

STATE OF MICHIGAN
COURT OF APPEALS

In re J. M. DEVINE III, Minor.

UNPUBLISHED
October 17, 2019

No. 348133
Oakland Circuit Court
Family Division
LC No. 16-847183-NA

Before: METER, P.J., and O’BRIEN and SWARTZLE, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court’s order terminating his parental rights to the minor child, JMD, under MCL 712A.19b(3)(c)(i) (182 or more days have elapsed since the issuance of an initial dispositional order and the conditions leading to adjudication continue to exist); (g) (failure to provide proper care and custody); and (j) (reasonable likelihood that the child will be harmed if returned to the parent). Finding no error, we affirm.

I. FACTS

On August 17, 2017, the Department of Health and Human Services (DHHS) filed a petition seeking temporary wardship of three-day-old JMD. The petition stated that JMD was born exhibiting withdrawal symptoms and tested positive for methadone and opiates.¹ The petition alleged that respondent had a “history of drug usage and arrests for felony dangerous drugs and misdemeanor dangerous drugs”. The petition further alleged that there was an active bench warrant out for respondent’s arrest because he failed to complete court-ordered substance abuse treatment, which was a condition of his conviction for “felony dangerous drugs.” The petition also alleged that respondent’s untreated substance abuse created a risk of harm for JMD. Additionally, the petition alleged that respondent absconded from probation and had multiple other warrants issued for his arrest. The petition also stated that respondent was unemployed and lacked the financial ability to care for JMD.

¹ The trial court also terminated the parental rights of the respondent-mother. However, she is not a party to this appeal.

The trial court held a preliminary hearing on August 17, 2017. Respondent did not appear despite being notified. The trial court authorized the petition, finding that respondent lacked the financial ability to care for JMD and that he did not have proper housing. The trial court placed JMD with the DHHS, who ultimately placed JMD with the maternal grandmother after he spent three weeks in the hospital.

On November 20, 2017, the trial court held a bench adjudication trial. Respondent was again not present and his whereabouts were unknown to his attorney. The trial court took jurisdiction because of respondent's untreated substance abuse issues and criminal behavior. The DHHS presented a parent-agency treatment plan (PATP) that required respondent to participate in a substance abuse assessment and treatment, follow any recommendations of the assessment, submit to random drug screens, obtain stable housing, obtain suitable employment, complete a parenting skills class, complete a psychological evaluation, and engage in individual counseling.

The trial court held multiple review hearings that respondent did not attend. At the first review hearing on January 31, 2018, the caseworker reported that respondent had only attended 4 out of 14 parenting times that period. The caseworker opined that respondent made partial progress with his substance abuse services by attending counseling sessions through a program called Bio-Med, but also reported that he had not participated in a psychological evaluation or parenting class, and had not provided documentation of housing or employment. However, she stated that respondent indicated he was living with his mother. Also, the LGAL informed the court that respondent had criminal charges pending out of Flint for "dangerous drugs," out of Burton for attempted retail fraud, and out of Flushing for "misdemeanor dangerous drugs and traffic." At the second review hearing on April 26, 2018, the caseworker testified that referrals were made for parenting classes, individual therapy, and a psychological evaluation, but respondent had not made any attempt to complete the services. She further testified that respondent had five warrants out for his arrest and only attended 2 out of 21 scheduled parenting visits.

On July 16, 2018, the trial court held a combined permanency planning hearing and review hearing. A new caseworker testified that JMD had been transferred to a foster home with his half-sister because respondent was having unauthorized contact with JMD while he was with his maternal grandmother. Respondent and mother were living at JMD's maternal grandmother's home. The caseworker testified that on May 16, 2019, mother tried to run over respondent with a car in front of maternal grandmother's home. Then on May 18, 2018, the police were called to maternal grandmother's home because mother was running around outside in her underwear. The caseworker testified that maternal grandmother told the police that mother and respondent were not in the home. When the police entered the home, they found mother inside and respondent hiding in the closet. Respondent had warrants out for his arrest and an officer had to draw his weapon on respondent with JMD in the home. Respondent was arrested and incarcerated, but released prior to the date of the hearing. The trial court ordered the DHHS to file an amended petition to terminate respondent's parental rights.

Ultimately, the supplemental petition was filed and the trial court held a bench trial on statutory grounds in September and October of 2018, where it found that statutory grounds for termination had been established. The trial court then held a best interests hearing in February

and March 2019 and concluded that it was in JMD's best interests to terminate respondent's parental rights.

II. STATUTORY GROUNDS

Respondent first argues that the trial court clearly erred in finding that a statutory ground for termination of his parental rights was proven by clear and convincing evidence. We disagree.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. MCL 712A.19b(3); *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court's determination for clear error. *In re VanDalen*, 293 Mich App at 139. "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), which state:

(3) 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, although, in the court's discretion, financially able to do so, 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.

“A parent’s failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody.” *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). Similarly, “a parent’s failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent’s home.” *Id.* at 711. “Harm” includes physical as well as emotional harm. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Regarding MCL 712A.19b(3)(c)(i), respondent does not contest that he was a respondent or that 182 days had passed since the trial court issued a dispositional order. Indeed, both of those elements are clearly met. Respondent only contests the finding that the issues that led to adjudication continued to exist and that he would not be able to rectify them within a reasonable time.

The conditions that led to adjudication included respondent’s long-term substance abuse, criminal behavior, and overall inability to provide proper care and custody for JMD. Respondent appeared in court for the first time when the bench trial on statutory grounds began on September 27, 2018. The caseworker testified that overall, respondent was not compliant with his PATP. The caseworker stated that respondent failed to attend weekly drug screens and reports from Bio-Med indicated that respondent admitted to using heroin in June 2018. She stated that respondent was unemployed and failed to participate in parenting classes or obtain suitable housing. The caseworker stated that respondent had been living with JMD in maternal grandmother’s home, despite the trial court’s orders prohibiting him from having unsupervised contact with JMD, and that when police discovered respondent hiding in the home, an officer had to draw his weapon on respondent with JMD present. Also, the caseworker testified that respondent’s parenting time was suspended in July 2018 due to lack of participation. She further testified that JMD had been in care for essentially his entire life and respondent did not have any plan for caring for JMD in the future. In addition, respondent’s probation officer testified that a court date was pending for respondent’s violation of probation for missing court-ordered drug screens. Based on this evidence, the trial court found that respondent made a “very poor effort” to try to rectify the issues that led to JMD being removed from his care. The trial court determined that a statutory ground for termination had been established under MCL 712A.19b(3)(c)(i) because the conditions that led to adjudication—respondent’s continued drug use, lack of adequate housing, failure to comply with the PATP, and inability to provide a safe environment for JMD—continued to exist and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering JMD’s young age.

Considering respondent’s continued drug use, criminal behavior, violation of court orders, and incarceration, we conclude that the trial court did not clearly err when it found by clear and convincing evidence that the conditions that led to adjudication continued to exist. We also conclude that the trial court did not clearly err in finding that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering JMD’s young age. JMD had been in foster care essentially since his birth and respondent continued to use drugs and engage in criminal behavior throughout JMD’s entire life. Accordingly, we are not “left with a definite and firm conviction that a mistake has been made,” *In re HRC*, 286 Mich App at 459, in the trial court’s finding that MCL 712A.19b(3)(c)(i) was proven by clear and convincing evidence. Because we conclude that the trial court did not clearly err by determining

that one statutory ground for termination existed, we not need to address the additional grounds for termination. See *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009).

III. BEST INTERESTS

Respondent next argues that the trial court clearly erred in finding that termination of his parental rights was in JMD's best interests. We disagree.

After the trial court finds that a statutory basis for termination exists by clear and convincing evidence, the trial court must find by a preponderance of the evidence that termination is in the child's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "[This Court] review[s] for clear error the trial court's determination regarding the child[]'s best interests." *In re White*, 303 Mich at 713. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5).

In determining the child's best interests, the trial court may consider the child's bond to his parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the suitability of alternative homes. *In re Olive/Metts* 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. Further, the trial court may consider the testimony and opinion of experts. See *In re Conley*, 216 Mich App 41, 45; 549 NW2d 353 (1996). A parent's substance abuse history is also relevant to whether termination is in the child's best interests. *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

The best interest hearing began on February 15, 2019 and concluded on March 5, 2019. Respondent was present in person on a writ, as he was incarcerated due to a probation violation. The evidence demonstrated that respondent was living with JMD after he was removed from respondent's care in violation of the trial court's orders. Because respondent was living with him, JMD was present when respondent was arrested at gun point on outstanding criminal warrants. The caseworker testified that respondent had not consistently provided support or care for JMD, only sporadically attended parenting time, and had not visited with JMD since June 2018. Although the caseworker found that respondent was appropriate during visits and that there appeared to be a bond, she testified that the bond was broken due to a lack of visits. Also, as discussed, respondent failed to meaningfully engage in his PATP. The caseworker opined that it was in JMD's best interests to terminate respondent's parental rights.

Moreover, the evidence demonstrated that JMD was thriving in foster care. JMD was walking, talking, and developing appropriately according to the caseworker. The caseworker witnessed JMD refer to his foster mother and father as "Mama" and "Daddy." She also testified that the foster family was in the process of adopting JMD's half-sister, and that they wanted to adopt JMD as well. The caseworker further testified that respondent never provided a plan of how he would care for JMD and he never attended a psychological evaluation. Respondent testified that he had a job lined up for when he was paroled and that he would live with his sister,

but he never provided proof of either arrangement to the trial court. Respondent also testified that he was working on his substance abuse problem while in prison, but there was no guarantee that once released he would refrain from all substance abuse, especially considering that he was in prison for violating probation by not appearing for court-ordered drug screens. The caseworker stated, and the trial court agreed, that JMD had been in foster care for essentially his entire life and he deserved the permanence and stability that the foster home could provide. In rendering its decision, the trial court stated that it was considering respondent's parenting ability, his bond with JMD, his parenting-time history, his compliance with the PATP, the possibility of adoption, JMD's need for permanence and stability, the advantages of the foster home over respondent's home, and JMD's well-being while in care. We conclude that the trial court considered the appropriate factors, and we are not "left with a definite and firm conviction that a mistake has been made," *In re HRC*, 286 Mich App at 459, in the trial court's findings that it was in JMD's best interests to terminate respondent's parental rights.²

Affirmed.

/s/ Patrick M. Meter
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle

² Respondent argues that the trial court failed to consider his liberty interest in raising and caring for JMD when analyzing best interests and that a remand is therefore required. We disagree. The best-interest analysis focuses on the child rather than the parent. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). "Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established under subsection 19b(3), the liberty interest of the parent no longer includes the right to custody and control of the children." *In re Trejo*, 462 Mich 341, 355. Therefore, so long as the DHHS satisfied its burden of establishing one ground for termination under MCL 712A.19b(3) by clear and convincing evidence, respondent's constitutional rights were not violated. As explained, the evidence presented by the DHHS established a statutory ground for termination by clear and convincing evidence, and as a result, respondent's constitutional right to parent JMD was not violated.