

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of EDWARD HARRY DAILEY II,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHERRY BOUGHNER,

Respondent-Appellant,

and

EDWARD DAILEY and MARVIN BLOCKER,

Respondents.

In the Matter of CODEY DAVID DAILEY,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHERRY BOUGHNER,

Respondent-Appellant,

and

EDWARD DAILEY and MARVIN BLOCKER,

Respondents.

UNPUBLISHED
March 3, 2009

No. 287517
Macomb Circuit Court
Family Division
LC No. 2007-000509-NA

No. 287518
Macomb Circuit Court
Family Division
LC No. 2007-000510-NA

In the Matter of DEMAROC MATTHEW-ALLEN
BOUGHNER, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHERRY BOUGHNER,

Respondent-Appellant,

and

EDWARD DAILEY and MARVIN BLOCKER,

Respondents.

No. 287519
Macomb Circuit Court
Family Division
LC No. 2007-000606-NA

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

In these consolidated appeals, respondent Sherry Boughner appeals as of right from the August 21, 2008 circuit court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist). We decide this case without oral argument pursuant to MCR 7.214(E), and we affirm.

I. Basic Facts And Procedural History

Boughner is the mother of Edward Dailey, Codey Dailey, and Demarco Boughner.¹ Edward Dailey is the legal father of Edward and Codey; Marvin Blocker is the putative father of Demarco. Dailey's and Blocker's parental rights were also terminated, but they are not parties to these appeals.

In September 2007, the DHS filed a petition for temporary custody of Edward and Codey. At that time, Boughner was unemployed, lacked independent housing (she was sharing a

¹ The child's name appears as both Demarco and Demaroc in the lower court file. Boughner named the child "Demarco," and he is called "Demarco," but the C and the O were transposed on the birth certificate, which was never corrected. For ease of reading, Demarco will be used throughout the report.

friend's two-bedroom apartment), was behind in child support payments, and only saw the boys sporadically. Following a preliminary hearing, the trial court authorized the petition. At the pretrial hearing, Boughner entered a no contest plea to the allegations against her and the trial court took jurisdiction over the children, made them temporary court wards, and adopted a service plan for the parents. The service plan included a substance abuse assessment, a psychological evaluation, parenting classes, employment and housing, family visits, and regular contact with the agency.

In November 2007, the DHS filed a petition for temporary custody with respect to Demarco. It alleged that Boughner had left Demarco with a friend on November 1 and disappeared. She called on November 5 to say that she would be coming to collect the child, but never arrived. Since the prior petition was filed, Boughner had moved three times and was still looking for housing. She was still unemployed and her food stamps had been canceled. Following a preliminary hearing, the trial court authorized the petition. At the pretrial hearing, Boughner entered a no contest plea to the allegations against her and the trial court took jurisdiction over Demarco, made him a temporary court ward, and adopted the existing service plan.

At a review hearing, the foster care worker reported that the results of the psychological evaluation indicated evidence of bipolar disorder and that Boughner needed to be referred to Community Mental Health for treatment. Boughner was staying with Dailey's sister in Lapeer. Boughner had submitted job applications and signed up with a temporary employment agency, but had not been hired or placed anywhere. She had not attended parenting classes, claiming that she could not drive. Boughner had not visited Demarco since the last hearing and visits with Edward and Codey were "sporadic at best." The trial court made it plain that housing and income were a top priority.

At the next review hearing, the foster care worker reported that Boughner was still living with Dailey's sister in Lapeer. Boughner had been placed in at least one job through the temporary employment agency, but it had ended and she was again unemployed. She signed up to do work at home stuffing envelopes. Boughner had not gone to parenting classes and had not provided any information regarding her mental health treatment, if any. Boughner had been visiting Edward and Codey regularly because their residential facility provided transportation; she had only visited Demarco once. Boughner indicated that she had been prescribed medication for her bipolar disorder and depression, but she did not like taking the medication and said, "I take it when I feel like I need it." Based on the lack of progress, the trial court authorized the DHS to file a termination petition, but set the hearing for late summer to give Boughner an opportunity to comply with services.

Steven Haag, the initial foster care worker, testified that Boughner completed a psychological evaluation. The recommendations were parenting classes and psychiatric services. Haag testified that Boughner was referred to Macomb Family Services for counseling, therapy, and medication. But he never received anything in writing indicating that Boughner had pursued treatment. Haag discussed the matter with Boughner, who "said on at least two occasions that she was in treatment and that she would get . . . some sort of verification, but she didn't." Haag also testified that when the service plan was first adopted, he gave Boughner "the phone number for CARE to call and find out when the next [parenting] classes start." But Boughner had not provided any verification that she had completed parenting classes.

Haag further testified that the service plan called for suitable, stable housing and a legal source of income. Boughner never lived at one place for more than a few months throughout the case. Haag did not know where Boughner was currently living, “but I know she does not have suitable housing.” Boughner never provided proof of any income.

Haag testified that the service plan called for family visits. Boughner visited with Edward and Codey “more” because their residential facility provided transportation. She saw Demarco “[n]ot so much.” Haag recommended termination of parental rights “[b]ecause the children need permanence and stability and Ms. Boughner . . . was not able to offer that to” the children.

Angela Forney, the current foster care worker, testified that she took over the case from Haag at the “[e]nd of May, beginning of June” 2008. Forney testified that Boughner had been living at Dailey’s sister’s home in Lapeer until August 2008, when she “moved to New Haven with friends and Charlie.” The home probably would not have been suitable because there were numerous people living there. Dailey’s sister reported that Boughner and Dailey were both living there, although Dailey “would deny that.” Boughner “was sleeping on her couch[.]” She had offered Boughner the use of one of her cars “and they would use her automobiles whenever they needed to get somewhere that was important to them, but never to go to . . . services that were required by DHS.” Boughner later admitted that “she had no secure housing.” She was homeless and planning to go to a shelter. Forney further testified that Boughner was unemployed. She had worked briefly in June 2008 “and she had pay stubs and that was a temporary service.” Forney also testified that Boughner had not visited Demarco at all since she took over from Haag. Forney explained that she advised Boughner that despite the supplemental petition, “she was still allowed visitation with both [sic] children and at that point she said she was going to set something up, but she . . . was never able to follow through.”

The trial court found that § 19b(3)(c)(i) had been proven by clear and convincing evidence because the conditions that led to the adjudication on the part of Boughner were homelessness, unemployment, and “some mental health issues that she needed to get under control.” The trial court then went on to address the children’s best interests:

Now there was some discussion and some testimony here today that the termination is clearly not in, especially Edward’s situation. Now there are three children involved. We’ve got Codey, who was born 11/26/96, which makes him eleven, almost twelve. We have, and I believe his name’s Demarco But as far as Demarco is concerned, he was born in April of 2004, so he is four years old. And then we have Edward, who is going to turn seventeen here in December of this year.

Now, there really wasn’t any testimony taken today with regards to best interest as to the two younger children. Primarily, the comments were directed towards Edward, considering the fact that he’s almost seventeen years old. Now the standard that has . . . to be applied here, that says that if the court finds that there are one or more grounds for termination of the parents’ rights, which I have found here today, the court shall order termination and order that additional efforts for reunification not be made unless the court finds that termination is clearly not in the child’s best interest.

Now, with regards to the younger two children, I do find that termination is clearly in their best interest. They are younger. They've been in care for about a year. And there wasn't really any testimony here presented today that termination would not be in their best interest so I am going to order termination.

With regards to Edward, it's a little bit more difficult and it's a little bit trickier of a proposition, only because Edward is almost seventeen and he's older. Now, if I take the statutory language at face value, I have to order termination on these basis [sic] unless I find that termination is clearly not in the child's best interest. I do not find that. I do feel that it is in the child's best interest, Edward's best interest, to terminate the parents' parental rights at this point in time because I do not feel that there was enough evidence here present today to show that termination is clearly not in his best interest.

II. Statutory Grounds For Termination

A. Standard Of Review

To terminate parental rights, the trial court must find that the petitioner has proven at least one of the statutory grounds for termination by clear and convincing evidence.² We review for clear error a trial court's decision terminating parental rights.³ A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.⁴ Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁵

B. Analysis

The children came into care primarily because Boughner lacked housing and a source of income with which to obtain suitable housing and otherwise support herself and the children. She rarely worked, never found housing, and at the time of the hearing was unemployed and planning to enter a homeless shelter. A parent's failure to comply with the parent/agency agreement is evidence of a parent's failure to provide proper care and custody for the child and can be a valid indication of neglect.⁶ Accordingly, we conclude that the trial court did not clearly err in finding that statutory grounds for termination of Boughner's parental rights were established by clear and convincing evidence.

² MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

³ MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Sours, supra* at 633.

⁴ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁵ MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

⁶ *JK, supra* at 214; *Trejo, supra* at 360-363, 361, n 16.

III. Best Interests Determination

A. Standard Of Review

Once a petitioner has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is clearly in the child's best interests, then the trial court shall order termination of parental rights.⁷ There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available.⁸ We review the trial court's decision regarding the child's best interests for clear error.⁹

B. Analysis

Boughner contends that the trial court erred in its best interests analysis because the evidence did not clearly and convincingly support that termination was in the children's best interests. We disagree.

We note that the trial court erred by stating that law required it to order termination unless it found termination was clearly not in the children's best interests. MCL 712A.19b(5) was amended shortly before the trial court rendered its decision such that the trial court was required to affirmatively find that termination of parental rights *was* in the child's best interests.¹⁰ Despite this error in its statement of the applicable standard, the trial court nevertheless went ahead and affirmatively concluded that termination was in the child's best interests. And based on our review of the record, we conclude that the trial court did not clearly err in finding that termination of Boughner's parental rights was in the children's best interests. Boughner was unable to provide for the children's basic material needs such as food and shelter, had not made any significant progress in this regard during the pendency of the proceedings, and had no reasonable prospects of being able to meet the children's basic material needs at any time in the near future. She had unresolved mental health issues and had insufficient parenting skills necessary to raise a child, much less children with Edward's and Codey's special needs.

We additionally note that in deciding the children's best interests, the trial court was not required to consider the best interest factors set forth in § 3 of the Child Custody Act.¹¹ This Court has unequivocally held that the Child Custody Act is not applicable to child protection

⁷ MCL 712A.19b(5); *Trejo, supra* at 350. To the extent the statute conflicts with MCR 3.977(E), the statute controls. See *People v Watkins*, 277 Mich App 358, 363-364; 745 NW2d 149 (2007).

⁸ *Trejo, supra* at 354.

⁹ *Id.* at 356-357.

¹⁰ 2008 PA 199, effective July 11, 2008.

¹¹ MCL 722.23.

proceedings,¹² and thus a trial court is not required to make findings with regard to the best interest factors of the Child Custody Act in applying § 19b(5) of the Juvenile Code.¹³

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens

¹² *In re Schejbal*, 131 Mich App 833, 835; 346 NW2d 597 (1984).

¹³ *In re JS & SM*, 231 Mich App 92, 102; 585 NW2d 326 (1998), overruled in part on other grounds by *Trejo*, *supra* at 353, 356-357.