

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 15, 2011

In the Matter of Smith, Minors.

No. 303636
Bay Circuit Court
Family Division
LC No. 09-010402-NA

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Respondent M. Pickett appeals as of right from the trial court's order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i) and (g). We affirm.

Respondent is a 50-year old man who has been incarcerated throughout the proceedings. He was not identified as a putative father of the minor twins¹ until October 2009, and his paternity was not established until August 2010. His parental rights were terminated in March 2011. Respondent has a lengthy criminal history including 12 misdemeanor convictions and 2 felony convictions, as well as a history of drug abuse. His current incarceration follows a probation violation subsequent to his plea of home invasion as an habitual offender.

Initially, we disagree with respondent's argument that reversal is required because the Department of Human Services (DHS) failed to offer services before he was determined to be the legal father of the children. A putative father must perfect his legal paternity in order to be entitled to services. *In re LE*, 278 Mich App 1, 19; 747 NW2d 883 (2008). Respondent's legal paternity was not established until the permanency planning hearing on August 30, 2010, when the trial court received evidence regarding genetic testing and the affidavits of parentage signed by respondent and the children's mother, and determined that respondent is the children's legal father. See MCR 3.903(A)(7)(d) and (e) (defining "father" to include a man judicially determined to have parental rights or a man whose paternity is established by the completion and filing of an acknowledgement of parentage, which is signed by the man and mother). Therefore, respondent was not entitled to services before August 30, 2010.

¹ The twins were born on March 30, 2009. The twins were approximately four months old when the DHS initiated this child protection proceeding based on the mother's neglect of the twins. The mother's parental rights were eventually terminated and she is not a party to this appeal.

A trial court's authority under MCL 712A.6b(1)(a) and (b) to require a nonparent adult to participate in a case service plan does not support a different result because this statutory provision does not create a duty on either the trial court or the DHS to provide services. In any event, because respondent does not meet the criteria for a nonparent adult as defined in MCL 712A.13a(1)(h), MCL 712A.6b(1)(a) and (b) do not apply. Therefore, we find no violation of the DHS's statutory duty to provide services that could render termination premature under *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

We also reject respondent's claim that reversal is required for failure to comply with MCR 2.004. This court rule provides that an incarcerated party under the jurisdiction of the Michigan Department of Corrections be given an opportunity to participate in each proceeding in a child protection action, including dispositional review and permanency planning hearings. See *In re Mason*, 486 Mich at 154-155; *In re BAD*, 264 Mich App 66, 72-74; 690 NW2d 287 (2004); see also MCR 3.920(A)(2) ("MCR 2.004 applies to juvenile proceedings involving incarcerated parties"). Here, however, respondent has failed to establish that he should have been treated as a "party" before his legal paternity was established on August 30, 2010.

A party is defined in MCR 3.903(A)(19)(b) as the "petitioner, child, respondent, and parent, guardian, or legal custodian." To be a "parent," it was necessary that respondent establish that he is the legal father of the children. See MCR 3.903(A)(18) (defining a "parent" as including the father as defined in MCR 3.903(A)[7]). A "parent" may also be a respondent, but MCR 3.903(C)(10) defines a "respondent," except as provided in MCR 3.977(B),² as "the parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against the child." The phrase "offense against a child" means "an act or omission by a parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code." MCR 3.903(C)(7).

As indicated previously, respondent's parental status was not determined until August 30, 2010. Further, this case was initiated solely because of an offense committed by the children's mother. Even considering that the DHS prematurely filed a petition to terminate respondent's parental rights before his status as the children's legal father was determined, reversal on the basis of MCR 2.004 would not be warranted. Aside from the August 30, 2010, hearing at which the trial court determined that respondent was the children's legal father, the only hearings that respondent failed to attend by telephone were either adjourned or subject to a rehearing. Under these circumstances, any violation of MCR 2.004 was harmless. MCR 3.902(A); MCR 2.613(A).

Respondent argues that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We review the trial court's findings of fact for clear error and review its resolution of issues involving the interpretation of the statutory grounds for termination de novo. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); *In re DMK*, 289 Mich App 246, 253; 796 NW2d 129 (2010).

² For purposes of proceedings in which termination is sought, MCR 3.977(B)(2) defines a "respondent," in pertinent part, as "the father of the child as defined in MCR 3.903(A)(7)."

Under § 19b(3)(c)(i), the trial court was required to find that 182 days had elapsed since the issuance of the initial dispositional order and that “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.” Here, the conditions that led to the adjudication of the children in August 2009 were established by the mother’s plea to allegations concerning her neglect of the children; they did not involve any offense committed by respondent. Accordingly, the trial court committed an error of law in applying § 19b(3)(c)(i) to respondent. Section 19b(3)(c)(i) does not apply where termination is sought on the basis of circumstances new or different from the offense that led the trial court to take jurisdiction over a child. MCR 3.977(F)(1)(b)(ii).

Nonetheless, a petitioner need only establish at least one statutory ground for termination of parental rights by clear and convincing evidence. *In re JK*, 468 Mich at 210. Under MCL 712A.19b(3)(g), the trial court was required to find that “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.” With respect to § 19b(3)(g), the trial court found:

Mr. Pickett expresses love for his children, but he has never met them. They were conceived in a short-lived liaison with a mentally ill and drug addicted mother. Mr. Pickett’s judgment in becoming involved with a women whom he claims his friends identified as “crazy”, is brought into question. This involvement gives credence to the children’s attorney’s final argument that Mr. Pickett needed a place to sleep and a house with a telephone for his tether. It does not appear that marriage and family life was high on his priority list. Mr. Pickett expresses a desire to now become a parent, and that expression is admirable. However, his life history thus far does not predict an ability to be stable, sober, law abiding, or family oriented.

The children are two years old as of this month. It will be several months before Mr. Pickett is released from prison. Without regard to his benevolent attitude toward the children, there is no reasonable likelihood that he will be able to alter his lifestyle and provide for the children within a reasonable time considering their needs. These children are active two year old toddlers, who continue to have special needs, and mild developmental issues. It is not practical or sensible to require them to wait another twelve to eighteen months for possible custody with a father who has never met them.

Respondent argues that the trial court’s finding that he failed to provide proper care and custody for the twins was clearly erroneous because he offered his 71-year-old mother as placement for the children until his release from prison. In support of this argument, respondent relies on *In re Mason*, 486 Mich 142. The primary focus of the decision in *Mason* concerned the duties of the DHS and the trial court to offer an incarcerated parent the opportunity to participate in child protection proceedings. In *Mason*, it was determined that an incarcerated father was denied the right to participate in child protective proceedings because he was denied the right to appear by telephone and was also denied the right to participate in a case services plan. *Mason*, 486 Mich at 154, 159-160. The Court held that incarceration, alone, is not grounds for

termination and that a trial court must consider whether an incarcerated parent can provide proper care and custody for a child by placing the child with relatives during the parent's prison term. *Mason*, 486 Mich at 163-165.

Respondent has not shown any clear error in the trial court's assessment of the reasonableness of the efforts made by the DHS to provide him with services in prison or in the future when he is released on parole. Nor has respondent established any clear error in the trial court's determination that the earliest release date for respondent to begin community-based services would be November 2011, which was contingent on the parole board agreeing to reconsider the possible February 2012 release date after respondent completed the assaultive offender program. The trial court found that it would take 12 to 18 months, with at least nine months of this time period occurring post-release, for respondent to prove himself and that this amount of time would not be reasonable considering the twins' circumstances. It found that there were a multitude of hurdles that respondent would have to overcome to establish his parental fitness, including his failure to demonstrate any understanding that his domestic violence in the presence of minor children could be emotionally harmful to them. Given respondent's lengthy criminal lifestyle, domestic violence, past substance abuse, and the length of time it would take for him to demonstrate his parental fitness, the trial court did not clearly err in finding that respondent would be unable to provide proper care and custody within a reasonable time considering the age of the twins.³

Under MCL 712A.19b(5), once the court finds a statutory ground for termination has been established, it should order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" The trial court's best interest decision is reviewed for clear error. MCR 3.977(K); *In re JK*, 468 Mich at 209.

Considering that the twins never established a relationship with respondent, and thus would experience no emotional distress from the loss of respondent's parental rights, and that termination will provide the twins with the stability they need, the trial court did not clearly err in finding that it was in the twins' best interests to terminate respondent's parental rights.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

³ Incarceration alone was not the basis for termination in this case, as respondent would ask us to believe. Thus, we find no error in the trial court's failure to consider whether respondent could provide proper care and custody for the twins by placing the twins with his mother during the remainder of his incarceration.