STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of A. A. GREGORY, Minor.	UNPUBLISHED October 24, 2013
	No. 314349; 314350 Wayne Circuit Court Family Division LC No. 08-483186-NA

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, respondent E. Goodwyn ("respondent-mother") (Docket No. 314349) and respondent R. Gregory ("respondent-father") (Docket No. 314350) each appeal by right the trial court's order terminating their parental rights to the minor child. The court terminated respondent-mother's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j), and terminated respondent-father's parental rights pursuant to §§ 19b(3)(a)(*ii*), (c)(*i*), and (g). We remand for further proceedings.

Respondent-mother has a prior history with petitioner, which resulted in three other children being made court wards because of respondent-mother's failure to provide a suitable home, proper supervision, and medical treatment, caused in part by substance abuse and mental health issues. Services were provided, but respondent-mother failed to comply with or benefit from those services. After petitioner filed a petition to terminate respondent-mother's parental right to the three older children, respondent-mother voluntarily released her parental rights to the children. As a result of the prior case, petitioner was notified when respondent-mother gave birth to the child at issue in this appeal in December 2010. Approximately a month after the birth, it filed a petition for jurisdiction over the child and requested termination of respondent-mother's parental rights at the initial dispositional hearing.

The court initially placed the child with respondent-father, but removed him shortly thereafter because respondent-father tested positive for marijuana use. The court placed the child with a maternal relative. The court acquired jurisdiction over the child, but declined to terminate respondents' parental rights at the initial dispositional hearing in May 2011, primarily because of the progress respondent-mother had made since her parental rights to her older children were voluntarily released. The court ordered both respondents to participate in services.

In August 2012, petitioner filed a supplemental petition to terminate the parental rights of both respondents. Following hearings held in November and December 2012, the court terminated each respondent's parental rights.

I. STATUTORY GROUNDS

Both respondents argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree. A petitioner is required to establish a statutory ground for termination by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000). This Court reviews the trial court's factual findings, as well as its ultimate decision whether a statutory ground for termination has been proven, for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. Deference is given to the trial court's assessment of the credibility of the witnesses. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

The trial court terminated respondent-mother's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), which permit termination under the following circumstances:

> (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.
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> * * *
>
> (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.
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> * * *
>
> (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.

The trial court terminated respondent-father's parental rights under §§ 19b(3)(c)(*i*) and (g), and also § 19b(3)(a)(*ii*), which permits termination where "[t]he child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period."

For both respondents, the trial court relied largely on their failure to complete or comply with the terms of their respective treatment plans. A parent's failure to comply with a parent-agency agreement is evidence of the parent's failure to provide proper care and custody of the child. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

Although the trial court acknowledged respondent-mother's participation in services and completed portions of her treatment plan, it also noted that she missed several sessions of her mental health treatment, and she did not benefit from her individual counseling with regard to domestic violence because she continued to maintain an abusive relationship with respondent-father. The trial court did not clearly err in finding that respondent-mother failed to rectify the conditions that led to the adjudication and that, given her lack of progress, she was not reasonably likely to rectify those conditions within a reasonable time considering the age of the child. Therefore, the trial court did not clearly erred in terminating her parental rights under § 19b(3)(c)(*i*). For the same reasons, the trial court did not err in also terminating respondent-mother's parental rights under §§ 19b(3)(g) and (j). Because respondent-mother failed to fully address her mental health issues and history of domestic violence, she would not be able to meet the child's needs and provide a safe home within a reasonable period of time.

Respondent-father argues that termination of his parental rights was not justified because he completed an evaluation at the Clinic for Child Study, attended parenting classes, and maintained a legal source of income. However, his primary obstacles to reunification were domestic violence and drug abuse. Respondent-father did very little to address those issues, which remained unresolved at the time of the termination hearing. Although respondent-father also claims that the trial court's suspension of his parenting time prevented him from developing a bond with his child, the parenting time issue did not prevent respondent-father from complying with the other requirements of his treatment plan. Because respondent-father had not made any progress in resolving his substance abuse and domestic violence issues after more than a year, the trial court did not clearly err in finding that grounds for termination were established under §§ 19b(3)(c)(*i*) and (g). Because only one statutory ground for termination need be proven, *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991), it is unnecessary to address whether the trial court erred in relying on § 19b(3)(a)(*ii*) as an additional ground for termination.

II. PARENTING TIME

Respondent-father argues that the trial court erred when it suspended his parenting time visits with the minor child until he submitted to three negative drug tests. Respondent-father contends that the parenting time suspension violated former MCL 712A.13a(11), now codified at MCL 712A.13a(13),[1] which provides:

> If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.

[1] MCL 712A.13a was amended by 2012 PA 115, effective May 1, 2012, and 2012 PA 163, effective June 12, 2012. The amendments redesignated the numbering of the statutory subsections, but did not result in any substantive changes to the subsection in question.

See also MCR 3.965(C)(6)(a).

MCL 712A.13a(13) provides that a court can deny parenting time when it would be harmful to the child. Because the minor child was only an infant, the psychological evaluation and counseling requirements were not practical. However, the family was evaluated by the Clinic for Child Study in June 2011. There does not appear to be any dispute that the Clinic for Child Study evaluation resulted in recommendations recognizing that respondent-father's continued use of marijuana was harmful to the child and to his ability to care for the child.

Moreover, the record discloses that before the trial court adopted the three-test rule, respondent-father agreed that it would be appropriate to condition his parenting time on his compliance with drug testing. Because respondent-father agreed with that condition, he cannot now argue that the trial court's implementation of the drug-testing condition constitutes error requiring reversal. A party may not take a position before the trial court and subsequently seek relief on appeal based on the contrary position. *Living Alternatives For the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). In any event, any error in the trial court's conditional suspension of parenting time was harmless because respondent-father's failure to visit the child was not the basis for the trial court's decision to terminate his parental rights under §§ 19b(3)(c)(*i*) and (g).

III. BEST INTERESTS

Both respondents challenge the trial court's determination that termination of their parental rights was in the child's best interests. Once a statutory ground for termination has been established, the trial court shall order termination of parental rights if it finds by a preponderance of the evidence "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5); see also *In re Moss*, ___ Mich App ___; ___ NW2d ___ (Docket No. 311610, issued May 9, 2013), slip op at 6. The trial court's best interests decision is also reviewed for clear error. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

In deciding whether termination of parental rights is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting abilities, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). Further, where a child has been placed with a relative, the trial court must consider that factor in determining whether termination of parental rights is in the child's best interests. As this Court explained in *In re Olive/Metts*, *id.* at 43-44:

> [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. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). 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, *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999), overruled on other grounds by *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012); *In re McIntyre*, 192 Mich App 47, 52–53; 480 NW2d 293 (1991), 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," *Mason*, 486 Mich at 164. *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.* *Mason*, 486 Mich at 163–165; *In re Mays*, 490 Mich 993, 994 (2012). [Emphasis added.]

In this case, the trial court's best interests analysis is sparse, and the court never considered the child's relative placement in its analysis of the child's best interests. Accordingly, remand is appropriate for the trial court to supplement its findings regarding the child's best interests, including the issue of relative placement.

IV. THE INDIAN CHILD WELFARE ACT

Respondents argue that reversal is required because the trial court failed to comply with the notice provision of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and thus never properly resolved whether the child was an Indian Child subject to the enhanced procedural and substantive protections of the ICWA.

The record discloses that the caseworker announced at a preliminary hearing that the minor child might be an Indian child because of respondent-father's Cherokee heritage. The caseworker advised the court that she would investigate the matter and provide any necessary notices, but the record does not disclose what resulted from her investigation.

The information provided to the caseworker regarding respondent-father's possible Indian heritage was sufficient to trigger the notice provision of 25 USC 1912(a) to determine whether the minor child qualified as an Indian child under the ICWA. *In re Morris*, 491 Mich 81, 88-89, 109; 815 NW2d 62 (2012). The parties agree that the trial court failed to address the ICWA-notice issue after it was brought to the court's attention. In *Morris*, 491 Mich at 89, 121-122, our Supreme Court explained that when there has been an ICWA notice violation, thereby leaving unresolved whether a child qualifies as an Indian child, the appropriate remedy is to conditionally reverse a trial court's decision terminating parental rights and remand the matter to the trial court for resolution of the ICWA-notice issue. In this case, however, because we have concluded in section III, *supra*, that remand is additionally required for supplemental findings regarding the child's best interests, we conclude that in lieu of conditionally reversing the trial court's order, it is more appropriate to remand this case, while retaining jurisdiction, for further proceedings regarding the applicability of the ICWA. On remand, the trial court shall ensure that proper notice is provided to the appropriate entity and then make a determination whether the ICWA applies. See *In re Morris*, 491 Mich at 89, 123.

V. CONCLUSION

We affirm the trial court's finding of statutory grounds to terminate each respondent's parental rights and hold that any error in the trial court's conditional suspension of respondent-father's parenting time was harmless. However, we remand for further proceedings regarding the applicability of the ICWA in accordance with this opinion, and for supplemental findings if

necessary regarding the child's best interests, including the issue of relative placement. We retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood

Court of Appeals, State of Michigan

ORDER

In Re A A Gregory Minor		Michael J. Kelly Presiding Judge
Docket Nos.	314349; 314350	Kurtis T. Wilder
LC No.	08-483186-NA	Karen M. Fort Hood Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 91 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

OCT 24 2013

Date

Chief Clerk