

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 20, 2013

In the Matter of HEUER/Franzel, Minors.

No. 312594
Sanilac Circuit Court
Family Division
LC No. 10-035416-NA

Before: M. J. Kelly, P.J., and Murray and Boonstra, JJ.

PER CURIAM.

Respondent conceded that MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist) served as grounds to terminate her parental rights to her four children. Subsequently, the trial court determined that termination of parental rights would be in the children's best interests. Respondent now appeals by right from an order terminating her parental rights. We vacate the trial court's order and remand for specific findings on the best interests of the children. We retain jurisdiction.

I. FACTUAL PROCEEDINGS

The three older children came into protective custody in October 2010 at a time when respondent was abusing prescription medications. Respondent made substantial progress toward reunification. The youngest child was born during the course of these proceedings. After he was taken into custody he was initially placed with respondent. However, he was placed with his grandfather and step-grandmother after respondent was found nonresponsive with the child red from crying, and respondent admitted to taking 14 Klonopin and one Percocet. Petitioner continued to work with respondent toward reunification, but after respondent took a Xanax during a visitation and fell asleep, leaving the older children to care for the infant, petitioner sought authorization to petition to terminate parental rights. Ultimately, the court authorized the petition but stated it was not going to consider it for 60 days, during which time there would be no contact with the children, respondent was to continue therapy, and respondent would have the opportunity to establish that she was using prescription drugs therapeutically and had in place the prerequisites for taking care of the children (i.e., an approved home, income, etc.). Respondent substantially complied but did not strictly comply. In anticipation of the next hearing on the petition to terminate parental rights, the court encouraged respondent to work toward strict compliance with the hope that she might be able to create a defense to the termination petition.

On April 19, 2012, respondent agreed that grounds for termination had been established. The permanency plan called for placement of all the children with respondent's father and step-

mother, who would seek a permanent juvenile guardianship, and for respondent to have visitation if she did not skip visitations and appeared sober and drug-free. However, respondent failed to appear for a dispositional hearing on June 21, 2012. Ultimately, on August 1, 2012, petitioner filed a motion to reconsider the best-interest determination, representing that respondent had not taken any action to visit her children since the April 19, 2012, hearing, and that she was incarcerated for multiple criminal violations.

Following a hearing on August 23, 2012, which was continued on September 13, 2012, the trial court acknowledged that the April 20, 2012, dispositional order precluded respondent from seeing the children until the guardianship was established. However, a register of actions and judgment of sentence established that respondent had been charged as a second habitual offender with second-degree home invasion, conspiracy to commit second-degree home invasion, attempted resisting and obstructing, receiving and concealing over \$200 but less than \$1,000, conspiracy to receive and conceal over \$200 but less than \$1,000, operating with a suspended license, and breaking and entering with intent. She had entered a plea of nolo contendere to the resisting and obstructing and breaking and entering charges, and the remaining charges were dismissed. Respondent was sentenced on September 10, 2012, to 330 days in jail with 65 days credit for time served, and would not be released until April 7, 2013, which was two and a half years after the older children first came into custody. The court concluded that respondent's chaotic life was affecting the children's need for permanency and stability, and that it would be in their best interests to terminate her parental rights. From this order, respondent now appeals.

II. ANALYSIS

Respondent argues that the trial court failed to consider the fact that the children were placed with relatives in determining their best interests. A trial court's decision regarding a child's best interests in a termination proceeding is reviewed for clear error. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

In *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012), this Court stated:

[B]ecause “a child’s placement with relatives weighs against termination under MCL 712A.19a(6)(a),” the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child’s best interests. Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child’s best interests, the fact that the children are in the care of a relative at the time of the termination hearing is an “explicit factor to consider in determining whether termination was in the children’s best interests[.]” *A trial court’s failure to explicitly address whether termination is appropriate in light of the children’s placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal.* [Citations omitted and emphasis added.]

At the final hearing at which the court determined that termination of parental rights would be in the children's best interests, the trial court was informed that the children were currently in relative placement. Despite this knowledge, the trial court did not expressly consider relative placement in its best-interest determination. Instead, and somewhat understandably, the trial court was predominately focused on respondent's recent criminal activities in connection with determining the best interests of the children:

And that would give these children permanency in the Guardianship. But since that period of time—and in that order I did say that we would seek Guardianship, and then we came back in June, you [respondent] failed to appear ma'am at that hearing. I ordered that the Prosecutor may look at the case and revisit the question of termination again in that order. Now, at that point in time I can assure you I knew nothing about the fact that you had, on June the 15th, been involved in a breaking and entering. And lone [sic] behold, I just said you can reorder—you can reopen it because you had failed to appear and appeared to be completely non-compliant with anything that we were trying to do. Well not only were you non compliant with what we were trying to do, you had decided to step across the line and commit additional crimes, and now those additional crimes say at the earliest you would be free to see your children would be April 7, 2013, two and a half years after their removal. It is my opinion that the children's rights now come first, and their right to have stability, their right to have permanency, their right to put their head on a pillow every night and know that's where it's gonna stay outweighs any sense of fair play or justice in favor of the parent. I believe that the pendulum has now swung from trying to preserve the rights of a parent and get their children back, to the rights of a child who can't protect themselves to have a sense of stability and permanency. And in this case that stability and permanency is only accomplished by taking you out of your children's lives. And as a result I'm terminating your rights today. I don't do it easily, I wish you the best, but I'm more concerned at this point about your children. They have a right to have a stable, solid home and that's where I'm gonna put them. . . . I'm sorry you have—you've had chaos in your life. That's where we are. But I'm taking that so that your chaos doesn't affect your children any longer.

While respondent's criminal behavior was certainly a factor that the trial court properly considered in making a best-interest determination, see MCL 722.23, in this case, because the children were in relative placement, the trial court also needed to "explicitly address whether termination is appropriate in light of the children's placement with relatives[.]" *Olive/Metts Minors*, 297 Mich App at 43. We find that the trial court's earlier conclusion at the permanency plan hearing, that regardless of relative placement, termination of parental rights would be in the best interests of the children because of the continued chaos in respondent's life, does not satisfy the *Olive/Metts Minors* requirement because this factor must be considered "at the time of the termination hearing[.]" *Id.*

In addition, respondent argues that *Olive/Metts Minors*, 297 Mich App at 44, required the trial court to consider the best interests of each child individually. The *Olive/Metts Minors* Court addressed the best-interest determination of five children, three of whom were not in relative

placement, and two of whom were in relative placement. This Court discussed the three children not in relative placement as a group and affirmed the trial court's best-interest determination. The Court also discussed the two children in relative placement as a group, and found that the best-interest determination was deficient because the trial court failed to consider the relative placement. Thus, although the *Olive/Metts* Court noted that each child should be viewed individually, it actually viewed children in like circumstances together. *Id.* Likewise, in this case, the trial court properly grouped all of the children together because they were in relative placement. In other words, the record does not support a finding that there were particular and unique factors that required the trial court to individually consider each child. Rather, each child in this case was in a similar situation, relative placement, and thus, the trial court's best-interest determination adequately addressed each child.

We vacate the trial court's order and remand for specific findings on the best interests of the children as required by *In re Olive/Metts Minors*. We retain jurisdiction and the parties shall proceed in accordance with the order issued with this opinion.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra