STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
April 16, 2013

In the Matter of G. SPARKS, Minor.

No. 312509
St. Joseph Circuit Court
Family Division
LC No. 2011-000615-NA

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(h). We affirm.

Respondent was arrested in 2011 and sentenced to a minimum of three years and six months' imprisonment on drug and second-degree criminal sexual conduct charges. Respondent's earliest release date is February 2015. He has a history of criminal behavior and substance abuse, including several convictions for various offenses since 2007. During respondent's past incarcerations, the child lived with respondent's mother, his youngest sister, or his former girlfriend, none of whom had been approved by petitioner for placement. During respondent's most recent incarceration, the child has been living with respondent's older sister. Petitioner approved this placement, and there was testimony presented at the termination hearing that the child was doing well in the placement.

Respondent argues that the trial court lacked jurisdiction in this case because a hearing referee, rather than a circuit judge, presided over the adjudication hearing at which he pleaded to the allegations contained in the petition. However, respondent failed to challenge the trial court's jurisdiction at the time of the adjudication, and he cannot collaterally attack the trial court's jurisdiction after the termination of his parental rights. *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008) (an adjudication cannot be collaterally attacked if the termination followed the issuance of an initial dispositional order.). We will not address this collateral challenge.

Next, respondent argues that the trial court clearly erred when it found statutory grounds for termination under MCL 712A.19b(3)(h). "In a termination of parental rights proceeding, a trial court must find by clear and convincing evidence that one or more grounds for termination exist and that termination is in the child's best interests." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). An appellate court "review[s] for clear error both the [trial] court's decision that a ground for termination has been proven by clear and convincing evidence and,

where appropriate, the [trial] court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court's termination decision "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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The only statutory ground alleged in the petition in this case was MCL 712A.19b(3)(h), which is satisfied if there is 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.

As explained by our Supreme Court in *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010), there are three criteria set forth in § 19b(3)(h), and "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." The Court described the three criteria of § 19b(3)(h) and how they are satisfied as follows:

> The combination of the first two criteria—that a parent's imprisonment deprives a child of a normal home for more than two years *and* the parent has not provided for proper care and custody—permits a parent to provide for a child's care and custody *although the parent is in prison;* he need not *personally* care for the child. The third necessary condition is forward-looking; it asks whether a parent "will be able to" provide proper care and custody within a reasonable time. Thus, a parent's past failure to provide care because of his incarceration also is not decisive. [*Id.* at 161 (footnote omitted; emphasis in original).]

We decline to find that the trial court's findings under § 19b(3)(h) were clearly erroneous. There is no dispute that the termination in this case fulfills the first factor, i.e., respondent's current incarceration exceeds two years. Regarding the second factor, the record supports the trial court's determination that respondent failed to provide for the child's care and custody. Although the child was placed with the respondent's older sister, there is no indication in the record that respondent requested the placement. The record indicates that respondent specifically requested that the child stay with respondent's mother or his younger sister, but petitioner did not approve either placement because both respondent's mother and younger sister had children removed from their care in the past. Although respondent eventually inquired about his older sister serving as a guardian, this inquiry took place after the child was placed with the older sister. Accordingly, this case is distinguishable from *In re Mason*, 486 Mich at 163, where the respondent's children were placed with appropriate relatives at the respondent's request.

Additionally, the trial court correctly concluded that the third factor was satisfied. Petitioner introduced a psychological report that concluded that respondent was "not assessed to be an appropriate primary caregiver for minor children at this time *or in the near future*." (Emphasis added). Additionally, Audrey Loosier, the foster care worker, believed that based on

respondent's criminal history and substance abuse, respondent could not provide proper care and custody for the child within a reasonable amount of time.

Moreover, contrary to respondent's arguments, the record indicates that petitioner provided respondent with adequate access to services, and that respondent failed to comply with those services. Loosier testified that respondent did not engage in the services that were required of him. Loosier's testimony in this regard was somewhat contradictory as she admitted on cross-examination that respondent signed up to be on a waiting list for a substance abuse class. And, respondent testified that he attempted to sign up for services and participated in at least one alcoholics anonymous class. However, the trial court resolved this conflicting testimony by finding that respondent had the opportunity to comply with services, but did not engage in those services. "We give deference to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App at 459. Consequently, respondent was not denied the opportunity to participate in services.

Termination of respondent's parental rights was also in the child's best interests. Respondent was incarcerated for most of the child's life, causing the child to be passed amongst various relatives, some of whom were not approved by petitioner for providing care and custody. Moreover, respondent had an extensive criminal history, as well as a history of substance abuse. The child's counselor testified that the child needed the stability and permanence he was receiving from respondent's older sister. The advantages of living in respondent's older sister's care weigh in favor of finding that termination was in the child's best interests. See *In re Foster*, 285 Mich App 630, 634; 776 NW2d 415 (2009). The trial court's best-interest determination was not clearly erroneous.

Respondent argues that the trial court failed to consider the child's placement with respondent's older sister as a relative placement when the court made the best-interest determination. A child's placement with relatives during a parent's incarceration weighs against termination, and "the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012). "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Id.*

In the case at bar, the trial court explained how the child's placement affected the best interests determination as follows:

> Recently[,] the Court of Appeals has been remanding cases where people are in prison and the children are with relatives. The panels want more detailed findings by courts if the family is good enough till the parent is out of prison to provide a "normal home." This Court makes the findings [sic] the aunt's placement *is not a relative placement* in the terms considered by the Court of Appeals. There is [sic] and will be no ties between [respondent's older sister] and [respondent]. [(Emphasis added.)]

Although the trial court may have erred by finding that there were no ties between respondent and his older sister, respondent is not entitled to relief. The trial court engaged in the requisite best-interest analysis. The court expressly considered respondent's incarceration in relation to the child's placement with respondent's older sister. The court determined that termination was nonetheless in the child's best interests. The court thus engaged in the proper analysis, and reversal is not required. Cf. *In re Olive/Metts*, 297 Mich App at 43-44.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro