STATE OF MICHIGAN

COURT OF APPEALS

In re K. IRISH, Minor.

UNPUBLISHED
February 14, 2017

No. 334419
Kent Circuit Court
Family Division
LC No. 14-053923-NA

Before: MURPHY, P.J., and SAWYER and SWARTZLE, JJ.

SWARTZLE, J. (*concurring*).

I concur in the panel's decision to affirm in part and reverse in part but write separately to make clear that, absent stare decisis, I would vote to affirm in full. To my eyes, the trial court did not commit error in terminating the father's parental rights, and I certainly am not of the definite and firm conviction that a mistake has been made. Instead, this case is being returned to the trial court because binding precedent so requires.

In *In re Mason*, 486 Mich 142, 782 NW2d 747 (2010) and *In re Mays*, 490 Mich 993, 807 NW2d 307 (2012), the Supreme Court announced a rule that, when a child is placed with a relative, a trial court's failure to discuss that fact explicitly on the record will necessarily preclude an adequate best-interest analysis for purposes of parental-rights termination. It would appear that, based on this circumstance alone, a reviewing court must reverse and remand. See, eg, *In re Olive/Metts Minors*, 297 Mich App 35, 43, 823 NW2d 144 (2012).

And yet, this is not an outcome dictated by our Legislature. Nowhere in the Probate Code is it written that, when a child is placed with a relative, a trial court cannot make an adequate best-interest determination during termination proceedings without explicitly addressing the importance, or lack thereof, of that particular placement. With respect to parental termination and placement with a relative, the Legislature requires only that if the relative provides information about the child, then the trial court must consider that information. MCL 712A.19a(12). The Legislature has also seen fit to give a trial court the *discretion* not to require the initiation of termination proceedings when a child is placed with a relative. MCL 712A.19a(6)(a) ("The court is not required to order the agency to initiate proceedings to terminate parental rights if . . . (a) The child is being cared for by relatives."). It is this latter provision that has been interpreted not as a legislative grant of discretion to the trial court but, rather, a legislative dictate for all best-interest analyses when there is a placement with a relative. See *Mays*, 490 Mich at 994; *Mason*, 486 Mich at 164.

I do not read MCL 712A.19a(6)(a) in this way, nor am I aware of any other statutory or constitutional provision that would similarly mandate reversal. In fact, when deciding whether to terminate a parent's rights, the Legislature chose to direct trial courts to determine the best interests of the child without delineating a check-list of factors, thus leaving the decision to the sound discretion of the trial court based on case-specific circumstances. See MCL 712A.19b(5); see also *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 202, 848 NW2d 107 (2014) (noting similar discretion with respect to guardianship decisions after termination under MCL 712A.19c(2)).

While it may be that, in the mine run of cases, a trial court should explicitly consider a child's placement with a relative before terminating a parent's rights, there certainly will exist the occasional case that weighs so strongly in favor of termination that such consideration need not be stated expressly by the trial court. I believe this to be one of those occasional cases, especially when it is clear from prior proceedings that the probate judge was well aware of the child's placement with a maternal aunt prior to terminating the father's parental rights.

With this said, precedent on the matter is clear. Accordingly, with respect to the partial reversal, I concur in the result only.

/s/ Brock A. Swartzle