

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 20, 2011

In the Matter of D. D. COLMAN, Minor.

No. 303979
St. Clair Circuit Court
Family Division
LC No. 09-000571-NA

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

This is a difficult case with no easy judicial resolution. The respondent-father is unable to provide proper care and custody for his now 14-year-old, special needs son given his own cognitive limitations. We do not agree with the entirety of the circuit court's termination decision. However, the petitioner need establish only one statutory ground to support termination of parental rights. Because respondent has not provided proper care and custody in the past, and will be unable to do so within a reasonable time given his child's age, we affirm.

I. BACKGROUND

Respondent and his former girlfriend had two sons together—DC (born in 1997) and NC (born in 2001).¹ The boys initially lived with their mother and were removed from her care shortly after NC's birth. The Department of Human Services (DHS) provided intensive services to the family for a four-year period, but respondent began participating only toward the end of the process. The court returned DC to his mother's care in 2005, but terminated both parents' rights to NC based on the lack of a parent-child bond. The DHS again removed DC from his mother's care in 2007, based on allegations of sexual abuse perpetrated by the mother's boyfriend. DC was then placed in respondent's care.

DC is diagnosed with mental retardation, attention deficit disorder (ADD) and post-traumatic stress disorder stemming from the sexual abuse he suffered. Respondent suffers from depression and anxiety, faces cognitive challenges and likely has an IQ of less than 87. Respondent admittedly did not recognize his child's special needs when he first assumed custody

¹ Respondent also has an older son with a different woman. That child lives with his mother and is not at issue in this case.

in 2007. Respondent removed DC from therapeutic services through Community Mental Health Services (CMHS) and claimed to follow a doctor's advice in seeking increased doses of the child's medications as a method of controlling his behavior. The DHS took DC back into custody in December 2009 after DC started a small house fire with a lighter left out by respondent. The initial Child Protective Services (CPS) worker who investigated the allegations suggested that DC remain in the home with the implementation of a safety plan. Respondent refused to accept a safety plan and the worker had to summon police assistance to remove the child from the home.

Over the next 17 months, the DHS provided various intensive services to respondent, all modified to accommodate his special needs.² Respondent received a psychological evaluation and was referred to a psychiatrist to reevaluate his own dosage of psychotropic medications. Respondent participated in parenting and life skills classes. A life skills mentor worked closely with respondent, visiting him more than twice each week for a six-month period. The mentor tried to teach respondent personal and environmental hygiene, budgeting, and how to organize appropriate activities for DC. The life skills mentor also supervised home visits and advised respondent regarding parenting skills. Respondent participated in meetings with DC's school, doctors, psychiatrists and other service providers but often left prematurely. After each meeting, DHS staff utilized many methods to assist respondent in understanding DC's goals and needs. A DHS staff member even created a binder with visual aids to assist respondent's memory regarding DC's care. But respondent was reluctant to accept the help given, throwing the binder at the care worker in the courtroom. And, after each meeting, respondent complained to his life skills mentor that he did not understand what was expected of him.

Despite the intensive, specially coordinated services provided to respondent, he did not actually benefit. Respondent did not attempt to maintain structure or cleanliness in his home and failed to engage in activities with DC. During parenting time, respondent usually watched television while DC played alone. Respondent still could not recognize DC's special needs and blatantly asserted that he would discontinue DC's services through CMHS as soon as the child was returned to his care.³ Exacerbating the troublesome situation, respondent's live-in girlfriend, who had served as DC's primary caregiver, lost her sight in 2010.

DC, on the other hand, thrived while in DHS care. He received specialized services to teach him basic life skills, regulate his medication, improve behavioral issues and increase his academic success. Through visual aids, structured schedules and a combination of reduced medication with increased therapy, DC flourished.

The court ultimately terminated respondent's parental rights, finding:

² Respondent's IQ was too high to qualify for "special parent" services so the CMHS workers involved in this case modified their regular services to meet respondent's specialized needs.

³ Respondent's life skills mentor testified that respondent told her on November 3, 2010 "that [DC] was just fine before the State took him, and all this CMH BS is causing trouble. [DC] don't need it. Once he's home he's stopping CMH."

Although [respondent] has participated in the services that were provided to him and the family, he was resistant to those services. Further, he did not follow the recommendations of the workers and in fact returned some material which was provided to him. [Respondent] also told several workers that as soon as the Court was no longer involved he was removing the minor child from [CMHS]. He felt that the minor only needed to be placed on medications and go to counseling. He did not see the need for any structure in [DC's] life. [Respondent] spent very little time with [DC]. His [live-in girlfriend] was [DC's] main caregiver until she lost her sight.

[Respondent] also has two other children. His parental rights to one child was terminated in Macomb County. His other son lives with the mother. [Respondent] has not seen him since the summer of 2009.

II. STANDARD OF REVIEW

A court may terminate a respondent's parental rights if clear and convincing evidence proves one or more of the statutory grounds listed in MCL 712A.19b(3). Once a statutory ground for termination is established, the court shall order termination of parental rights if it finds that termination serves the child's best interests. MCL 712A.19b(5). "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest" under MCL 712A.19b(5). *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); see also MCR 3.977(K). Where, as here, the petitioner seeks termination under a supplemental petition, the court must base its termination decision on "clear and convincing legally admissible evidence" supporting the additional cited grounds. MCR 3.977(F)(1)(b). "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation omitted). This Court gives deference to a trial court's special opportunity to observe and judge the credibility of witnesses. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

III. ANALYSIS

The court terminated respondent's parental rights to DC under four provisions of MCL 712A.19b(3):

(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.

* * *

(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.

* * *

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(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 clearly erred in terminating respondent's parental rights under subsection (i). Respondent's rights to his oldest son were never terminated; the child has always lived with his mother. A court terminated respondent's rights to NC in 2005 because of the lack of a parent-child bond, not because respondent committed neglect or abuse. MCL 712A.19b(3)(i) simply is not applicable.

We question the adequacy of the evidence to support termination under subsection (j). Respondent clearly did not make the best choices in relation to DC's medical and psychiatric care. Petitioner presented some testimony regarding corporeal punishment used in the home, but nothing reaching the level of abuse. The petitioner presented no real evidence that DC would be in physical or emotional danger if returned to respondent's care to support termination on this ground.

Despite these erroneous findings, the petitioner did present clear and convincing evidence to support termination under subsections (c)(i) and (g). The court took jurisdiction over DC for various reasons: respondent had discontinued DC's therapeutic services in favor of increased medication, DC had started a house fire due to lack of adequate supervision, and there were allegations of inappropriate physical discipline. By the time of the termination trial, respondent recognized that DC has special needs but felt there were too many workers assigned to his case. Respondent still did not appear to understand that DC requires a structured home life with significant supervision and testified that he would continue his method of laissez-faire parenting upon DC's return. The lack of adequate care leading to the adjudication was not resolved despite the provision of specialized, intensive services over a 17-month period, supporting termination under MCL 712A.19b(3)(c)(i).

While the care and custody provided by respondent might have been sufficient for an average child, DC requires more. When DC came into care, he was failing academically, had severe behavior issues and lacked basic life skills such as managing his personal hygiene. DC's treating psychiatrist reduced the amount and type of psycho-stimulant medications he was given. In exchange, DC attended group, individual and family therapy sessions several times a week. With the advocacy of a caseworker, the school district provided a more intensive Individual Education Plan (IEP) and DC's performance improved. Care providers instituted a system of

visual aids, which allowed DC to remain on task, and imposed a highly structured schedule on his day, which greatly reduced DC's stress levels. DC's occupational therapist discovered that he could focus better when wearing a weighted vest and using a "sit in move cushion." Over time, DC improved so much that he needed to attend counseling only once per week.

DHS workers explained the benefits of these various methods to respondent many times and in many different ways. One caseworker even tried visual aids to explain DC's needs to respondent, a method that had proven successful with DC. Yet, when questioned to determine his level of comprehension and retention, respondent could provide only vague or superficial answers. Even at trial, respondent could not provide a clear example of something he learned through services; respondent merely testified that he learned that DC has ADD and the family would have to learn to work around it. Respondent refused to impose any structure during unsupervised parenting time and instructed DC to keep that a secret. Although respondent requested a weighted vest and "sit in move cushion" for DC's use at home, respondent self-reported that they did not use these tools. Respondent failed to advocate for DC to receive a specialized IEP, which would have resulted in the loss of special education services had the caseworker not intervened. Most troubling, despite significant evidence of DC's improvement on lower doses of medication and higher levels of therapeutic services, respondent still insists that DC needs only medication and minimal counseling.

From this evidence, it does not appear that respondent intentionally neglected DC's special needs. Rather, DC requires a proactive parent who will advocate for necessary services and accommodations and provide a rigid structure to ease DC's stress and confusion. Unfortunately, because of his own cognitive limitations, respondent cannot provide this necessary higher level of care and custody. "A parent must benefit from the services offered so that he or she can improve parenting skills to the point where the child would no longer be at risk in the parent's custody." *In re Gazella*, 264 Mich App 668, 676; 692 N2d 708 (2005). Absent any evidence of respondent's benefit from services, we conclude that the trial court had clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g).

We similarly conclude that termination was in DC's best interests. By continuing in care, DC will be represented by caseworkers who will advocate for his IEP and other necessary services. Potentially, DC will be placed with foster or adoptive parents who are able to provide the structure and sensory tools he needs to succeed. Most importantly, DC will not be in danger of being over-medicated and under-served. Although respondent and DC love each other, the record evidence more than adequately supports that termination of respondent's parental rights serves DC's physical and emotional best interests.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher