

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 18, 2011

In the Matter of FOWLER, Minors.

No. 304079
Cheboygan Circuit Court
Family Division
LC No. 07-004263-NA

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Respondent J. Fowler appeals as of right from a circuit court order terminating his parental rights to his minor children pursuant to MCL 712A.19b(3)(g) (unable to provide proper care and custody) and (h) (parent's imprisonment will deprive the child of a normal home for more than two years). We affirm.

I. FACTS

Fowler and K. Wheelock are the parents of HF, AF, DF, and EF. In December 2009, the Department of Human Services (DHS) filed a petition for temporary custody of the children. It alleged that Wheelock had a substance abuse problem that led to the children's temporary removal in 2007. Wheelock had begun using drugs again, was physically abusive toward the children, and had failed to properly treat AF's earache. Wheelock was arrested on December 26, 2009, for stealing drugs from a neighbor. Fowler was unavailable because he was serving a prison sentence of 20 to 40 years for a conviction of first-degree criminal sexual conduct.¹

The trial court acquired jurisdiction over the children in January 2010 pursuant to a plea agreement reached with Wheelock. The substance of the petition was limited to the following allegations:

¹ According to the March 2011 updated service plan, Fowler was convicted of sexually abusing Wheelock's four-year-old niece. Fowler was sentenced in June 2004. His conviction and sentence were affirmed on appeal. *People v Fowler*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 256845).

1. [Wheelock] has a substance abuse problem that impairs her ability to provide adequate and appropriate care and supervision for the minor children. 2. [Wheelock] is currently incarcerated . . . for a probation violation. She is also awaiting further criminal charges. She has been incarcerated since December 26, 2009. Her release date is uncertain.

Wheelock pleaded no contest to the first allegation and admitted the second. As part of the agreement, Fowler was allowed to correspond with the children.

According to a February 2010 initial service plan, Wheelock reported that Fowler's contact with the children since his incarceration had been sporadic. The March 2010 updated service plan indicated that Fowler was allowed to call and write to the children, but had not had any known contact with the children. According to a June 2010 updated service plan, Fowler called the children one time, but he had not sent any letters. A September 2010 updated service plan reported that Fowler sent one letter to HF and AF.

According to the December 2010 updated service plan, Fowler had been sent copies of the parent/agency agreements, but refused to sign and return them. He did not engage in 12-step meetings or church activities at the prison, although these are available to him. He had only sporadic telephone contact with the children. Fowler had written to HF and AF twice, but had not written to DF or EF.

According to a March 2011 updated service plan, Fowler's contact with the children remained limited. Fowler reported that he was not participating in substance abuse or 12-step programs, church services, or college/training courses in prison and that parenting classes were not available. He stated that he had begun seeing a psychologist but would not say why.

Following a review hearing, Wheelock released her parental rights to the children, and the DHS filed a supplemental petition to terminate Fowler's parental rights.

At an April 2001 hearing, Eric Young, a probation and parole officer with the Department of Corrections, testified that he prepared the presentence report following Fowler's conviction. Fowler was convicted of first-degree CSC and was sentenced in June 2004, to 20 to 40 years in prison. Young testified that Fowler would have to serve at least 20 years before he will be eligible for parole. Young also testified that most prisons offer sex offender programming, educational and vocational services, and substance abuse programming. Prisoners were sometimes wait-listed to get into programs.

B. Otero, HF and AF's foster mother, testified that the girls had recently completed counseling. During counseling, "[HF] had showed interest in knowing why her dad was in prison and she had a counseling session with her mom . . . to discuss that[.]" Fowler called the girls "[p]eriodically, but not very often." Regarding the calls, Otero testified, "Sometimes they go well. Sometimes the kids walk away frustrated. There's been a time where [HF] had hurt feelings because of he wasn't proud of her for some accomplishments that she had made." Fowler had not provided any financial support for the girls.

E. Ditta, DF and EF's foster mother, testified that Fowler sent the children "a couple of letters." Fowler called the children and sent them Christmas and birthday cards. The children

rarely mentioned Fowler when they were not on the telephone with him. According to Ditta, Fowler had not provided support for the children.

Foster care worker, Dana Holcomb testified that she had spoken with Fowler and learned that there were services available to him in prison. Fowler reported that he was “receiving counseling from a prison psychologist or counselor averaging about a half hour every few weeks for his . . . mental health in coping.” Holcomb requested a release so she could speak to the counselor directly or obtain Fowler’s records and sent Fowler a blank release form, but Fowler had not authorized release of his information. Holcomb also spoke to Fowler’s prison case managers about services available to Fowler. Parenting classes were not available at the facility where Fowler was incarcerated, so Holcomb encouraged him to read material on parenting and child development. She did not know if he had done so. Holcomb stated that in light of Fowler’s conviction, he would have to have a sex offender risk assessment and rehabilitative therapy, but he would not be eligible for that service until he was closer to release. Holcomb advised Fowler to participate in AA or NA meetings because there were “some concerns that he did have a previous substance related issue.” Fowler denied a history of substance abuse and “refused to engage in that service.” Holcomb stated that “educational services and . . . other vocational opportunities” were available through the prison. Fowler obtained a GED “earlier on while he was in prison.” He was working as a porter. Holcomb also testified that she had sent Fowler copies of the case service plan and/or parent/agency agreement along with a self-addressed stamped envelope. He had not signed and returned any of them.

Holcomb testified that termination was requested because Wheelock had released her parental rights, and Fowler

is not in the position now nor will he be during the children’s childhood to be able to provide care and custody, a home for them, stability, permanence since his out date is 2023 that puts the youngest child at twenty years old when he gets out of prison and these children have been in care two times now for significant periods of time, both times, and they deserve permanence. They deserve a home. They deserve stability, love and guidance that all children deserve.

Holcomb stated that termination was in the children’s best interests in light of

[t]heir age, permanency. Obviously, he’ll be in prison for a while and . . . the concern is, obviously, his sexual offense and then he hasn’t been able to be rehabilitated because of his out date being so long and services are not available currently to him because of his out date being so far in the future.

Holcomb stated that the current foster care providers had “indicated that they would be open to adopting the children.”

Holcomb testified that she had spoken to Fowler on March 1, 2011, regarding the children’s placements. He did not have any concerns regarding DF and EF because he knew Ditta. Fowler had concerns about HF and AF’s placement “because he thought that if his parental rights were terminated or if he released them they [the Oteros] . . . would completely cut him out of the picture and would not allow him to have any contact with the children.” Holcomb

testified that she had spoken to the foster parents about the matter. Ditta “indicated that they would still continue contact.” Otero said “she wouldn’t be opposed to it,” but “it would have to be appropriate and things like that”

Fowler testified that he had not executed the release for his counseling records because the prison “don’t allow me to send anything back out in those envelopes and I had already talked to my counselor and told him that she could get the records if she wanted them.” Fowler opposed termination of his parental rights because “if I get my appeal overturned and I come home, then I won’t have no rights at all. So, I would like to have my rights if I had my appeal overturned and came home.”

The trial court terminated Fowler’s parental rights under MCL 712A.19b(3)(g) and (h). It explained:

The facts, I think, for both grounds, basically, can be the same. Imprisonment not only beyond two years but no reasonable expectation that the parent would be able to provide proper care and custody within a reasonable time. Considering the children’s age, [HF] eleven, [AF] ten, [DF] nine and [EF] eight, the twenty years before parole with time served takes us to at least to 2023. Father’s been incarcerated for seven plus . . . years as of today, so certainly, again, without regard to intent in (g) and then imprisonment in (h) is of such a period of time that both of those grounds are met. Case law has indicated that (g) is a fall back provision or ground when the two year amount of incarceration is possibly at issue and there’s some question . . . whether the two years is gonna be met based on a possible parole or other factors. But in this case there is no such issue. The case law in [sic] the statute and court rules don’t at all consider the possibility of post appellate . . . appeals as affecting the permanency of the children. There’s so much uncertainty there in this case that the Court can’t even consider it I think permanency requires that the Court find that the both of those grounds have been met. Some sporadic telephone contact and . . . letter contact I think I have to consider the full period of time that he’s been incarcerated

I think he’s failed to provide proper care and custody for quite some period of time and what the children really need is a father that’s at home and with the children on a regular basis even if he’s not the custodial parent. It means visitation and contact and involvement in their lives on a daily basis not an occasional telephone call or letter or gift.

In . . . addition, the Court has to consider that it sounds like Mr. Fowler did have some income and has not provided any support for them as well. But really the proper care and custody in my mind is making sure that they have a home and they have parents that can care for them. The history of this case, dating back to 2007, is that Mr. Fowler’s relied on the mother to provide care and custody. Now, that’s no longer there. And so the circumstances are such that the children do need some permanency here that he cannot provide. And he’s unavailable to act as a parent and he can’t rely on the other parent to provide that care and custody under the circumstances of the case.

And as far as the best interest, although, there may be some because of the age of the children and they do have some recollection of their father having been four, three, two, of course, [EF] would have no recollection, however, she may have discovered she had a father as she aged. Certainly there's . . . maybe some connection there and some knowledge that they have a father, but even if there is some bond and some love and affection and some knowledge that they have a parent, that's not sufficient for the Court to find that it's not in their best interest to terminate parental rights. The Court considers the fact that this case . . . since it's been reopened has in excess of a year and three or four months. The children have been in their current placements during that period of time plus prior to this proceeding. The children are now bonded with their care providers and look to them for permanence, guidance and supervision. And the children are of such an age where, you know, that's what they need. The father would not be in a position to be a parent until they are all adults. And the Court does consider—I'm not looking at the quality of the home or anything of that nature but I think it's important for the Court to consider that the permanency will be provided and there is a pre-adoptive consideration at this point in time and that permanency is in their best interest. And it's just plain and simple that Mr. Fowler can't . . . provide the guidance, care and supervision that these young children deserve the rest of their lives going forward due to his incarceration.

So, the Court will find . . . clear and convincing evidence under those grounds as I indicated and so that it is in their best interest that Mr. Fowler's parental rights be terminated.

Fowler now appeals.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

Fowler argues that the trial court clearly erred when it found that the statutory grounds for termination of his parental rights were proven by clear and convincing evidence. To terminate parental rights, the trial court must find that the DHS 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

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

³ MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

has been made.⁴ We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁵

B. LEGAL STANDARDS

Under MCL 712A.19b(3)(g), a trial court may terminate a parent's rights to a child if the court finds, by clear and convincing evidence, that:

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.

Under MCL 712A.19b(3)(h), a trial court may terminate a parent's rights to a child if the court finds, by clear and convincing evidence, that:

The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

C. APPLYING THE STANDARDS

Fowler was sentenced to a prison term of 20 to 40 years in 2004. He left his children in the care of their mother who, due to a substance abuse problem, was not a suitable caretaker as shown by the fact that the children were removed from her custody in 2007 and again in 2009, just six months after the trial court terminated its jurisdiction in the prior case. There was no evidence that Fowler had made alternative plans for the children's care when Wheelock's inability to care for them became apparent. Due to his lengthy prison sentence, Fowler will not be available to provide care and custody until 2023 at the earliest, by which time the youngest child will be 20 years old. Moreover, Fowler only had sporadic contact with his children, and he did not take full advantage of services available to him. Contrary to Fowler's contentions, this case is therefore distinguishable from *In re Mason*,⁶ in which the incarcerated father was due to be released in a few months and had participated in services to ready himself for reunification.

We conclude that the trial court did not clearly err in finding that DHS established by clear and convincing evidence sufficient grounds for termination of Fowler's parental rights under MCL 712A.19b(3)(g) and (3)(h).

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 *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

Fowler contends that the trial court erred in its best interests analysis because there was insufficient evidence on which to base a conclusion that termination was in the children's best interests. Once DHS 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 in the child's best interests, then the trial court is required to 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 for clear error the trial court's decision regarding the child's best interests.⁹

B. LEGAL STANDARDS

In determining a child's best interests, a trial court may consider a variety of factors including the parent's history, unfavorable psychological evaluations, the child's age, inappropriate parenting techniques, and continued involvement in domestic violence.¹⁰ A trial court may also consider the strength of the bond between the parent and child, the visitation history, the parent's engaging in questionable relationships, the parent's compliance with treatment plans, the child's well-being while in care, and the possibility of adoption.¹¹ A trial court may also consider the child's need for permanence and the length of time the child may be required to wait for the parent to rectify the conditions, which includes consideration of the child's age and particular needs.¹²

C. APPLYING THE STANDARDS

Fowler was convicted of sexually abusing a four-year-old child. He had irregular and infrequent contact with his own children until shortly before the termination hearing, he did not contribute to the children's support, and he will remain incarcerated for the whole of the children's minorities. The children need the permanency and stability that adoptive placement could offer. We conclude that the trial court did not clearly err in finding that termination of Fowler's parental rights was in the child's best interests.

⁷ MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich at 351.

⁸ *In re Trejo Minors*, 462 Mich at 353.

⁹ *Id.* at 356-357.

¹⁰ See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

¹¹ See *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

¹² See *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).

We affirm.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck