STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 12, 2013

In the Matter of Armstead, Minors

No. 310434
Washtenaw Circuit Court
Family Division
LC No. 2010-000059-NA;
2010-000060-NA

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating his parental rights under MCL 712A.19b(3)(g) and (j). For the reasons set forth in this opinion, we affirm.

I. OVERVIEW OF THE FACTS.

Respondent father's parental rights to the four and five-year-old minor children were terminated at initial disposition while he was incarcerated. He appeals the termination order, claiming termination was premature because petitioner perfunctorily prepared treatment plans for him but failed to make genuine efforts to reunify him with the children, and that the trial court lacked sufficient evidence to terminate his parental rights and improperly based termination solely on his past criminality and current incarceration. He analogizes his case to *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

Respondent's whereabouts were unknown when the children were removed from their substance-addicted mother in May 2010 because he was evading law enforcement authorities. A nine-count felony warrant had been issued for his arrest, stemming from an incident on April 2009, during which he fired a semi-automatic pistol at the ground outside the door and into the hood of the minivan containing the children, their mother, and a companion.[1] Respondent had not established legal paternity of the children, and was a putative father when this proceeding

[1] In addition to the nine count warrant, the record reveals that respondent had an adult criminal history that included convictions for use of a controlled substance in 2002, domestic violence and malicious destruction of property in 2003, and assault with a dangerous weapon in 2006. Respondent was 22 years old at the time of proceedings.

commenced. The trial court assumed jurisdiction over the children with regard to respondent on August 24, 2010, finding that neither he nor any other man had come forward or expressed concern regarding the welfare of the children for more than 91 days since removal, failed to visit or support them for more than a year, had previously posed a serious risk of harm to them by intentionally shooting at the vehicle in which they were passengers, and that there was a warrant for his arrest. Respondent surrendered to authorities in September 2010, and in December 2010, was sentenced to prison with an earliest release date of November 27, 2013 and maximum discharge date of October 28, 2016.

Petitioner requested termination of respondent's parental rights at initial disposition for the reasons set forth above. Respondent's initial disposition did not commence until December 2011, because he and the children's mother did not fully execute Affidavits of Parentage establishing respondent as the children's legal father until August 2011. Nevertheless, shortly after respondent was sentenced and lodged with the Michigan Department of Corrections in December 2010, petitioner provided him an initial family assessment and psychosocial assessment. Between December 2010 and the time respondent's initial disposition concluded in March 2012, petitioner provided respondent parent agency treatment plans, and communicated occasionally with respondent and his prison counselor. Respondent attended hearings and participated in available services as he was able. The initial disposition resulted in termination of respondent's parental rights on April 17, 2012 and the trial court entered an amended order terminating his parental rights pursuant to MCL 712A.19b(3)(g) and (j) on April 25, 2012.

II. INAPPLICABILITY OF *In Re Mason*.

On appeal, respondent first argues that the trial court erred in terminating his parental rights at initial disposition because he was entitled to reunification services and, as in *Mason*, that petitioner's lack of reasonable reunification efforts resulted in insufficient evidence upon which to terminate his parental rights. Respondent's arguments fail for several reasons. In *Mason*, despite knowing where respondent Mason was incarcerated, petitioner and trial court failed to facilitate his participation in all hearings during the crucial dispositional phase, and the caseworker candidly testified he had had no contact with Mason during the proceeding. Our Supreme Court found the trial court and petitioner's failure to secure Mason's presence at hearings, and petitioner's complete abandonment of its statutory duty to involve Mason in the reunification process, had prevented Mason's meaningful participation in the proceeding, and therefore created "holes in the evidence" and missing information. *Mason*, 486 at 152-160, 166, 169. The Court, citing *Rood*, 483 Mich 73, 119, 127; 763 NW2d 587(2009), held the "holes in the evidence," or lack of information regarding Mason, had effectively relieved petitioner from its burden to prove the statutory grounds alleged against Mason by clear and convincing evidence. *Id.* at 159-160, 167. A key finding in both *Mason* and *Rood* was that a trial court may not make a decision terminating parental rights based on lack of information about a respondent or lack of a respondent's participation in the proceeding, when that lack of information or participation is caused by petitioner's failure to properly service a respondent's case. *Mason*, 486 Mich 159-160; *Rood*, 483 Mich 119.

Hence, this case is distinguishable from *Mason* in that caseworkers had contact with respondent and his prison counselor, respondent was given an opportunity to participate in all hearings, was present at all hearings after turning himself into authorities, respondent had not

tried at any time to provide for the care of the children while he was on the run before becoming incarcerated, and there were no "holes in the evidence" but ample evidence upon which to terminate his parental rights under the statutory grounds discussed below. Additionally, respondent's argument that *Mason* applies, fails because the aggravated circumstance of abandonment supported a request for termination at initial disposition, and thus reasonable efforts to reunify were not required. Moreover, services were not required until respondent established legal paternity, and paternity would not have been established if not for the efforts of petitioner. Hence, contrary to respondent's arguments on appeal, we find *Mason* inapplicable to this case.

III. TERMINATION AT INITIAL DISPOSITIONAL HEARING.

In some cases termination may be petitioner's initial goal and termination may occur at the initial dispositional hearing.[2] Under MCL 712A.19a(2) reasonable efforts to reunify the child and family must be made in all cases except those listed in the statute, which include cases where:

> (a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638.

Respondent argues none of the special circumstances in § 19a(2) were present to warrant an immediate request for termination in his case. However, the evidence shows a circumstance listed in § 19a(2)(a) was present because the trial court made a judicial determination at adjudication that respondent had subjected the children to abandonment, an aggravated circumstance listed in MCR 722.638(1)(a)(*i*)[3]. The petition for termination at initial disposition was supported by a judicial determination that respondent's whereabouts were unknown since April 2009 and he had subjected the children to the aggravated circumstance of abandonment, and was not their legal father.[4] Therefore, the trial court did not err in proceeding to termination of respondent's parental rights at initial disposition.

IV. PLACEMENT WITH RESPONDENT'S MOTHER.

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[2] MCL 712A.19b(4); MCR 3.977(E).

[3] MCL 722.638 (1) provides in relevant part,

The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:

(*i*) Abandonment of a young child.

[4] It is important to state that the finding of abandonment was made independent of the finding that respondent shot at and into a van where the minor children were seated.

Although respondent argues that petitioner should have actively encouraged the children's placement with his mother, the trial court addressed and correctly decided that issue during the proceeding. A court is not required to place a child with a relative, but may place a child with a relative instead of terminating a respondent's parental rights if this arrangement would serve the child's best interests. *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999); *In re McIntyre*, 192 Mich App 47, 52; 480 NW2d 293 (1991). In this case, the evidence showed placement with respondent's mother was contrary to the children's best interests. The record reveals that for an extended period of time, respondent was alluding law enforcement and thus unable to suggest placement with his mother. The record also reveals that the children had limited contact with respondent's mother and she was unfamiliar to them, and the children had attachment disorders and had bonded to their foster parents during the nine months it took respondent's mother to achieve expungement of her previous CPS violation.

Respondent also provides no support for the contention that petitioner was required to or should have allowed visits between the children and their half-sibling, and it was not apparent that the children even knew they had a sibling. Additionally, petitioner's provision of services did not negatively impact respondent's case, but rather the fact that respondent and his family had maintained such an attenuated relationship with the children, and the fact that respondent was incarcerated and provision of reunification services was under the control of the Department of Corrections, impacted the outcome.

We reject respondent's assertion that he is able to provide the children proper custody with his mother while he is incarcerated. As previously stated, the evidence revealed that the children had limited contact with respondent's mother at very young ages and virtually no contact during the nearly 1-1/2 years of respondent's disappearance, making her a virtual stranger. The evidence showed the children had attachment disorders due to the inconsistent care they received from respondent and their mother, but with therapy were making progress attaching to their foster parents. The children's therapist recommended against placing the children with respondent's mother or even introducing her into visits, based in part on the children's memory of respondent as "that bad man." Therefore, the trial court properly found that placement with respondent's mother was not suitable alternate custody.

V. CONCLUSIONS.

The evidence showed respondent failed to establish legal paternity by November 2010 as ordered by the trial court, and failed for 11 months after turning himself in to authorities to establish himself as the legal father entitled to seek the children's custody. Until respondent executed Affidavits of Parentage for the children in August 2011, he remained a putative father and had no legal right to participate in the proceeding, and was not entitled to services on that basis alone. *In re LE*, 278 Mich App 1, 18-21; 747 NW2d 883 (2005); MCR 3.903(A)(7), MCR 3.903(A)(24). Directly after respondent established legal paternity, the trial court conducted his initial disposition, at which it found that legally admissible clear and convincing evidence supported termination of his parental rights.

Based on our review of the record, the trial court did not err in finding that the statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence. MCR 3.977(K); *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The

evidence showed respondent failed to provide consistent or adequate care or custody for the children when he had the opportunity, but lived a transient lifestyle, residing at times with his mother, or other relatives and friends, sometimes having the children and their mother with him and at other times leaving them to fend for themselves. He did not maintain a stable home or employment, or provide consistent physical care for the children. He occasionally provided diapers, food, toys and some cash assistance, but his contributions fell short of adequately supporting them. He acted in an extremely violent manner in the April 21, 2009 incident, after which he resided with girlfriends and fathered two other children while leaving the minor children at issue in this case, in the care of their drug-addicted mother with little or no concern for their well-being. He had no contact with the children after December 2009 and would remain incarcerated until at least November 2013, was either so far attenuated from their lives that he did not know they were removed or knew that they were removed and did not come forward until convinced by his mother to do so, and he was not available at the time of removal to inform petitioner that his mother was willing to provide placement for the children. The trial court correctly found that respondent's mother could not and should not provide care and custody for the children. We therefore find that the evidence presented was clear that respondent failed to provide proper care or custody for the children.

Finally, contrary to respondent's assertion on appeal, the trial court did not base termination solely on respondent's current incarceration or past criminality, or on speculation that the children associated him with the man who attacked the van in which they were passengers. The trial court properly found that respondent failed to provide proper care or custody for the children and there was no reasonable expectation that he would "reinvent" himself upon release from prison and become able to do so within a reasonable time, and that the children would likely suffer harm if returned to his care. That finding was based on clear evidence of respondent's previous lack of care and custody of the children, the attachment disorders they suffered due in part to his inconsistent care, the unsuitability of respondent's plan to place the children with his mother, the fact that upon his earliest release date, the children will not have seen him for nearly four years and do not know him, the significant substance abuse and anger management issues respondent needed to resolve before reunification could be attempted, and respondent's previous failure to successfully complete probation for his other criminal offenses involving violent behavior. Respondent has not shown that the trial court's findings regarding the statutory grounds for termination are clearly erroneous, or that the court erred in finding that any of the applicable grounds for termination were established by clear and convincing evidence. Accordingly, the trial court did not err in terminating respondent's parental rights under MCL 712A.19b(3)(g) and (j).

Affirmed.

/s/ Kathleen Jansen
/s/ William C. Whitbeck
/s/ Stephen L. Borrello