

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of STEPHAN, Minors.

UNPUBLISHED
November 14, 2013

No. 316050
Osceola Circuit Court
Family Division
LC No. 11-004853-NA

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No. 316135
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Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Respondent-father and respondent-mother each appeal by right the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

I. DOCKET NO. 316050

Respondent-father argues that termination was premature because petitioner, the Department of Human Services (DHS), failed to make reasonable efforts to reunify the family. Respondent-father also argues that the trial court erred in finding that a statutory ground for termination was established by clear and convincing evidence and that termination of his parental rights was in the children's best interests.

We review the trial court's findings of fact for clear error. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). A finding is clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 209-210. Questions of law involving the interpretation of a statute are reviewed de novo. *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

When a child is removed from a parent's custody, the DHS is generally required to make reasonable efforts to rectify the conditions that caused the removal by adopting a case service plan. *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005), citing MCL 712A.18f(1), (2),

and (4). The DHS's failure to provide reasonable services may affect the sufficiency of the evidence in support of a statutory ground for termination. *Id.* at 541. To terminate parental rights, the trial court is required to find at least one statutory ground for termination under MCL 712A.19b(3) by clear and convincing evidence. *In re JK*, 468 Mich at 210.

Because child protective proceedings are treated as a single, continuous proceeding, evidence admitted at one hearing may be considered at all subsequent hearings. *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). While the rules of evidence do not apply to a supplemental petition for termination that is based on the same circumstances that led to the court's jurisdiction, legally admissible evidence is required when termination is sought on the basis of new or different circumstances. See MCR 3.977(F)(1)(b) and (H)(2).

Respondent-father correctly argues that the trial court erred in applying § 19b(3)(c)(i) to his circumstances. Because petitioner sought to terminate his parental rights less than 182 days after issuance of the initial dispositional order for the younger child, the trial court erred in applying § 19b(3)(c)(i) to that child. Further, the condition that led to the adjudication of the older child was respondent-mother's plea of admission to an allegation that she used cocaine while pregnant with the child. The older child's adjudication was not based on any allegations concerning respondent-father. Therefore, the trial court also erred in applying § 19b(3)(c)(i) to the older child. But it was not necessary for the trial court to take jurisdiction over the older child based on respondent-father's circumstances in order to require his compliance with the case service plan. *In re CR*, 250 Mich App 185, 202-203; 646 NW2d 506 (2002); MCL 712A.6; MCR 3.973(F)(2).

Although we conclude that § 19b(3)(c)(i) did not apply to respondent-father, we hold that the trial court did not clearly err in finding that §§ 19b(3)(g) and (j) were each established with respect to respondent-father.

The record does not support respondent-father's argument that petitioner failed to provide reasonable services intended to rectify the housing problem that precluded his reunification with his children. Although housing was not specifically addressed in the parent-agency agreement, housing issues were addressed during the proceedings, including at the proceeding when the initial termination hearing was adjourned for 90 days. It is also clear from the record that services to address housing and employment were provided to respondent-father through Community Mental Health (CMH). The inability of the DHS caseworker to obtain funds for respondent-father to use to repair his rental home does not render the services in the area of housing unreasonable.

The record also fails to support respondent-father's contention that petitioner failed to provide reasonable services to assist with transportation. And considering that respondent-father's psychological evaluation included a diagnoses of alcohol abuse, which affected his ability to properly care for his older child, we find no merit to respondent-father's argument that it was unreasonable for petitioner to demand that he not use alcohol.

We also reject respondent-father's argument that his delay in engaging in mental health services at CMH renders petitioner's services unreasonable. Respondent-father's psychological evaluation identified two primary areas of concern about his mental health: (1) stress and

frustration requiring individual therapy, and (2) depression, for which evaluation for psychotropic medication was recommended. Respondent-father indicated in his testimony at the termination hearing that he did not intend to take medication. Further, the record supports the trial court's finding that respondent-father had denied any need to participate in mental health services. Although the DHS has an obligation to make reasonable efforts to reunify a respondent and a child, the respondent has a commensurable responsibility to participate in and cooperate with offered services. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Respondent-father has not demonstrated that the termination of his parental rights was premature. Considering the multitude of barriers to reunification that respondent-father still faced at the time of the termination hearing, particularly those relating to substance abuse, housing, transportation, emotional stability, and understanding child development, the trial court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence. The evidence also supports the trial court's determination that there was a reasonable likelihood based on respondent-father's conduct or capacity that the children would be harmed if returned to respondent-father's unsafe home. Therefore, termination was also warranted under § 19b(3)(j).

