

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 20, 2012

In the Matter of D.Q. REYES, Minor.

No. 309588
Kalamazoo Circuit Court
Family Division
LC No. 2004-000074-NA

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(g). Because we conclude that the trial court did not clearly err by finding clear and convincing evidence to prove the statutory ground for termination, we affirm.

The minor child was born at the end of January 2009. The mother tested positive for marijuana at the delivery, and a petition for child protective proceedings was filed in February 2009. Respondent was identified as the putative father of the child, and notice of the proceedings was sent to his last known address. Several hearings in regard to the termination proceedings against the minor child's mother were held without the participation of respondent. On April 11, 2011, a notice of current address was filed indicating respondent's current address was at the Bellamy Creek Correctional Facility.

Petitioner filed a petition for termination of respondent's parental rights on August 29, 2011. The petition alleged that respondent was currently incarcerated with the Department of Corrections with an earliest release date of October 30, 2013 and a maximum discharge date of October 30, 2024. The petition alleged that respondent had not been able to provide any family member or friend to care for the minor child. A termination hearing was scheduled for October 19, 2011, and respondent was present at the hearing with his attorney. Before the termination hearing began, the trial court noted that it was "late in the game" when it was discovered that respondent was the minor child's legal father. The trial court noted that respondent was in prison, but that incarcerated fathers must be offered services and the opportunity to seek familial placement. The trial court adjourned testimony relating to the allegations concerning respondent for three months during which time respondent was to be offered services.

An updated service plan dated September 28, 2011 notes that respondent was offered services for substance abuse treatment, parenting class, prison services, and general case management services. The plan includes a section on respondent's strengths, needs, and a

description of areas that were unable to be evaluated. There is also a section addressing respondent's progress and a reunification assessment. Respondent was addressed in assessment and evaluations from that point forward. Respondent's strengths and weaknesses were addressed in the children's foster care updated service plan dated December 23, 2011 and in an addendum to a termination report.

The termination hearing continued on January 18, 2012. Respondent testified regarding the services he participated in while incarcerated, his behavioral problems, and psychiatric care. Respondent admitted to previous substance abuse. Respondent testified that he had only seen the minor child three times; however, he testified to sending the child pictures and letters. The caseworker assigned to respondent's case testified that it was in the minor child's best interests for respondent's parental rights to be terminated. She emphasized that she did not believe this because respondent was incarcerated, but because he had made no progress and did not appear to benefit from services. The caseworker explained that to see progress, they would have to wait until respondent was released, and she estimated that once respondent was released, he would need another year or two of services to resolve his issues and that was not a reasonable amount of time for the minor child to remain in foster care. She explained that she was taking into account the work respondent was doing while he was incarcerated. She acknowledged it was possible that respondent could resolve the barriers in a shorter amount of time and that she had worked with respondent on the treatment plan for less than three months. A Department of Corrections employee testified in regard to respondent's difficulty following the correction facility's rules and regulations, and respondent's misconduct while incarcerated. After hearing all the testimony, the trial court issued its decision from the bench and ruled that there was clear and convincing evidence that proved the statutory grounds for termination set forth in § 19b(3)(g), and that termination was in the minor child's best interests. Respondent now appeals as of right.

On appeal, respondent first argues that the trial court clearly erred by finding clear and convincing evidence to prove the statutory ground for termination set forth in § 19b(3)(g).

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. MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999). We review for clear error a trial court's decision terminating parental rights. 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. 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. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

In this case, respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(g), which provides in pertinent part:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(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.

The evidence in this case demonstrated that the child was born on January 31, 2009, and was placed in foster care in February 2010. Respondent saw the child three times in his life, most recently when the child was six or eight months old. Respondent was incarcerated in October 2009 and his earliest release date was October 2013. Even though he was participating in services while incarcerated, the caseworker testified that it would take respondent one or two years of additional services to be able to care for the child. Based on this record, the earliest respondent would be able to care for the child would be October 2014, at which time the child would be five years old and would have been in his foster care placement for over four years. Therefore, the record evidence clearly indicates respondent had failed to provide proper care and custody and would not be able to provide proper care and custody within a reasonable time given the child's age. MCL 712A.19b(3)(g). Thus, we conclude that the trial court did not clearly err by terminating respondent's rights under § 19b(3)(g).

Respondent also argues that his rights were prematurely terminated because he was denied the right to participate in the proceedings. We disagree.

Our Supreme Court has found that, in accordance with MCR 2.004, an incarcerated parent must be provided the opportunity to participate in "each proceeding in a child protective action" and that participation in one proceeding is not sufficient. *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010). In *In re Mason*, the respondent was not provided sufficient opportunity to participate when there was participation through a telephone call for a pretrial hearing, but then no participation over the next year when there were review and permanency planning hearings. *Id.* at 154-155. The instant case is different from the circumstances in *In re Mason*. Importantly, respondent in this case was not incarcerated at the beginning of the proceedings. We acknowledge that it is troubling that respondent was not recognized as the legal father in this action until July of 2011, despite the fact that there was a paternity action identifying respondent as the legal father in December of 2009. However, from the beginning of the proceedings, respondent received notice of most hearings, including ones that occurred before his incarceration, and he did not appear. Once the trial court realized respondent was the legal father, respondent was appointed counsel, the termination hearing was adjourned, respondent was provided the opportunity to engage in services, and he participated in proceedings, including testifying on his own behalf. Therefore, we conclude that respondent was provided the opportunity to meaningfully participate in the proceedings.

Respondent also argues the trial court erred by terminating his parental rights because he was incarcerated, was not offered services by the department of human services (DHS), and then had his rights terminated because he did not comply with services. Regarding services offered, "[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." *Id.* at 152. In this case, the record reflects that respondent was offered services. The lower court record includes several letters between the caseworker and respondent,

respondent was evaluated and assessed in the caseworker's reports, he was offered a case service plan, and he participated in services offered through the Department of Corrections. Based on the record, it is clear that respondent's rights were not terminated because he did not comply with services; rather, his rights were terminated because he had not provided proper care and custody and would not be able to do so within a reasonable time.

Finally, respondent argues that termination of his rights was improper because the focus of the proceedings was on the mother. Although the mother was involved in the proceedings for a longer time and received more services, this was largely because more services were available to her because she was not incarcerated. Regardless, respondent participated in services, participated in the proceedings, and his rights were terminated based on clear and convincing evidence proving the grounds for termination under § 19(b)(3)(g), not because the mother's rights were also terminated.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra