STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KYLIE GRACE LABO, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MONICA GRACE LABO,

Respondent-Appellant,

and

ERIC JAMES LABO,

Respondent.

UNPUBLISHED
March 11, 2008

No. 279231
Oakland Circuit Court
Family Division
LC No. 06-724342-NA

In the Matter of KYLIE GRACE LABO, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ERIC JAMES LABO,

Respondent-Appellant,

and

MONICA GRACE LABO,

Respondent.

No. 279370
Oakland Circuit Court
Family Division
LC No. 06-724342-NA

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother appeals as of right from the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(f), (g), and (j), and respondent-father appeals as of right from the same order terminating his parental rights to the child under MCL 712A.19b(3)(f) and (g). We affirm.

I. Facts and Proceedings

Following the minor child's birth in October 2003, respondents became addicted to heroin and protective services became involved with the family. In order to avoid the child being placed in foster care, respondents agreed to place her in a limited guardianship with her maternal grandmother, Patricia Denny. Pursuant to a March 2004 guardianship plan, respondents agreed to become drug free, find employment and housing, visit the child, and provide $400 monthly. In the first six months of the guardianship, respondents visited sporadically, never phoned, and did not provide any support. The guardianship was renewed for an additional six months. Shortly afterwards, Denny, who was struggling financially and emotionally, petitioned the court to name her neighbor and friend, Michelle LaPierre, who had been helping Denny care for the child, as co-guardian. In November 2004, the child moved in with LaPierre, who began providing for all of her needs. After the limited guardianship had been in effect for a full year, the court, finding that respondents had failed to comply with the terms of the guardianship agreement, converted the limited guardianship to a full guardianship. On July 31, 2006, the child's guardian ad litem filed a petition to terminate both respondents' parental rights. Petitioner filed a termination petition, with the guardian ad litem as co-petitioner, on September 26, 2006.

Respondents requested a jury trial on the issue of jurisdiction. The court advised the jury to consider the two-year period preceding the filing of the July 31, 2006, petition in establishing the court's jurisdiction over the child. Denny testified that, during the nine months the child was in her care, respondents had not provided any financial support, had visited only sporadically, had not called, and had written only a few letters. LaPierre testified that, from the time the child came into her care in November 2004 to the date the petition was filed on July 31, 2006, respondent-mother had provided three $50 checks, two dresses, and a purse for the child's support, and had visited the child between five and ten times. During that same time, respondent-father had not provided any financial support, had visited the child about five times, and did not send any correspondence.

The evidence showed that respondent-father had been incarcerated from October 2004 to February 2005. Upon his release, he moved, placing him about three hours away from the minor child's home. In December 2005, he became employed as a merchandising carpenter for Lowe's Home Improvement Stores, a job requiring his assignment to different stores across the country for eight-week stints to remodel stores. Beginning February 25, 2006, $236 was withheld from respondent-father's biweekly paychecks for child support.[1] As of July 31, 2006, respondent-father had paid over $900 pursuant to withholding. He testified that he was prepared to care for

[1] Although the evidence showed this money was withheld, it was not clear whether Dennis or LaPierre had actually received any of these funds.

the child and had planned to have his sister-in-law and brother care for her when he was on job assignments. He claimed to have stopped using drugs upon his October 2004 incarceration.

Respondent-mother testified that she was either incarcerated or in rehabilitation programs for a year and a half between March 2005 and March 2007. She had last been incarcerated in May 2006 and anticipated being released in April 2007. She claimed she had not used drugs since May 2006.

The jury found that jurisdiction had been established. The court ordered that both respondents undergo psychological evaluations to help the court with the best interests determination. At the best interests hearing on May 25, 2007, the evaluator testified that respondent-father had cancelled his appointment for an evaluation and failed to reschedule in a timely manner. Respondent-mother had participated in an evaluation, and the evaluator found that she was an individual who was likely to engage in risk-taking behaviors and have difficulty benefiting from her experiences. The evaluator concluded that there was no reasonable likelihood that respondent-mother would be able to provide appropriate care and custody for the child within a reasonable time due to her history, current test findings, and the failure of substance abuse treatment.

