

STATE OF MICHIGAN
COURT OF APPEALS

In re T. T. J. JACKSON, Minor.

UNPUBLISHED
January 11, 2018

No. 339833
Saginaw Circuit Court
Family Division
LC No. 17-035182-NA

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Respondent-mother appeals by right the order terminating her parental rights to TJ under MCL 712A.19b(3)(g), (i), and (l). Because the trial court did not clearly err by terminating respondent's parental rights, we affirm.

In 2007, respondent's parental rights to her daughter, AG, were involuntarily terminated. The information relating to the termination of respondent's rights to AG indicates that, in 2007, respondent was convicted of second-degree criminal sexual conduct (CSC) involving a victim under 13 years of age. Respondent also had a history of domestic violence, she failed to provide AG with an appropriate home, and she failed to even maintain contact with AG. In connection with AG, respondent was provided with services, including the opportunity for parenting programs as well as substance abuse and mental health assessments, but she did not participate in the services that were made available to her, and her rights to AG were terminated under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j).¹

In 2015, respondent pleaded guilty to assault with a dangerous weapon, arising from an incident during which she bit a woman and cut her ex-boyfriend with a knife. Respondent was placed on probation, but she soon violated the terms of her probation by failing to engage in substance abuse treatment, engaging in assaultive behavior toward her father, failing to receive permission to change her address, failing to take her mental health medications as prescribed, and possession of marijuana and opiates. As a result of violating the terms of her probation, respondent was ordered by the court to reside at Emmaus House, a facility that provides

¹ *In re Gates Minor*, memorandum opinion of the Court of Appeals, issued April 1, 2008 (Docket No. 281791), p 1.

transitional services for women who have recently been released from prison or jail. Respondent began living in Emmaus House in January of 2016.

The minor child at issue in this case, TJ, was born in November of 2016, while respondent was living in Emmaus House. In March 2017, respondent was terminated from Emmaus House for rule violations and noncompliance, which included failure to attend required substance abuse and mental health counseling, failing to take medications, smoking indoors, and keeping an unclean apartment. Staff also raised other concerns related to TJ's well-being including instances in which respondent left TJ unattended and transported TJ without a properly secured car seat as well as the presence of items in TJ's crib suggesting that respondent had not been following safe sleeping practices. As a result of her termination from Emmaus House, respondent was arrested on March 21, 2017 for violating her probation, and TJ was placed in foster care. TJ was later placed with respondent's aunt.

Upon her arrest, it was also discovered that respondent was not in compliance with the rules governing sex offenders. While respondent had registered one phone with the police—as required due to her status as a registered sex-offender—it was discovered that she had multiple unregistered phones, three of which had internet access in violation of the limitations imposed on respondent as a sex-offender. One phone belonged to a man with a prior history of criminal sexual conduct, and messages were found on one of the phones that discussed the potential exchange of alcohol and cocaine. As a result of her probation violations, respondent was sentenced to two to five years' imprisonment. Her earliest opportunity for parole is May 2018.

On March 22, 2017, a petition was filed seeking termination of respondent's parental rights at the initial dispositional hearing. At the hearing, the trial court took judicial notice of the case file surrounding AG, including respondent's failure to participate in, or benefit from, the services provided. With regard to TJ, after adjudicating respondent as unfit, the trial court concluded that clear and convincing evidence supported termination of respondent's parental rights under 712A.19b(3)(g), (i), and (l). The trial court also concluded that termination was in TJ's best interests. Respondent now appeals as of right.

I. STATUTORY GROUNDS FOR TERMINATION

On appeal, respondent argues that the trial court erred by terminating her parental rights merely because she was incarcerated and she previously had her rights to another child terminated. According to respondent, she will be able to parent TJ within a reasonable time, she should be given an opportunity to participate in services, and she can arrange for the care of TJ during her incarceration by placing TJ with her aunt.

“In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met.” *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). “We review for clear error a trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence.” *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); MCR 3.977(K). “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).

In this case, the trial court did not clearly err by terminating respondent's parental rights under MCL 712A.19b(3)(g). Under MCL 712A.19b(3)(g), a trial court may terminate parental rights if "[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." Relevant to respondent's provision of care and custody for TJ, the evidence showed that respondent failed to maintain a clean apartment, that she left the infant unattended, that she failed to properly secure TJ in a car seat, and there was also evidence of unsafe infant sleeping practices. Respondent also struggled with mental health issues and substance abuse; but, she failed to attend group meetings and private counseling sessions, and there were times when she failed to take her medications as prescribed. As a result of her failure to abide by the rules of the program, respondent was kicked out of her housing at Emmaus House. And, as a result of violating the terms of her probation, respondent was incarcerated at the time of the termination hearing.² Additionally, respondent violated the rules for registered sex offenders by having multiple phones in her possession with access to the internet. Respondent-mother acknowledged that one of these phones belonged to a man previously convicted of CSC, raising concerns over respondent's contact with another sex offender, and one of the phones contained text messages relating to controlled substances. All of these circumstances demonstrate that respondent failed to provide TJ with proper care and custody. Given respondent's long history of failing to participate in, and benefit from, the services and opportunities for rehabilitation provided to her, including the numerous

² Respondent argues on appeal that it is inappropriate to terminate her parental rights to TJ based on her incarceration because she can provide proper care and custody during her incarceration by placing TJ with a relative. See *Mason*, 486 Mich at 161 & n 11. However, during the initial discussion of possible relative placements, the only relatives mentioned were respondent's brother and parents, who were found to be unsuitable due to abuse afflicted on respondent by her brother with her parents' knowledge. It is true that, by the time of the termination hearing, TJ had been placed with respondent's aunt. However, this relative placement does not render the trial court's findings under MCL 712A.19b(3)(g) clearly erroneous. While "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination," *Mason*, 486 Mich at 160, respondent's inability to care for TJ is not a result of incarceration. Rather, there was ample evidence that, when respondent is not incarcerated, she is unable to provide proper care and custody. In these circumstances, respondent's plan to temporarily place the child with a relative during the period of her incarceration does not necessarily demonstrate proper care or custody, see generally *Matter of Taurus F*, 415 Mich 512, 543; 330 NW2d 33 (1982) (opinion by WILLIAMS, J.); *In re Martin*, 237 Mich App 253, 258; 602 NW2d 630 (1999); and this relative placement does not preclude a finding that respondent failed to provide proper care and custody and that she will not be able to do so within a reasonable time given the child's age, MCL 712A.19b(3)(g). Notably, unlike in *Mason*, 486 Mich at 163-164, the trial court in this case acknowledged and considered TJ's placement with respondent's aunt before terminating respondent's parental rights.

opportunities at Emmaus House as well as services offered during proceedings involving AG, the trial court also did not clearly err by concluding that “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.”³ MCL 712A.19b(3)(g). Thus, the trial court did not clearly err by terminating respondent’s parental rights under MCL 712A.19b(3)(g).

The trial court also did not clearly err by terminating respondent’s parental rights under MCL 712A.19b(3)(i). Under MCL 712A.19b(3)(i), a trial court may terminate a parent’s right if “[p]arental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.” Whether prior rehabilitative efforts were successful must be considered “as of the date of the termination hearing.” *In re Gach*, 315 Mich App 83, 94; 889 NW2d 707 (2016).

In relying on MCL 712A.19b(3)(i) as a basis to terminate respondent’s parental rights to TJ, the trial court took judicial notice of the facts surrounding the past termination of respondent’s parental rights to AG, specifically referencing respondent’s refusal to take advantage of services offered. Moreover, the trial court determined that, despite having numerous chances to correct her conduct over nearly 10 years, attempts to rehabilitate respondent had not proven successful. These findings were not clearly erroneous and they support the trial court’s termination decision under MCL 712A.19b(3)(i). As noted, respondent’s rights to her first child, AG, were terminated under MCL 712A.19b(3)(a)(ii) (parent has deserted the child for 91 or more days), (c)(i) (conditions that led to adjudications continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to parent). *In re Gates Minor*, unpub op at 1. In terminating respondent’s rights to AG in 2007, the trial court found that respondent failed to provide AG with an appropriate home, she failed to maintain contact with AG, she had a history of domestic violence, she failed to participate in services, she spent time in jail, and she had recently been convicted of CSC-II involving a child under 13. Regarding the termination of respondent’s parental rights to AG, this Court previously stated:

Apart from the fact that respondent made little effort to participate in reunification services, the evidence showed that she was a convicted child sex offender who had subjected [AG] to such trauma that, at the age of five, she was in therapy because she was acting out sexually and suffering from post-traumatic stress disorder. [*Id.*]

³ Respondent asserts on appeal that she should have been provided with additional services in connection with the instant case before her rights to TJ were terminated. However, respondent previously had her rights to AG involuntarily terminated and her rights to TJ were terminated as a result of a request for termination in the initial petition. Reunification services are not required in these circumstances. See MCL 712A.19a(2)(c); MCR 3.977(E); *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013); *In re Smith*, 291 Mich App 621, 624; 805 NW2d 234 (2011).

Clearly, respondent's rights to another child were terminated due to serious and chronic neglect or abuse. See MCL 712A.19b(3)(i). Further, at the time of the termination hearing relating to TJ, respondent had not remedied the issues that led to termination of her parental rights to AG. See *Gach*, 315 Mich App at 94, 99. Respondent lacked an appropriate home for TJ, she was not providing proper care and custody for TJ, she was on probation for an incident in which she cut her former boyfriend with a knife, she was a convicted sex offender who failed to abide by the rules governing sex offenders, and she was still failing to participate in the services made available to her. Indeed, respondent had recently been kicked out of Emmaus House for failing to abide by the rules, including requirements that she participate in services, and she was in prison for violating her probation. These facts support the conclusions that respondent's rights to another child were terminated due to serious and chronic neglect or abuse and that prior attempts to rehabilitate respondent, as of the date of the termination hearing, were unsuccessful. See *id.* Consequently, the trial court did not clearly err by finding that MCL 712A.19b(3)(i) was established by clear and convincing evidence.

In addition to MCL 712A.19b(3)(g) and (i), the trial court also relied on MCL 712A.19b(3)(l), which provides that termination is appropriate when "[t]he parent's rights to another child were terminated as a result of proceedings under [MCL 712A.2(b)] or a similar law of another state." MCL 712A.19b(3)(l) has been held unconstitutional. *Gach*, 315 Mich App at 98-101. However, any error in relying on MCL 712A.19b(3)(l) was harmless because "[o]nly one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

II. BEST INTERESTS OF THE CHILD

Respondent next argues that the trial court clearly erred when it determined that it was in the best interests of the child to terminate respondent's parental rights. Respondent maintains that she shares a bond with TJ, that she will be able to care for TJ upon her release from prison, and that placement with a relative weighs against termination.

Once a statutory ground for termination of parental rights has been proven, the trial court must find by a preponderance of the evidence that termination is in the child's best interests before the trial court may terminate parental rights. MCL 712A.19b(5); *Moss*, 301 Mich App at 90. We review the trial court's best interests determination for clear error. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). In deciding whether termination is in the child's best interests, the focus is on the child and not the parent. *Moss*, 301 Mich App at 88. The trial 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 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The trial court may also consider the child's safety and well-being, *VanDalen*, 293 Mich App at 142, and "whether it is likely that the child could be returned to her parent[s] home within the foreseeable future, if at all," *In re Jones*, 316 Mich App 110, 120; 894 NW2d 54 (2016) (quotation marks and citation omitted). "Moreover, a trial court must explicitly address whether termination is appropriate in light of the children's placement with relatives." *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016) (quotation marks and citation omitted). A

child's placement with a relative weighs against termination. *Olive/Metts Minors*, 297 Mich App at 43.

In the present case, the trial court determined that TJ needed permanency and consistency, and she "needs to be assured that she is safe at all times, under all conditions, and forever." The trial court also reasoned that, given her very young age, TJ should not be made to wait for respondent to be in a position to provide proper care. In reaching this conclusion, the trial court emphasized respondent's long history of noncompliance with programs and her failure to avail herself of opportunities for services. The trial court also expressly considered TJ's placement with respondent's aunt, but nevertheless concluded that termination was in TJ's best interests given her need for permanency and safety. Cf. *Schadler*, 315 Mich App at 411-412. Indeed, the trial court noted that respondent's aunt is willing and able to provide TJ with "a forever home." Considering the record in this case, the trial court did not clearly err in its determination that termination of respondent's rights was in the child's best interests. Consequently, the trial court did not clearly err by terminating respondent's parental rights. See MCL 712A.19b(5).

Affirmed.

/s/ Peter D. O'Connell

/s/ Joel P. Hoekstra

/s/ Brock A. Swartzle