STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
August 16, 2012

In the Matter of T. MULLINS, Minor.

No. 308118
Wayne Circuit Court
Family Division
LC No. 06-458062-NA

In the Matter of T. MULLINS, Minor.

No. 308119
Wayne Circuit Court
Family Division
LC No. 06-458062-NA

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, both respondent parents challenge the termination of their parental rights to their infant son, TM. The Department of Human Services (DHS) presented clear and convincing evidence that at least one statutory ground supported termination. However, the circuit court did not properly consider TM's placement with his paternal grandmother when deciding whether termination was in TM's best interests. We therefore vacate the termination order and remand for reconsideration of the best interest factors.

I. BACKGROUND

Respondent-mother has five children. The DHS removed her three oldest children from her care in 2006 and placed them in their fathers' custody due to respondent-mother's drug abuse and connected neglectful parenting. Respondent-mother never regained custody of her three oldest children but the court also never terminated her parental rights.

Two years later, respondent-mother gave birth to NM, respondent-father's child. The court took NM into care shortly after her birth because the baby was born with heroin and methadone in her system and because respondent-mother had not complied with the parent-agency agreement created in relation to her older children. Respondent-father was also addicted to opiates and had been in and out of jail. The court placed NM with her maternal grandmother. Despite the child's placement with a relative, the court terminated both parents' rights to NM in April 2010. Only respondent-father appealed that decision and this Court affirmed. See *In re*

NG Mullins, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2010 (Docket No. 297771).

TM was born on June 13, 2011. The DHS immediately sought permanent custody of TM because respondents' parental rights to NM had been involuntarily terminated, and because TM tested positive for cocaine and opiates at birth. At the adjudicatory hearing, respondents stipulated to jurisdiction over the child. They also stipulated to the existence of a statutory basis for termination—the prior termination of their rights to NM. TM was placed in his paternal grandmother's care upon his release from the hospital. The court deferred the dispositional hearing to allow the parties an opportunity to voluntarily seek services. It ordered immediate drug testing, at which both parents tested positive for cocaine and opiates. The court also ordered random drug screens, an evaluation at the Clinic for Child Study, and that respondent-mother immediately enter an inpatient drug treatment program.

Neither parent appeared at the dispositional hearing. They both missed their scheduled and rescheduled appointments at the Clinic for Child Study. The respondent-father apparently lied to his mother, telling her that his parole officer had arranged his residence at an inpatient drug treatment program. Respondent-father had actually violated the conditions of his parole by stealing diapers and was incarcerated as a result. Respondent-mother's attorney did not know her whereabouts but was able to contact her on her cellular phone during the hearing. Respondent-mother claimed to be in Arizona doing a voluntary "treatment program." She asserted that she traveled to Arizona after witnessing a friend's success at a particular facility. Respondent-mother had not notified the DHS of her whereabouts, however, and no one asked her on the record to name the clinic or its exact location, or to provide proof of her attendance.

The trial court terminated both respondents' parental rights pursuant to MCL 712A.19b(3)(*l*) as their rights to NM previously had been involuntarily terminated. The court also relied upon factors (g) (failure to provide proper care and custody), (i) (parental rights to the child's sibling were terminated based on "serious and chronic neglect" and "prior attempts to rehabilitate the parents have been unsuccessful"), and (j) (child is reasonably likely to be harmed if returned to the parent's care).

II. ANALYSIS

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground for termination by clear and convincing evidence, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). This Court reviews for clear error a circuit court's decision to terminate parental rights. MCR 3.977(K); *Trejo*, 462 Mich at 356-357. The clear error standard controls our review of "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." *Trejo*, 462 Mich at 356-357. A decision is clearly erroneous when, "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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes the Court as more than just maybe or probably wrong. *Trejo*, 462 Mich at 356.

Respondents stipulated at the adjudication hearing that the DHS had established a statutory ground for termination. A party cannot stipulate to a matter and then argue on appeal that the resulting action was error." *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; 761 NW2d 784 (2008). In any event, it is undisputed that a circuit court involuntarily terminated respondents' parental rights of TM's older sister, NM. Moreover, the DHS established by clear and convincing evidence that "[t]here 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." MCL 712A.19b(3)(j). Respondent-mother continued to abuse controlled substances after losing custody of four children and throughout her last two pregnancies. She failed to keep the DHS informed of her whereabouts and provided no documentation that she was actually in a residential drug treatment facility. Respondent-father also failed to establish that he sought out any addiction treatment. He lied to his child's caregiver, claiming to be at a drug rehabilitation center when he was actually incarcerated. Neither respondent abided by circuit court orders to establish their fitness to parent. Accordingly, even if respondents had not stipulated to a ground for termination, we would affirm in this regard.

Both respondents contend that the circuit court's termination judgment was premature as neither was provided DHS services toward reunification. As a general rule, "[r]easonable efforts to reunify the child and family must be made in all cases" unless certain aggravating circumstances are present. MCL 712A.19a(2); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). The previous involuntary termination of a parent's rights to the child's sibling is such an aggravating circumstance. MCL 712A.19a(2)(c). Thus, the court did not err in proceeding to termination without requiring additional reunification services.

We also reject respondent-mother's argument that her parental rights could not be terminated absent "real evidence of long-term neglect or serious threats to the future welfare of the child" as held in *Fritts v Krugh*, 354 Mich 97, 114; 92 NW2d 604 (1958), overruled on other grounds by *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). *Fritts* predates the enactment of MCL 712A.19b(3), which sets forth the legislatively selected criteria to support termination of parental rights. We are bound by the legislative determination that evidence of long-term neglect is unnecessary to establish grounds for termination.

Respondent-mother argues that the DHS should not have initiated these child protective proceedings as TM was safely placed in a relative's care. The trial court may exercise jurisdiction over a child "who is without proper custody or guardianship." MCL 712A.2(b)(1). If "a parent has placed the juvenile with another person who is legally responsible for the care or maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance," then the child has "proper custody and guardianship." MCL 712A.2(b)(1)(B); *In re Nelson*, 190 Mich App 237, 241; 475 NW2d 448 (1991). When the DHS filed the current petition, TM did not have "proper custody or guardianship." TM was still in the hospital and respondent-mother had not arranged for him to be cared for by another legally responsible adult.

Further, the DHS is legally required to file a child protective petition when it "determines that there is risk of harm to the child and . . . [t]he parent's rights to another child were terminated as a result of proceedings" brought under MCL 712A.2(b). MCL 722.638(1)(b)(i). Petitioner properly determined that TM was at risk of harm given respondent-mother's neglectful

care of her older children due to her drug abuse and her willingness to risk TM's health by using cocaine and heroin during the pregnancy. There simply was no legal way the DHS could have avoided interference into this parent-child relationship.

Respondent-mother also asserts that the court should have considered TM's relative placement when analyzing the child's best interests. As noted, the DHS could not avoid initiating the proceedings in this case, but the trial court certainly could consider the child's placement in its best interest analysis. In *Mason*, 486 Mich at 164, our Supreme Court held:

> [A] child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), which expressly establishes that, although grounds allowing the initiation of termination proceedings are present, initiation of termination proceedings is not required when the children are "being cared for by relatives." Thus the boys' placement with respondent's family *was an explicit factor to consider in determining whether termination was in the children's best interests* . . . . [Emphasis added.]

The Supreme Court reaffirmed in *In re Mays*, 490 Mich 993, 933; 807 NW2d 307 (2012), that a trial court's failure to explicitly consider a child's placement with relatives during the best interest hearing renders the record "inadequate to make a best interests determination." Our Court recently reiterated this mandate in *In re Olive/Metts*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306279, issued June 5, 2012), slip op at 4 (quotation marks and citations omitted): "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, the fact that [a] child[] [is] 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 child[]'s best interest." The trial court must "explicitly address whether termination is appropriate in light of the children's placement with relatives[.]" *Id.*

At the dispositional hearing, the paternal grandmother testified that she was willing to provide permanent care for TM and to facilitate both respondents' relationships with their child. The paternal grandmother asserted that both respondents loved their son and had made diligent efforts to bond with him, visiting frequently when they were available to do so. The visits went well and there was no evidence of inappropriate conduct by respondents. The court terminated respondents' parental rights because they had shown "no track record" of improving their situations and retaining their parental rights "would put this child in legal limbo." The court continued:

> I'm terminating their legal rights to this child because I don't believe that they can legally make good decisions and be legally responsible for this child long-term.
>
> It doesn't mean that they can never see the child, in my opinion.
>
> It doesn't mean that they don't have a connection to the child.
>
> I cannot cut off anyone's blood connections or any kind of emotional bond.

That's something the court has no power to do.

The relative-placement factor is relevant to the best interest analysis because the relative may be open to allowing the parent to maintain a relationship with the child and maintenance of that relationship may be in the child's best interests even if the parent is not a fit full-time custodian. See *Mason*, 486 Mich at 168-169. Foregoing termination does not mean that the court must delay permanency or give the parent an opportunity to work toward reunification. Rather, it permits the court to consider an alternative permanency plan, such as a guardianship. Under a guardianship, the child is given a permanent and stable home but is allowed to maintain a beneficial parent-child relationship even though the "parent is not personally able to be a primary caregiver." *Id*.; MCL 712A.19a(7).

The circuit court did not specifically find that maintenance of a relationship with respondents was in TM's best interests. Yet, the court specifically stated that it did not intend to prevent respondents from visiting TM or otherwise disrupt "any kind of emotional bond" they shared with the child. Termination of respondents' parental rights would eliminate all rights to the child, including the legal right to visit. *In re Beck*, 488 Mich 6, 16 n 23; 793 NW2d 562 (2010). Because the trial court intended that TM should be allowed to maintain a relationship with respondents, it clearly erred in finding that termination was in the child's best interests. We therefore vacate the termination order and remand for further consideration of the best interest factors. We retain jurisdiction to ensure the prompt resolution of this matter.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra

Court of Appeals, State of Michigan

ORDER

Elizabeth L. Gleicher
Presiding Judge

In the Matter of T Mullins, Minor

Docket Nos. 308118; 308119

LC No. 06-458062-NA

Donald S. Owens

Mark T. Boonstra
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 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand the case to the trial court to consider the effect of the child's placement with relatives as it relates to the best-interest analysis. The proceedings on remand are limited to this issue.

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 Larry S. Royster, Chief Clerk, on

AUG 16 2012
Date

Chief Clerk