Respondent-father also argues that termination of his parental rights was not in the children's best interests. We disagree. Although the court was not required to do so, it was permissible for the court to consider the best-interest factors in MCL 722.23 of the Child Custody Act as relevant when evaluating the children's best interests. *In re JS & SM*, 231 Mich App 92, 102; 585 NW2d 326 (1998), overruled in part on different grounds, *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The court properly also considered the factors specifically recognized in *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). Although the court improperly used a clear and convincing evidence standard when evaluating the children's best interests, and instead was only required to determine whether a preponderance of the evidence showed that termination was in the children's best interests, *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013)¹, that error inured to the benefit of respondent-father. By applying a clear and convincing evidence standard, the court necessarily found that a preponderance of the evidence established that termination was in the children's best interests.

Contrary to respondent-father's argument on appeal, the trial court adequately considered the available alternatives regarding respondents' home and the children's separate pre-adoptive homes in evaluating the best interests of each child, as well as evidence regarding respondent-father's bond with the children. *In re Olive/Metts*, 297 Mich App at 41-42. In light of all of the circumstances, the trial court did not clearly err in finding that termination of respondent-father's parental rights was in the children's best interests.

II. DOCKET NO. 316135

¹ The Court held "that the preponderance of evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App at 83.

Respondent-mother's sole claim on appeal is that the trial court erred in finding that petitioner made reasonable efforts to reunify the family. As indicated previously, the DHS's failure to provide reasonable services may affect the sufficiency of the evidence in support of a statutory ground for termination.

Unlike with respondent-father, § 19b(3)(c)(i) clearly applies to respondent-mother because it was her plea of admission that she used cocaine while pregnant that led to the adjudication of that child. The trial court did not clearly err in finding that petitioner made reasonable efforts to rectify respondent-mother's substance-abuse condition by referring her for a psychological evaluation, arranging for an assessment and treatment at the Ten Sixteen Recovery Network (TSRN), by providing random drug and alcohol testing, and through other services. Contrary to respondent-mother's argument on appeal, the caseworker's testimony that she was unable to locate a Narcotics Anonymous (NA) program in respondent-mother's area does not establish that the efforts to address this condition were unreasonable. And considering that evidence that respondent-mother resisted drug and alcohol treatment, we reject the suggestion that petitioner should be faulted for respondent-mother's limited participation in services available through the TSRN. *In re Frey*, 297 Mich App at 248. The record supports the trial court's determination that reasonable efforts were made to address respondent-mother's substance abuse. Thus, the adequacy of services does not affect the trial court's determination that § 19b(3)(c)(i) was established with respect to the older child.

Respondent-mother has also failed to establish that petitioner's efforts affected the trial court's findings that §§ 19b(3)(g) and (j) were also established for both children. We disagree with respondent-mother to the extent she suggests that her counseling services were unreasonable because her therapist's report included her statement that she was not ready to give up her "partying" lifestyle. As the trial court properly observed, that type of information was needed to evaluate respondent-mother's progress. The court has a responsibility to evaluate whether a parent has sufficiently benefited from services so that a child will no longer be at risk of harm in the parent's care. See *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005).

Respondent-mother also complains that many of the problems in this case could have been resolved if she and respondent-father had been provided with assistance in applying for social security benefits. The record, however, discloses that respondent-father had already been denied social security benefits three times, although he had recently obtained an attorney to further pursue his social security claim. Further, the caseworker testified at the termination hearing that respondent-mother had applied for social security benefits on her own. Respondent-mother has not demonstrated that she was unable to complete the process of making her own application for social security benefits.

Furthermore, the time for respondent-mother to request assistance would have been when benchmarks were established for her to start working on her GED and employment skills in a program that accommodated her learning disability. There is no indication that respondent-mother did so. As the trial court determined, respondent-mother failed to document that she was exempted from employment. The court's ultimate finding that respondent-mother did not show any interest in working, and that the economic responsibility for the family income had fallen on respondent-father, is not clearly erroneous. Respondent-mother has not established that

petitioner's efforts to engage her in services that would allow her to contribute to the family income were unreasonable.

As previously addressed in respondent-father's appeal, respondent-mother has also failed to establish that petitioner's efforts with respect to transportation and housing were unreasonable. Respondent-mother has not established any deficiency in services that precluded the trial court from properly finding that the statutory grounds for termination were established by clear and convincing evidence.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Jane M. Beckering