated that he also lived in the home . . . for about the first 11 years of [D. McJennett's] life. That means the guardians had legal custody, legal control and legal responsibility for the child.

. . . [O]ne of the allegations was that the father failed to support or provide for the child during the timeframe that we're talking about here. The father had testified that he had given money. I do not believe, or if there was, I was not presented with any evidence to show, that there was any child support order or any type of legal obligation on behalf of the father and I do not believe that the father set anything up like that.

So with respect to that section, the conditions that led to the adjudication continue to exist because [D. McJennett] continues to be under the supervision of the court. I know that the guardianship was dissolved right before [D. McJennett] came into care. But nonetheless, she continues not to be under the care and control of her father.

Now the father is incarcerated. He has been for about the last five years. So certainly he cannot have custody of the child while he's in prison. However, I do believe that if he were paroled, and I don't know that he's going to be paroled, that's another issue. . . . So I do believe that the condition of [D. McJennett] being care[d] for by other people will continue to exist for the foreseeable future. And that I don't think that there is any reasonable likelihood that that's going to change any time real soon.

Therefore, I do find by clear and convincing evidence that that portion of the statute has been satisfied and the conditions that led to [D. McJennett's] adjudication as a court ward continue to exist today and I do not believe there is a reasonable likelihood that the conditions have been rectified and that they will be fixed within a reasonable timeframe considering the current condition of the father.

Turning to § 19b(3)(g), the trial court found that the DHS met its burden of proof with respect to that section as well, explaining:

The father, I do not believe had the intention to not care for his daughter. He stated very clearly on the record that he cares very deeply for his daughter and I believe that. I believe that there has been contact during the time that you have been incarcerated and I do believe that you, to the best of your ability, sir, tried to maintain contact . . . . So you have . . . the ability to make some minimal contact, and I do believe that you have tried to do that. However, [the statute indicates] that without regard to the father's intent, that he is unable to care for his child. Therefore, I do believe that the statutory criteria has [sic] been met.

The trial court further found that termination was in D. McJennett's best interest. The trial court explained:

> [D. McJennett's] situation has been that she has been raised by relatives for practically her whole life. She probably does not remember her mother, I would guess. And with respect to her father, she knows her dad's incarcerated but she hasn't lived with her dad for the last five years and prior to that she was being cared for by a relative and there are allegations that that relative allowed someone else to come into the home or have contact with [D. McJennett] that cause[d] her to have a physical injury, namely I believe the allegation was sexual abuse. And [D. McJennett] has been through a lot in her short life of 15 years. She has not had a typical upbringing because of the circumstances of the parents. I do believe that she is in a good place right now, and I do believe that the father will continue to have a relationship with her when he ends his incarceration. But the fact of the matter is that . . . [D. McJennett] just turned 15 years old. She's going to be an adult in about three years time. I don't know that the father is even going to be out of prison in three years time. I don't think he knows that. He's hopeful, I know. But I don't know that that is going to happen for a fact.
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> I do believe that it is in [D. McJennett's] best interest to enter an order terminating the parental rights of the mother and the father at this time based on where she's been over the last 15 years, what's happened to her over the past 15 years, what she's used to, the parents' current situation, meaning the father's incarceration, the mother's missing and her whereabouts are unknown, and therefore I am going to enter an order indicating that.

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.[3] We review for clear error a trial court's decision terminating parental rights.[4] 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.[5] We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.[6]

B. ANALYSIS

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[3] MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

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

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

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

D. McJennett had been under the care of relatives since a very young age and her aunt became D. McJennett's legal guardian in 2000. D. McJennett then came within the court's jurisdiction after her legal guardian petitioned to terminate the guardianship in 2009, her mother's whereabouts were unknown, and G. McJennett was incarcerated. G. McJennett had been continuously incarcerated since 2005. Not at that time, nor at any time since, did G. McJennett have another person who was ready, willing, and able to assume responsibility for D. McJennett. Those circumstances were unchanged at the time of the termination hearing in March 2010, and G. McJennett did not know when he might be released from prison. Therefore, we conclude that the trial court did not clearly err in finding that the DHS established by clear and convincing evidence sufficient grounds for termination of G. McJennett's parental rights under MCL 712A.19b(3)(c)(*i*) and (3)(g) because the conditions of adjudication continued to exist and, due to his incarceration, G. McJennett was unable to provide proper care and custody.

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

G. McJennett contends that the trial court erred in its best interests analysis because he and D. McJennett had a strong bond. Once the 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 clearly in the child's best interests, then the trial court shall order termination of parental rights.[7] 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.[8] We review the trial court's decision regarding the child's best interests for clear error.[9]

B. ANALYSIS

Although G. McJennett had maintained a relationship with D. McJennett until the guardianship was terminated, he had never been a full-time parent to D. McJennett and had not been legally responsible for her for several years. G. McJennett, a convicted sex offender who had molested a child, could did not know when he might be released from prison and did not offer any insight on how he expected to provide the stability, structure, and supervision D. McJennett required in light of her mental health issues. Therefore, we conclude that the trial court did not clearly err in finding that termination of G. McJennett's parental rights was in D. McJennett's best interests.

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[7] MCL 712A.19b(5); *Trejo*, 462 Mich at 350.

[8] *Trejo*, 462 Mich at 353.

[9] *Id.* at 356-357.

We affirm.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood