

STATE OF MICHIGAN
COURT OF APPEALS

In re H Hall, Minor.

UNPUBLISHED
March 13, 2018

No. 340563
Berrien Circuit Court
Family Division
LC No. 2016-000067-NA

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

PER CURIAM.

The trial court terminated the parental rights of both respondents under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm). Respondent-mother appeals as of right.¹ We affirm.

I. BACKGROUND

The Department of Health and Human Services (DHHS) initiated child protective proceedings in May 2016, when the child was two months old, after police found a drug lab, supplies for the production of methamphetamine, marijuana, a pipe, and marijuana drug tests in respondent's home, in which the child also lived. Police searched the home after stopping respondent for a traffic violation and arresting her for having components for the production of methamphetamine in her car.

Respondent attended the first three hearings in person. These hearings were the preliminary hearing, the plea hearing when respondent pleaded no contest, and the first review hearing. Before the second review hearing, respondent was incarcerated, but the trial court did not find out about her incarceration in time to order her telephonic testimony. Respondent did not participate in the third review hearing because the trial court's order to the prison requesting respondent's telephonic participation was sent too late to give the prison enough time to make respondent available for the hearing. Respondent's lawyer agreed to proceed with both review hearings without respondent's participation.

¹ Respondent-father is not a party to this appeal.

Respondent appeared telephonically at the next hearing, a permanency planning hearing. Respondent testified about the classes and programs she attended in prison and testified about her intention to stay away from drugs after her release. At the end of this hearing, the trial court authorized the filing of a supplemental petition to terminate respondent's parental rights. DHHS filed that petition, and the trial court scheduled a termination hearing.

Respondent did not appear at the termination hearing, despite the trial court's timely request that the prison make respondent available for the hearing by telephone. A prison official notified the trial court that morning that respondent was under observation after expressing suicidal thoughts. The trial court contacted the prison, but the prison declined to bring respondent to the phone to participate in the hearing. Consequently, noting the importance of respondent's participation in the termination hearing, the trial court adjourned the termination hearing. The trial court then conducted a review hearing without objection from respondent's lawyer. The caseworker testified about the classes respondent attended in prison. The caseworker could not comment about whether respondent benefited from the classes because she was still incarcerated.

Respondent participated by telephone in the next hearing on the termination petition. Respondent explained that she had a panic attack when her six bunkmates ganged up on her, but she denied being suicidal. Respondent testified that she attended several classes while in prison, such as parenting classes and employment skills classes. Respondent did not attend a substance abuse recovery class that she was signed up for because it conflicted with her GED class, although she signed up to take the recovery class again. She testified that she planned to live at her mother's house after her release, find stable housing and employment, and stabilize her mental health so that she could focus on the child.

The caseworker disagreed that respondent would make progress upon her release. The caseworker testified that she was concerned about respondent's criminal history and repeated probation violations, including the most recent one after the initiation of child protective proceedings that caused respondent to miss the first scheduled parenting time session. The caseworker was also concerned that respondent did not attend a substance abuse recovery class in prison, explaining that addressing substance abuse in a controlled environment like prison was different from living without substance abuse after release. The caseworker testified that respondent did not have housing plans suitable for a child after her release. The caseworker did not believe that respondent would be able to find suitable housing and stable employment within a reasonable time after her release from prison. After this hearing, the trial court terminated respondent's parental rights.

II. DISCUSSION

A. DUE PROCESS CLAIM

Respondent first argues that her right to due process was violated when the trial court proceeded with three review hearings without her participation. Respondent did not preserve this issue because there was no objection to the trial court's holding the review hearings in her absence. See *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 120 (2011). We review an unpreserved constitutional claim for plain error. *Id.* "Generally, an error affects substantial

rights if it caused prejudice, i.e., it affected the outcome of the proceedings.” *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

A respondent’s incarceration, alone, does not excuse DHHS from including the respondent in termination proceedings and does not support termination of parental rights. See *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010). When a party in a termination proceeding is incarcerated, DHHS must confirm that the party is incarcerated, serve that party with the petition affecting the minor child, and note on the petition “that a telephonic or video hearing is required by this rule.” MCR 2.004(A)(2), (B). The trial court must then issue an order requesting the correctional facility to make the incarcerated party available to participate in a court hearing by telephone or video conference. MCR 2.004(C). The trial court must serve this order at least seven days before the hearing. MCR 2.004(C).²

In a case with an incarcerated respondent, DHHS’s failure to secure the respondent’s participation in the first five hearings affected the outcome of proceedings because the initial hearings were essential to establishing the child’s needs and the respondent’s deficiencies as a baseline to evaluate the respondent’s progress. *In re DMK*, 289 Mich App 246, 254-255; 796 NW2d 129 (2010). This Court determined that the trial court erred by concluding that respondent’s incarceration precluded his participation because the respondent “could have supplied the court with highly relevant information about his son’s needs, the child’s paternal family history, familial placement options, and the nature of the services necessary to achieve a permanency goal that would serve the child’s best interests.” *Id.* at 255. Likewise, DHHS’s withholding of services because of the respondent’s incarceration was clear error, particularly because the respondent’s parole officer confirmed that the respondent’s release was imminent. *Id.* at 255-256.

This case is distinguishable from *DMK*, 289 Mich App 246, in nearly all respects. Respondent attended the first three hearings in person, completed a psychological evaluation, and was scheduled to have a parenting time session with the child, which she missed because she was incarcerated after violating probation. Respondent knew that her substance abuse was the primary reason the child was removed from the home. Respondent asked DHHS to place the child with her mother, and DHHS investigated each relative identified as potential guardians. Respondent signed up for or completed classes while in prison related to substance abuse, education, and employment. The caseworker visited respondent in prison. The trial court permitted respondent to communicate with the child while respondent was in prison, although she did not do so. Respondent’s attorney attended every hearing and advocated on her behalf, arguing that respondent was working toward reunification. In addition, the trial court adjourned the bench trial to ensure respondent’s participation. Respondent testified at both the permanency planning hearing and the bench trial on the termination petition about the barriers to reunification and what steps she took and intended to take after her release. In short, the three review hearings respondent did not participate in did not impede her ability to stay apprised of the case service

² An amendment added this seven-day notice provision, effective January 1, 2017. Therefore, it only applied to the second and third review hearings in which respondent did not participate.

plan, to participate in the plan as much as possible, and to work toward reunification with the child. Therefore, the trial court did not violate respondent's right to due process by carrying on with the three hearings without her participation.

B. STATUTORY GROUNDS FOR TERMINATION

Respondent further contests the statutory basis for termination of her parental rights. This Court reviews for clear error a trial court's determination that a statutory ground for termination of parental rights was established by clear and convincing evidence. *In re Olive/Metts Minors*, 297 Mich App 35, 40-41; 823 NW2d 144 (2012). A trial court's finding is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* at 41 (quotation marks and citation omitted).

The trial court found statutory grounds for termination under MCL 712A.19b(3)(c)(i), (g), and (j), which provide as follows:

The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The 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.

* * *

(j) There 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. [MCL 712A.19b(3)(c)(i), (g), and (j).]

Failure to obtain suitable housing throughout the course of proceedings and an inability to address continued substance abuse, despite maintaining "some degree of employment," support termination under subdivisions (c)(i) and (g). *In re LE*, 278 Mich App 1, 27-28; 747 NW2d 883 (2008). A "lengthy period of instability" and "a continuing lack of judgment, insight, and empathy for the child" support termination under subdivision (j). *In re Utrera*, 281 Mich App at 25. Failure to resolve substance abuse issues, an inability to "provide adequate housing

and financial support for the minor child,” and continued involvement in criminal activity support termination under all three statutory grounds. *In re Frey*, 297 Mich App 242, 244-245; 842 NW2d 569 (2012).

In this case, the trial court did not err by finding grounds for termination under subdivision (c)(i). Respondent’s substance abuse and criminal history led to the adjudication, and the evidence did not show that she was likely to rectify those conditions within a reasonable time given the child’s young age. Respondent was stopped for driving a vehicle in violation of probation and arrested for having supplies to make methamphetamine in May 2016. Respondent admitted going to prison six or seven times since 2014. Respondent was not in prison during the initial stages of the proceeding but violated probation and returned to prison after the child was removed from the home at the age of two months. Despite acknowledging that her drug use was a barrier to reunification, admitting that she had substance abuse treatment in the past, and admitting that she had problems when she was not in prison, respondent did not believe herself to be dependent on drugs. She also decided not to attend a substance abuse recovery class in prison. Although respondent stated her understanding that drug use was her main problem and did not use drugs while incarcerated, this testimony supports the trial court’s concerns about respondent’s drug use and criminal history and about her unproven intention to stay away from drugs when she was not in prison.

The trial court did not clearly err by finding grounds for termination under subdivision (g). In addition to respondent’s criminal history and substance abuse, the child lived in the home where police found a drug lab, supplies to produce methamphetamine, and marijuana. Respondent also had no plans for housing that included the child. She testified that she would either live with her mother, who was not approved for a relative placement, or in a group home that did not allow children. She also testified that she had a job for only a short time after the child was born and before she was arrested. Respondent stated her intention to find a job and go back to school, but she had no concrete plans for how she would do that. Her plans for after her release from prison were not conducive to caring for a child, and the vagueness of her plans shows that she was not likely to be able to care for the child within a reasonable time. For all of these reasons, the trial court likewise did not clearly err by finding grounds for termination under subdivision (j).

Respondent argues that the trial court should have considered the possibility of a relative placement with her mother. A relative placement is not pertinent to whether statutory grounds for termination exist. Rather, DHHS must consider a potential relative placement during the initial adjudicative phase after removal of the child from the home. MCL 722.954a(2); *In re COH*, 495 Mich 184, 195-196; 848 NW2d 107 (2014). The statute provides for review of DHHS’s decision to place or not to place a child with a relative at the initial adjudicative phase, MCL 722.954a(9), but this record contains no evidence that respondent challenged DHHS’s

decision not to place the child with her mother. Therefore, respondent's challenge to the statutory grounds for termination based on a viable relative placement must fail.³

Finally, respondent does not challenge the trial court's determination that termination was in the child's best interests. "When an appellant fails to dispute the basis of the trial court's ruling," this Court does not need to consider the issue. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004). Nonetheless, the record supports the trial court's reasons for concluding that termination was in the child's best interests.

We affirm.

/s/ Peter D. O'Connell

/s/ Joel P. Hoekstra

/s/ Brock A. Swartzle

³ This case is distinguishable from *In re Mason*, 486 Mich at 163-164, in which the Supreme Court faulted the trial court for failing to consider a relative placement when deciding whether the respondent could provide proper care and custody while incarcerated because "the children had already been successfully placed with respondent's family" In this case, however, DHHS decided against placing the child with a relative, so respondent's wish that her child be placed with her mother was not relevant to the trial court's analysis of the statutory grounds for termination.