

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DEVIN MYKEL BURCIAGA,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ROMERO HENRY,

Respondent-Appellant.

UNPUBLISHED

November 29, 2007

No. 277399

Lenawee Circuit Court

Family Division

LC No. 05-000436-NA

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Respondent-appellant, the father of Devin Mykel Burciaga, appeals as of right a circuit court order terminating his parental rights pursuant to MCL 712A.19b(3)(a)(i) [the parent is unidentifiable and has deserted the child for 28 or more days]; (ii) [the parent has deserted the child for 91 or more days]; (c)(i) [the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the child's age]; (g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that he might do so within a reasonable time given the child's age], and (j) [based on the parent's conduct or capacity there is a reasonable likelihood that the child will be harmed if returned to the parent's home]. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

On October 25, 2005, petitioner removed Devin from his mother's care because she regularly used crack cocaine, lived with known drug dealers, including respondent, and refused to cooperate with treatment. Respondent filed an affidavit of parentage on November 15, 2005 asserting his legal status as Devin's father. At a hearing held that day, respondent stipulated to the circuit court's exercise of jurisdiction over Devin, and the court ordered Devin's temporary placement with his maternal grandparents.

At a dispositional review hearing on December 20, 2005, counsel for respondent advised the court that respondent was on parole, and did not learn of Devin's birth until "the last minute." According to his counsel, respondent was nevertheless "willing to step forward and do

everything possible to be a father here.” The circuit court approved a case service plan requiring respondent to secure and maintain employment, provide income verification, meet with the caseworker monthly, and complete a substance abuse assessment.

At the next review hearing on March 21, 2006, the caseworker testified that respondent was in compliance with the case service plan, but intended to move out of state when he completed his parole. Respondent told the circuit court that he had a job in South Carolina. The court ordered him to continue to look for work and to make regular reports of his efforts to find employment.

Respondent appeared by telephone at the next review hearing, on June 6, 2006. He advised the circuit court that he was in Georgia, and expressed an interest in visiting Devin, who remained in the care of his maternal grandparents. The court and counsel arranged for respondent to schedule visitation by calling his attorney. According to the caseworker’s report, respondent had not visited Devin during the preceding three months.

At the next review hearing on August 29, 2006, respondent’s counsel told the circuit court that he had received no communication from respondent since the previous hearing. On November 28, 2006, respondent’s counsel reiterated to the court that respondent had not made contact, either by telephone or in writing.

On December 11, 2006, petitioner filed a permanent custody petition seeking to terminate respondent’s parental rights. The petition alleged that respondent failed to notify the circuit court or petitioner of his address, did not verify employment, income, or suitable housing, and for more than six months failed to visit or financially support Devin.

At the termination hearing held on April 3, 2007, respondent testified that he currently resided in the Lenawee County Jail, serving a nine-month sentence imposed following his guilty plea to attempted delivery of less than 50 grams of cocaine. Respondent stated he was employed sporadically before his arrest. He claimed to have called Devin’s caseworker a couple of times during the preceding ten months, but could not remember any specifics. Respondent conceded that he forgot the phone number of Devin’s grandparents and did not call, visit, or contact Devin after June 2006. He admitted that he lacked employment and could not provide financial support for Devin, but insisted that he would “eagerly” seek employment when released from jail. He estimated that within six months of his release, he could find suitable employment.

Virginia Oswald, Devin’s caseworker, testified that respondent failed to provide a current address after he returned from South Carolina, and did not verify income or employment. She told the circuit court that respondent failed to arrange suitable housing for himself or Devin, contact her on a monthly basis, or visit Devin after December 2005.

On April 4, 2007, the circuit court terminated respondent’s parental rights. Respondent now appeals as of right.

II. Issues Presented and Analysis

Respondent first contends that insufficient evidence of any statutory ground supported the circuit court’s decision to terminate his parental rights.

This Court reviews for clear error a circuit court's finding that a ground for termination has been established by clear and convincing evidence "and, where appropriate, the court's decision regarding the child's best interest." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005) (internal quotation omitted); see also MCR 3.977(J). "A trial court's decision to terminate parental rights 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 had been made." *In re Gazella*, 264 Mich App 668, 672; 692 NW2d 708 (2005).

Respondent admitted that he did not call, visit, or make any attempt to contact his son during the six months preceding the filing of the petition to terminate his rights. This admission constituted clear and convincing evidence that respondent deserted Devin for at least 91 days. Pursuant to MCL 712A.19b(3)(a)(ii), the circuit court appropriately terminated his parental rights.

Furthermore, clear and convincing evidence established that the conditions leading to the adjudication continued to exist without reasonable likelihood of correction within a reasonable time. Respondent did not know of Devin's existence until shortly before he stipulated to jurisdiction. The circuit court placed Devin with his maternal grandparents, and offered respondent an opportunity to become part of his son's life. Despite the availability of regular visitation during most of the next year, respondent's absence from Devin's life continued. Respondent neither visited Devin nor provided him with financial support. The record therefore reveals clear and convincing evidence establishing MCL 712A.19b(3)(c)(i).

We also find clear and convincing evidence that respondent failed to provide proper care or custody for Devin, and that no reasonable expectation existed that he could do so within a reasonable time considering Devin's young age. The record clearly and convincingly establishes that respondent never gave Devin anything other than a few toys. Respondent's criminal conviction and incarceration made it impossible for him to support Devin, or to obtain suitable housing, in the foreseeable future. The circuit court thus appropriately invoked MCL 712A.19b(3)(g) as a ground for terminating respondent's parental rights.

We further observe that the circuit court properly relied on MCL 712A.19b(3)(j), which authorizes termination if "[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." At the time of the termination hearing, respondent had no housing or job, and was incarcerated for selling drugs. Although Devin first entered foster care because of his mother's substance abuse problems, respondent had an ample opportunity to take responsibility for Devin. Instead, respondent moved out of the state, ignored his son, and acquired drug-related criminal convictions when he returned to Michigan. The record also clearly and convincingly establishes that respondent failed to comply with the case service plan. *In re Trejo*, 462 Mich 341, 346 n 3; 612 NW2d 407 (2000), quoting former MCR 5.973(C)(4)(b), currently located at MCR 3.976(E)(1) (observing that a parent's "[f]ailure to substantially comply with a court-ordered case service plan 'is evidence that return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well being'"). Therefore, clear and convincing evidence supported the circuit court's finding of a reasonable likelihood that Devin would suffer harm if placed in respondent's custody.

In summary, the trial court correctly terminated respondent's parental rights pursuant to subsections 19b(3)(a)(ii), (c)(i), (g) and (j).

Respondent also contends that the termination of his rights conflicted with Devin's best interests. Once a ground for termination under MCL 712A.19b(3) is established, "the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5).

The evidence presented does not support a finding that terminating respondent's parental rights would clearly contravene Devin's best interests. Respondent had no contact with Devin for more than a year. Respondent did not know he was Devin's father until Devin was three-years-old, and after acknowledging paternity he never assumed responsibility for Devin's day-to-day care or financial support. According to the caseworker, Devin adjusted well to living with his grandparents and thrived in their home. We find no clear error in the circuit court's determination that "there was no evidence presented that it's not in the child's best interest to terminate" respondent's parental rights.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher