

STATE OF MICHIGAN
COURT OF APPEALS

In re M. A. JOHNSON, Minor.

UNPUBLISHED

July 22, 2021

No. 355551

Washtenaw Circuit Court

Family Division

LC No. 18-000124-NA

Before: FORT HOOD, P.J., and MARKEY and GLEICHER, JJ.

PER CURIAM.

The circuit court terminated respondent-mother's parental rights to her young son who had been in care since birth. Respondent challenges the evidentiary support for the court's termination decision as well as the court's decision to conduct the termination hearing over videoconference. We discern no error and affirm.

I. BACKGROUND

MJ was born in December 2018, with cocaine and methadone in his system and suffering from withdrawal symptoms. The child was placed in the care of his maternal aunt upon his hospital release and remains in her custody. Respondent pleaded to grounds for jurisdiction in April 2019, but did not participate in the early proceedings. Between January 21 and mid-July 2019, she visited MJ only once, and that visit was not properly scheduled with the caseworker or the child's caretaker. Rather, respondent's father invited the caretaker to his home as a ruse to allow respondent to visit. Respondent did not contact or respond to the caseworker, did not sign releases for the Department of Health and Human Services (DHHS) to access records from service providers, and made no attempt to start work on her case service plan for several months. She did not appear for court and could not be located. The circuit court ordered the DHHS to file an amended petition seeking termination of respondent's parental rights.

In the fall of 2019, respondent was incarcerated on drug charges and only then did she reappear in these proceedings. Respondent was admitted into the drug court recovery program. Many of the probation requirements through this program matched the requirements of the case service plan. In November 2019, the circuit court adjourned the termination hearing for two months to allow respondent time to benefit from these services.

Over the following months, respondent made some progress. She completed parenting classes in June 2020, and the instructor noted respondent's stellar performance. Respondent attended Alcoholics Anonymous meetings, but did not timely submit her meeting sign-in sheets and did not present sheets proving she was attending as often as required. Although respondent initially connected with a sponsor, that person dropped out and respondent never secured a replacement. Respondent was required to submit to approximately 120 random drug screens throughout the proceedings. She tested positive for cocaine three times and opiates (although prescribed) once, missing approximately 16 screens. In January 2020, respondent withdrew her release, preventing the caseworker and circuit court in the child protective proceeding from accessing information gathered during the drug recovery court program.

Respondent paints a picture of nearly perfect participation in the drug recovery program despite the difficulties faced during the COVID-19 pandemic and changes in her therapist and other service providers. Respondent's probation agent described things differently, explaining that respondent "was doing a lot" in her recovery plan but did not communicate well and failed to turn in AA meeting sheets—"we just didn't know a lot about what she was doing." Respondent had "some resistance" as late as September 2020 with accepting the drug court's recommendations, but continued to participate despite her misgivings. The probation agent further described respondent's positive cocaine tests in July 2020 as a "relapse." Ultimately, respondent was still in the first of two phases in the drug recovery program—working on stabilization and not yet addressing ongoing stability.

COVID restrictions prevented respondent from moving into transitional housing where her sobriety could be more closely monitored. Instead, respondent moved in with her father and the home was deemed suitable for the child. Indeed, as time went by, respondent's parenting time was moved from video to in-person at her father's home. Respondent even mended fences with her sister who was caring for MJ, allowing more meaningful access to her child.

But in early September 2020 respondent jailed for violation of the drug court recovery program requirements after missing two appointments with her new recovery support program. She remained incarcerated throughout that month, with a plan to move her to transitional housing upon her release. Her counsel reported that respondent "is still in the program," but noted that the probation agent reported that "if there is some glitch with regard to that transitional housing, . . . that would be an issue."

It appears that respondent remained under drug court jurisdiction until at least the conclusion of the child protective proceeding. Ultimately, the court extended the termination hearing for almost a year. On November 4, 2020, the court terminated respondent's parental rights.

The court began by outlining respondent's early absence from the proceedings and her initial failure to take any steps to overcome her drug addiction or to otherwise prepare to safely care for her child. Respondent voluntarily chose to participate in the drug court recovery program and the court commended her for that decision. However, the court noted "that the commitment" to recovery in that program "has to be for real" and the court was "well familiar with arguments avoiding that commitment and that basic responsibility." The court emphasized respondent's excuses, such as declining to give information to her caseworker because she did not trust her, and respondent's decision to cut off releases as "an indication of non-transparency." The lack of

transparency came across as “faking it till you make it” and showed a lack of taking responsibility for her own actions.

In finding termination supported under MCL 712A.19b(3)(c)(i) and (j), the court relied on respondent’s lack of substantial compliance to overcome her addiction issues. The court explained that the drug court could be more patient with these setbacks because its ultimate goal was the recovery of the individual, not the safeguarding of the individual’s child. Two years had passed and MJ remained in his aunt’s care. Respondent’s lack of responsibility in her treatment plans evidenced that she could not exhibit the level of responsibility necessary to safely care for a two-year-old. Placing a young child with “respondent mother today with this kind of uncertainty, with this kind of lack of insight, this child would be [at] substantial risk of harm for [his] wellbeing.”

In assessing the best interests of the child, the court expressly acknowledged that MJ was in relative care and that this fact weighed against termination, but nonetheless found termination supported. The court determined that MJ shared a strong bond with his aunt, and not truly with his mother. Respondent had repeatedly chosen addiction over caring for her child, preventing her from providing MJ with the permanency, stability, and finality he needed, the court reasoned. The court also weighed respondent’s failure to comply with her case service plan and her spotty visitation history in favor of termination.

II. VIDEO PROCEEDINGS

In March 2020, Michigan courts shut their doors because of the COVID-19 pandemic. By June 2020, courts began administering necessary justice again, but through electronic means adopted to protect the health and safety of all involved. Child protective proceedings were no exception. Through videoconferencing technology courts were able to keep cases flowing.

Respondent objected to the use of videoconferencing, arguing that her rights could not be adequately protected unless the proceedings were held in person. Although we sympathize with the plight of all parties who would have preferred in-person hearings, respondent’s rights were not the only ones at stake. The goal of child protective proceedings is to protect the best interests of the child. And a child cannot wait indefinitely for permanence and stability.

At the July 1, 2020 continuation of the termination hearing, respondent was present by telephone and the hearing was held via Zoom. Respondent successfully moved for an adjournment. The referee indicated that a courtroom was available on August 17, 2020, and the proceedings could go forward with a limited number of people in the courtroom and others present via Zoom. Despite this representation, every court hearing that followed was conducted exclusively via Zoom.

Respondent contends that the court failed to comply with MCR 3.904, governing the use of videoconferencing technology. The interpretation and application of statutes and court rules are reviewed de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

MCR 3.904(B) provides that in child protective proceedings:

(1) Except as provided in subrule (B)(2), courts may allow the use of videoconferencing technology by any participant as defined in MCR 2.407(A)(1), in any proceeding.

(2) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or any person at another location in the following proceedings:

* * *

(b) termination of parental rights proceedings under MCR 3.997 and trials, with the consent of the parties. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

Given the unusual circumstances of the COVID-19 pandemic, the Michigan Supreme entered a series of administrative orders extending the authority of lower courts to hold proceedings remotely. In relation to MCR 3.904, Administrative Order No. 2020-9, 505 Mich cxxxix (2020), released April 17, 2020, provided:

During the state of emergency established by Governor Whitmer under Executive Order 2020-33, the following rules are temporarily amended:

* * *

MCR 3.904. Courts may use two-way videoconferencing technology or other remote participation tools where the court orders a more restrictive placement or more restrictive treatment.

Administrative Order No. 2020-19, 505 Mich clxxi (2020), released June 26, 2020, further provided:

For the last several months, courts have been operating under special rules to ensure that essential functions continue while also limiting access to physical locations as a way to limit the spread of COVID-19 for both court staff and court visitors. As courts return to full capacity it is now appropriate to revisit those early orders.

* * *

3. Administrative Order No. 2020-9 adopted temporary amendments that promoted the use of electronic means to access the courts and enable parties to proceed with litigation, as well as extended some filing deadlines. The amendments of . . . MCR 3.904 . . . continue in effect until further order of the Court.

Administrative Order No. 2020-14, 505 Mich cxlix (2020), released on May 6, 2020, is also relevant and provided:

The Michigan Supreme Court has made clear that during the health crisis relating to the coronavirus pandemic, courts must continue to conduct essential functions, and are expected to use their best efforts to provide timely justice in all other matters. To achieve this goal, the Court has authorized judicial officers to *conduct proceedings remotely to the greatest extent possible*, and several administrative orders have been adopted to help courts and litigant navigate more efficiently and effectively. [Emphasis added.]

We discern no violation of the court rule as temporarily amended by the Supreme Court's administrative orders. The orders permitted courts to order the use of "two-way videoconferencing technology or other remote participation tools" and to "operat[e] under special rules to ensure that essential functions continue while also limiting access to physical locations as a way to limit the spread of COVID-19 for both court staff and court visitors." These orders eliminated the rights of waiver and consent and a party's ability to object to the use of videoconferencing technology in termination of parental rights proceedings. AO 2020-9 and AO 2020-19 were released during some of the most horrific days of the COVID-19 pandemic, when Michigan was under an emergency footing, in an attempt to limit the spread of the virus. If respondent could have insisted on a personal appearance with the presence of court personnel and witnesses, the administrative orders would have been gutted. And adjourning hearings until it was safe for people to gather in the courtroom would have placed MJ's future in limbo.

The issue is not "inconvenience of the court's docket management" or of the "fundamental liberty interest of parental rights," as respondent frames it. Weightier considerations were at play, including the health and safety of all persons involved, and the impact of an indeterminate adjournment.

Respondent also presents studies concluding that videoconferencing technology can impact determinations of credibility, affect outcomes, make it more difficult to read nonverbal cues, and create "Zoom fatigue," potentially affecting a respondent's ability to assist in her defense. While there may be some adjustments required of Zoom participants, those adjustments are outweighed by the benefits of continuing proceedings, especially in the child protective arena.

III. STATUTORY GROUNDS

Respondent next challenges the evidentiary support for the statutory grounds supporting termination. Pursuant to MCL 712A.19b(3), a circuit court "may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been proven by the DHHS. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). The court's termination decision followed the filing of an amended petition. When termination is sought in a supplemental petition based on new grounds, the DHHS must present legally admissible evidence in support. *In re DMK*, 289 Mich App 246, 258; 796 NW2d 129 (2010). We review for clear error a circuit court's factual finding that a statutory termination ground has been established. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "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 Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (cleaned up). "Clear error

signifies a decision that strikes us as more than just maybe or probably wrong.” *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

The circuit court terminated respondent’s parental rights pursuant to MCL 712A.19b(3)(c)(i) and (j), which provide:

(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.

* * *

(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.

Here, the conditions that led to adjudication were respondent’s drug use and MJ’s birth with those substances in his system. Respondent was completely absent from the proceedings for several months, showing up only to plead to grounds for court jurisdiction. Based on her lack of compliance, the court ordered the DHHS to proceed toward termination of respondent’s parental rights. Respondent only appeared in the fall of 2019 because she had been incarcerated and then submitted to the jurisdiction of the drug court. As a result, she did not begin any services until November 27, 2019, almost a year after the proceedings began. The circuit court then permitted respondent another year to demonstrate her progress in the drug court recovery program. Throughout the two separate proceedings, respondent displayed distrust with authorities that limited her ability to comply with her case service plan and probation conditions. She withdrew information release consent and withheld documents from the drug court, the latter decision, leading to a warrant being issued in the spring of 2020. Respondent relapsed in July 2020, testing positive for cocaine three times, yet she accepted a prescription for cough medicine containing an opiate. By the fall of 2020, respondent found herself incarcerated again. Although respondent had made progress, she did not benefit from services to overcome the conditions that led to adjudication. Respondent remained in the first phase of recovery throughout. And given her relapses and incarcerations so far into these proceedings, the evidence substantiated she that would likely be unable to safely care for MJ within a reasonable time, supporting termination under factor (c)(i).

As termination under MCL 712A.19b(3) need only be supported by one statutory ground, we need not consider the propriety of terminating respondent’s parental rights under factor (j).

IV. BEST INTERESTS

Finally, respondent challenges the circuit court's determination that termination of her parental rights was in MJ's best interests. "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*, 297 Mich App 35, 40; 823 NW2d 144 (2012), citing MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *Moss*, 301 Mich App at 90. The court should weigh all the evidence available to it in determining the child's best interests. *Trejo*, 462 Mich at 356-357. We review the court's factual findings in this regard for clear error. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 637; 853 NW2d 459 (2014).

Factors relevant to the best-interest determination include "the child's bond to the parent, the parent's parenting ability, [and] the child's need for permanency, stability, and finality," as well as the advantages of the foster home over the child's home with the parent. *Olive/Metts*, 297 Mich App at 41-42 (cleaned up). "The trial court may also consider a parent's history of domestic violence, . . . the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). The court must also explicitly recognize when a child is placed with relatives, a factor that generally weighs against termination. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). Ultimately, "the focus at the best-interest stage [is] on the child, not the parent." *Moss*, 301 Mich App at 87.

MJ had been in care nearly two years by the time the court terminated respondent's parental rights. Respondent went six months without seeing MJ early in the proceedings and then lost visitation during periods of incarceration. She had frequently disappeared and her whereabouts were unknown for long periods of time. As a result of her absences, MJ did not develop a meaningful bond with respondent. Respondent's failure to timely participate in and adequately benefit from services further supported that she was not ready to accept custody of her child and that placement with respondent was counter to the child's best interests. Respondent had not yet achieved sobriety, let alone demonstrated an ability to remain sober over any appreciable length of time. Accordingly, the court did not err in determining that respondent could not provide stability, permanency, and finality for young MJ.

And the court expressly found that termination was in MJ's best interests despite that he was placed with his mother's sister. Respondent often lashed out at her sister during these proceedings and apparently had done so throughout their relationship. This tumultuous relationship would complicate a lifelong guardianship. MJ's aunt expressed interest in adopting him and providing a permanent home. Although respondent no longer has a legal right to see MJ, the family connection leaves open the possibility of visits as long as MJ's aunt deems them safe. Accordingly, we discern no error in the court's judgment.

We affirm.

/s/ Karen M. Fort Hood
/s/ Jane E. Markey
/s/ Elizabeth L. Gleicher