STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MJC, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JOHN HINES,

Respondent-Appellant.

UNPUBLISHED
December 15, 2000

No. 221339
Wayne Circuit Court
Family Division
LC No. 89-277466

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Respondent appeals as of right from a family court order terminating his parental rights to his minor son pursuant to MCL 712A.19b(3)(a)(ii), (c)(i), (h) and (j); MSA 27.3178(598.19b)(3)(a)(ii), (c)(i), (h) and (j). We affirm.

I. Basic Facts And Procedural History

In the summer of 1998, the Family Independence Agency (FIA) petitioned the family court to make MJC and his half-brother temporary court wards. At that time both boys were living with their mother and Hines was serving a one-to-six-year prison sentence. Hines received notice of the July adjudication in this case by personal service. He testified at the adjudicative proceeding hearing by telephone,[1] at which time he explained that his earliest potential release date was in August 1999 and that he did not have a plan for his child's care before his release. The family court found that the children came within its jurisdiction and made them temporary wards of the court.

When the FIA asked the family court to terminate both parents' parental rights in March 1999, the mother voluntarily relinquished her parental rights. The family court, at a hearing on April 9, 1999, appointed an attorney to represent Hines. Four days later, the family court held

[1] Apparently, the parties in the courtroom used a speakerphone to hear and communicate with Hines. He testified and participated in the other hearings using this arrangement.

another hearing during which the FIA introduced documentary evidence regarding Hines' criminal record and the past-due child support he owed. Hines again participated by telephone, but he was also represented by his appointed counsel at this hearing, as well as the final hearing on April 22, 1999.

At the final termination hearing, Hines told the family court that he was having trouble hearing what was being said. In response, the family court instructed the witnesses and attorneys to speak louder. Substantively, a foster care caseworker testified that Hines did not receive a formal parent/agency agreement because he was incarcerated. He began serving his prison term in 1997 and was to be released sometime between August 1999 and July 2002. He had already served time in prison for drug offenses in the mid-1980s and had been convicted twice for misdemeanor domestic violence, in 1994 and 1996. According to the caseworker, MJC reported that his father was physically violent toward him, his half-brother, and his mother, and that he would hide under a table while Hines threw his brother against the wall. Hines denied using physical violence against his son or in his son's presence. Hines also testified that he had attended Narcotics Anonymous and Alcoholics Anonymous meetings while incarcerated. He claimed that his mother, MJC's grandmother, would assist him financially and provide a home for him and MJC after he was released, until he found work. Although he had not seen his son since 1997, Hines testified that he contacted MJC through relatives who visited him in prison. It appears that he rarely contacted MJC by letter, and he did not see or speak to him while he was incarcerated.

The family court terminated Hines' parental rights under MCL 712A.19b(3)(a)(ii), (c)(i), (h) and (j); MSA 27.3178(598.19b)(3)(a)(ii), (c)(i), (h) and (j). Although the family court noted Hines' incarceration, as well as his past-due child support, it focused on the evidence of past domestic violence in explaining its decision. On appeal, Hines challenges each of the grounds for termination and raises a number of additional arguments.

II. Statutory Grounds For Termination

A. Standard Of Review

To terminate parental rights, the family court must find that at least one statutory ground was established by clear and convincing evidence.[2] This Court reviews a family court's decision to terminate parental rights for clear error.[3] A finding is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made.[4]

B. Desertion

Hines contends that the family court erred when it terminated his parental rights under MCL 712A.19b(3)(a)(ii); MSA 27.3178(598.19b)(3)(a)(ii) because he did not leave his child

[2] *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).

[3] *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999).

[4] *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

voluntarily and because he kept in contact with the child during his incarceration. We disagree. Subsection (3)(a)(ii) requires a family court to "terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence . . . [t]he parent of a child has deserted the child for 91 or more days and has not sought custody of the child during that period."[5] At the time of the termination hearing in this case, Hines had been incarcerated for significantly longer than ninety-one days. While he was incarcerated, he made no effort to plan for or financially support MJC, he made little, if any, effort to contact his son and, critically, he did not seek custody of his son during this time. This constituted desertion.[6]

C. Failure To Correct Conditions Leading To Adjudication

Hines argues that the family court lacked clear and convincing evidence to terminate his parental rights under MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i). Subsection (c)(i) requires a family court to "terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence . . . [t]he parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

The condition first leading to adjudication was the neglect of MJC. At that time, MJC was living with his mother in inappropriate housing with alleged drug users and MJC's mother was suspected of using illegal drugs herself and had to be hospitalized for an overdose of prescription drugs and alcohol. Hines was not personally caring for his son at that time, primarily because he was incarcerated. However, he had contributed to MJC's neglect because he had paid little of the child support he owed and he was not in contact with his son.

When the family court terminated Hines' parental rights, more than 182 days had elapsed since the July 1998 dispositional order. Hines was still incarcerated and still had not developed a plan for caring for MJC while he was in prison. Although Hines testified that he was eligible for parole in August 1999, he was serving a one-to-six-year sentence and faced the possibility of incarceration until July 2002. Three years was not a reasonable amount of time for MJC to wait to live with his father, considering the fact that he was only six years old. Even when released, the record does not suggest that Hines would be willing or able to care for his son. Though Hines claimed that his own mother would be able to assist him in caring for MJC, he never provided any details concerning how that arrangement would work. Because there was evidence of every element of this statutory ground for termination, we do not see any clear error in the family court's decision to terminate Hines' parental rights under subsection (c)(i).

In a related argument, Hines contends that the family court could not terminate his parental rights under this subsection because the FIA did not give him a parent/agency agreement. He claims that, had he been given a parent/agency agreement, it would have assisted

[5] MCL 712A.19b(3)(a)(ii); MSA 27.3178(598.19b)(3)(a)(ii).

[6] See *In re Hall*, 188 Mich App 217, 22-224; 469 NW2d 56 (1991).

him in rectifying the conditions that led to adjudication and that FIA had a duty to assist him in this way.

The FIA does have an obligation to make reasonable efforts to reunite a parent and child *if* doing so would be safe for the child.[7] Making these reasonable efforts carries out "the policy of this state to keep children with their natural parents whenever possible."[8] In this case, however, Hines showed no interest in providing a home or support for his son while he was incarcerated. Thus we question the value of providing services aimed at reuniting him with his son while Hines was still in prison. Of more importance is the fact that Hines' history of abusing his son and others indicates that reuniting Hines with MJC would not be safe for the child and, therefore, not a legitimate goal for a parent/agency agreement. Further, Hines has not specified what services the FIA should have offered him, which makes it even more difficult to conclude that these services would have helped him in any manner, much less in a way that would have helped him eventually regain custody of his son. As a result, there is no reason to conclude that the family court clearly erred when it terminated his parental rights under subsection (c)(i) simply because there was no parent/agency agreement between Hines and the FIA in this case.

D. Imprisonment

Hines contends that the family court erred when it terminated his rights under MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h) because he was eligible for parole just four months after the termination hearing and in fact was paroled in August 1999. Under subsection (h), a family court must "terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence . . . [t]he parent is imprisoned for such a period of time 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 age of the child."[9] MJC was living with his mother in 1997 when Hines entered prison. Hines always had an obligation to provide proper care and custody for his son. But, because MJC's mother voluntarily relinquished her parental rights in 1998, it became imperative for Hines to produce a plan for caring for his son at that time. Yet, Hines admitted that he was unable to provide a home or financial support for MJC while he was incarcerated. When his parental rights were terminated, Hines' next parole hearing was in August 1999, which was two years after he was first incarcerated. At the time of the termination hearing, he was facing a possibility of three more years in prison, which was not a reasonable amount of time for MJC to wait for a normal home, considering his young age; quite obviously, six-year-old children require permanency. Four months was a long time to wait for the mere *possibility* that Hines would be paroled given the amount of time MJC had already spent in foster care. Thus, while the family

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[7] See MCL 712A.18f(4); MSA 27.3178(598.18f)(4); MCL 712A.19a(4); MSA 27.3178(598.19a)(4); see also *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000); *Tallman v Milton*, 192 Mich App 606, 614-615; 482 187 (1992).

[8] *In re Springer*, 172 Mich App 466, 474-475; 432 NW2d 342 (1988).

[9] MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h).

court may have been able to postpone this termination decision until after Hines' parole hearing, it did not clearly err by terminating his parental rights under subsection (h) in April 1999.

E. Likelihood Of Future Harm

Hines contends that there was insufficient evidence to terminate his rights under MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(j) because the only relevant evidence of physical harm to MJC was inadmissible hearsay. Under subsection (j), a family court must "terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence . . .[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."[10] There was ample evidence of the possibility of this sort of harm happening to MJC if he had been returned to his father. For instance, a caseworker testified that MJC said his father physically abused him as well as his brother. Although Hines correctly notes that this repetition of MJC's claims concerning abuse in his home was hearsay,[11] it was admissible in this dispositional phase of the proceedings in the family court.[12] Contrary to Hines' argument, this testimony was not the only evidence that MJC would be harmed if he was returned to his father. Hines was also convicted twice of domestic abuse against MJC's mother, which tended to corroborate the child's recollection of abuse. Overall, the evidence demonstrated a reasonable likelihood that MJC would be harmed if he was eventually reunited with his father and supported termination on this ground.

III. Notice

Hines claims that the family court could not terminate his parental rights because he never received a copy of the termination petition. A noncustodial parent must receive notice of a petition and the time and place of an adjudicative hearing, or all proceedings are rendered void.[13] According to the record, Hines was personally served with a summons, which notified him of the original petition and the July 1998 hearing. Hines was also personally served with a summons notifying him of the April 1999 termination hearing. Thus, Hines did received the required notice and he is not entitled to relief on this basis.

IV. Physical Presence At The Termination Hearing

Hines also argues that he was denied due process because he was not physically present at the termination hearing. Contrary to Hines' argument, MCL 712A.19; MSA 27.3178(598.19) does not require a parent's physical presence at a termination hearing.[14] Although a family court

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[10] MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(j).

[11] We also note that Hines' own attorney elicited this testimony during cross-examination of the caseworker. A party may not "assign error on appeal to something which his own counsel deemed proper at trial." *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

[12] *In re Henson*, 135 Mich App 472, 474; 354 NW2d 794 (1985).

[13] *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993); *In re Adair*, 191 Mich App 710, 713-714, 478 NW2d 667 (1991); MCL 712A.12; MSA 27.3178(598.12).

[14] *In re Vasquez*, 199 Mich App 44, 49; 501 NW2d 231 (1993).

cannot prevent a parent from attending the hearing, it does not have an absolute obligation to secure the parent's physical presence.[15] Furthermore, Hines was able to participate personally in the hearings by telephone. When Hines complained that he could not hear everything that was said, the family court took quick action to resolve this problem. He also was assisted by an attorney who was physically present at the termination hearing. Thus, Hines' due process rights were protected.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Kelly
/s/ William C. Whitbeck

[15] *Id.*