

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* L. L. MITCHELL, Minor.

UNPUBLISHED  
November 17, 2016

No. 332040  
Muskegon Circuit Court  
Family Division  
LC No. 13-042922-NA

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Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Respondent-father appeals as of right the February 25, 2016 order terminating his parental rights to the minor child LM under MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (h) (imprisonment for more than two years).<sup>1</sup> We affirm.

The Department of Health and Human Services (DHHS)<sup>2</sup> took LM into care the day after he was born because his mother was 16 years old and in foster care herself, she did not possess adequate skills or adaptive behavior to care for a child, she regularly ran away from her foster care placement, and she used marijuana, cocaine, and alcohol. At that time, the father was in prison. At first, LM and mother lived in the same foster home, but mother was later removed and placed in a different foster home. After father's paternity of LM was confirmed through a DNA test, he became LM's legal father. In August 2014, DHHS filed a petition to officially remove LM from father's care and custody, although at that time LM was already in foster care and father was still in prison. The petition alleged that father was incarcerated after convictions of malicious destruction of police property, felony assault with a dangerous weapon, and felony

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<sup>1</sup> The trial court also terminated the parental rights of LM's mother, but she is not a party to this appeal.

<sup>2</sup> By Executive Order signed by the Governor on February 6, 2015, the Department of Human Services (DHS) was abolished and its functions merged with the newly created Department of Health and Human Services (DHHS). Executive Order No. 2015-4. Although these proceedings began with "DHS" as the petitioning agency, it is referred to as DHHS throughout this opinion to reflect the current title of the department.

fleeing from police. The petition also alleged that father had no known appropriate relatives to provide for LM and that father had no contact or bond with LM. Father admitted to the allegations in the petition, and the trial court took jurisdiction over LM.

Father remained incarcerated, and he participated in several classes and programs offered by the prison. However, his earliest out date from prison was initially in January 2014, but he committed numerous misconducts and violations that caused him to be imprisoned until August or November 2017. In March 2015, DHHS filed a termination petition seeking termination of mother's and father's parental rights. In June 2015, mother's parental rights to LM were terminated. In July 2015, father moved the trial court to place LM with LM's paternal grandmother. DHHS had contacted grandmother in June 2014 regarding placement and visits, but at that time grandmother indicated she was not interested in visits or placement of LM because she was going through a difficult time and would be living at a mission. DHHS attempted to make additional contact with grandmother, but she did not respond again until May 2015. The trial court denied father's motion for relative placement, citing concerns with grandmother's income, her delay in becoming involved in the case, and any disruption of LM's successful and lengthy placement with his foster family. LM's paternal grandfather also eventually expressed willingness to care for LM. After the first portion of a termination hearing concerning father's parental rights was held in November 2015, DHHS performed a home study on grandfather but determined that he would not be an appropriate caregiver. On February 25, 2016, the trial court terminated father's parental rights, and he now appeals.

Father argues that the trial court erred by finding that it was in LM's best interests that father's parental rights be terminated. We disagree. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court's finding regarding best interests is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). In determining whether termination is in a child's best interests, the focus is on the child, not the parent. *In re Moss*, 301 Mich App at 88. The trial court may consider any evidence within the whole record to determine whether termination is in the child's best interests, and the trial court must state its finding and conclusions regarding any best interests evidence on the record or in writing. *In re Trejo*, 462 Mich at 356. "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App at 41-42 (citations omitted). The trial court may also consider whether it is likely that the child could be returned to the parent's home in the foreseeable future, *In re Frey*, 297 Mich App 242, 249; 824 NW2d 569 (2012), and it is proper to consider evidence that the child is not safe with the parent and is thriving in foster care. *In re VanDalen*, 293 Mich App 120, 142; 809 NW2d 412 (2011).

In this case, a caseworker testified that father never met LM because he was continually incarcerated during LM's whole life. Father's early release date was originally in 2014, but

because of at least 15 to 20 instances of misconduct while in prison, at the time of the termination hearing father's release date was not until November 2017. Father's lack of a bond with LM and his lack of a permanent or stable home supported that termination of his parental rights was in LM's best interests. *In re Olive/Metts Minors*, 297 Mich App at 41-42. Father participated in some classes while in prison, but many of his miscondacts occurred even after he participated in various classes. Father also had a significant history of mental health issues, including diagnoses of paranoid schizophrenia, bipolar, manic and with manic features, and depression. Father resided at a number of mental health hospitals and an adult foster home before he was incarcerated, he had problems taking his medication while in prison, and his mother testified that it was hard for her to deal with him when he was not taking his medication. Although father admitted to having serious mental health problems including hallucinations, he testified that he did not need any medication and did not want to take it because it was not normal or natural. But he also said he would take it if he had to do so to care for LM.

Again, in determining whether termination is in a child's best interests, the focus is on the child, not the parent. *In re Moss*, 301 Mich App at 88. Father argues that termination of his parental rights was not in LM's best interests because father's own parents were willing to care for LM until father was released from prison and a child should have the right to be raised by people of his lineage and genetics. As an incarcerated parent, father could potentially provide proper care and custody for LM by having him placed with a relative such as one of father's parents. *In re Sanders*, 495 Mich 394, 421; 852 NW2d 524 (2014). However, father's parents did not provide care for LM when father was imprisoned, they were not involved until very late in the case, they were not approved by DHHS to care for LM, and neither of them had a relationship with LM. Instead, LM lived his whole life in foster care and at the time of the termination hearing he was living in a stable foster home with parents who were willing to adopt him. The fact that father was unable to care for LM himself or provide other care for him and the fact that father would remain unable to do so for at least an additional year and a half supported that it was in LM's best interests to terminate father's parental rights. *In re Frey*, 297 Mich App at 249.

The evidence that LM was doing well in foster care with a family that was willing to adopt him also supported that termination of father's parental rights was in LM's best interests. *In re VanDalen*, 293 Mich App at 142. Father correctly notes that pursuant to *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010), "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." However, in this case it is clear that father's parental rights were not terminated because of his "mere present inability to personally care for" LM. Instead, LM lived in foster care for his entire life, father knew about the case and LM's living situation from the beginning of the case, and father was unable to provide anything for him. The two potential caregivers that father identified, his mother and his father, both initially indicated that they were unable or unwilling to care for LM. After LM spent years of his life in foster care and DHHS moved for termination, father's parents expressed willingness to care for LM, but DHHS was unable to approve them as caregivers. In addition, father's own misconduct in prison unnecessarily extended his imprisonment and his continued reluctance to take his medication also impacted his potential future ability to care for LM. Therefore, there is no basis for a definite and firm conviction that a mistake has been made,

and the trial court did not clearly err by finding that termination of the father's parental rights was in LM's best interests. *In re Mason*, 486 Mich at 152.

Affirmed.

/s/ David H. Sawyer

/s/ Jane E. Markey

/s/ Colleen A. O'Brien