II. Analysis

On appeal, respondents first challenge termination under each of the statutory grounds cited by the court. We review the trial court's findings for clear error. MCR 3.977(J). Termination under MCL 712A.19b(3)(f) requires consideration of a parent's contributions and contacts during the two years preceding the filing of the termination petition. In considering the support provision of MCL 712A.19b(3)(f)(i), if a support order is in place, the petitioner needs only to prove that the parent has failed to comply with the order for the statutory period. See *In re Hill*, 221 Mich App 683, 692; 562 NW2d 254 (1997).

With regard to respondent-father, a January 22, 2004, default judgment against him required child support in the amount of $257 per month. Respondent-father did not pay any child support until February 2006, and he paid over $900 between February 2006 and July 31, 2006, pursuant to withholding from his biweekly paychecks. Because respondent-father had contributed substantially less than required under the January 2004 support order during the two years before the termination petition was filed, the trial court did not clearly err in finding that respondent-father had failed to provide support as required under MCL 712A.19b(3)(f)(i).

Under the second prong of MCL 712A.19b(3)(f), there must be clear and convincing evidence that respondent-father failed to "regularly and substantially" visit, contact or communicate with his child for the two years preceding the filing of the termination petition. The evidence of respondent-father's minimal contacts with the child was sufficient to establish that he had failed to regularly and substantially visit, contact, or communicate with her. Respondent-father argues that his circumstances, including his incarceration, subsequent move away from the minor child's home, and employment requiring out of area assignments, place him outside the statute because he lacked the ability to visit. However, these circumstances did not preclude him from contacting the child by phone or mail. Thus, the trial court did not clearly err when it found a lack of regular and substantial contact in support of the second prong for termination under MCL 712A.19b(3)(f). Because both prongs for termination, support and

contact, were established with regard to respondent-father, the trial court did not clearly err in terminating respondent-father's parental rights under MCL 712A.19b(3)(f).

With regard to respondent-mother, no support order was in place, and the court therefore had to consider whether "the parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition." The court could properly conclude that respondent-mother's contribution did not constitute "regular and substantial" support for the minor. However, respondent-mother argues that she is excused under the statute from providing financial support because she lacked the ability to provide such support due to her incarceration and unemployment. A parent's incarceration does not excuse them from their obligation to provide support. See *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). However, the evidence showed that respondent-mother had a very limited income because of her incarcerations and sporadic employment. There was no evidence that respondent-mother had any source of funds to contribute towards the child's support. Because she was unable to provide regular and substantial support, the first prong for termination under MCL 712A.19b(3)(f) could not be established with regard to respondent-mother. Thus, the trial court clearly erred when it terminated respondent-mother's parental rights under MCL 712A.19b(3)(f). However, this error was harmless in light of the evidence supporting the other statutory grounds cited by the court in support of termination of respondent-mother's parental rights. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

The court also terminated both respondents' parental rights under MCL 712A.19b(3)(g), which requires clear and convincing evidence that 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 would be able to provide proper care and custody within a reasonable time considering the child's age. The court did not clearly err when it terminated respondent-mother's parental rights under MCL 712A.19b(3)(g) where the evidence showed that, as of the best interests hearing, respondent-mother had no housing, no employment, and had failed to establish that she could maintain sobriety outside of prison.[2]

In considering termination of respondent-father's parental rights under MCL 712A.19b(3)(g), the court conceded that respondent-father had successfully demonstrated his rehabilitation by stopping his heroin use, obtaining employment, and paying child support. However, the court concluded that respondent-father could not provide proper custody and care for the child where his employment took him away from home for extended periods and he

[2] In terminating respondent-mother's parental rights, the court also relied upon MCL 712A.19b(3)(j), which requires clear and convincing evidence that there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if returned to the home of the parent. The court was concerned that respondent-mother had failed to establish that she was drug-free. Although she claimed not to have used drugs since May 2006, she had been incarcerated from May 2006 until a few weeks before the best interests hearing. The evaluator who performed respondent-mother's psychological evaluation found that respondent-mother was likely to engage in risk-taking behavior and return to her past conduct. In light of this evidence the trial court did not clearly err when it terminated respondent-mother's parental rights under MCL 712A.19b(3)(j).

planned to leave the child with his brother and sister-in-law while on his frequent and extended out-of-town job assignments. The court conceded that, in certain circumstances, respondent-father's plan would be acceptable but not in the instant case where the child had seen respondent-father only sporadically since she was four months old and had never met her paternal aunt and uncle. In light of the facts and the court's reasoning, the court did not clearly err when it terminated respondent-father's parental rights under this section.

Respondents also contend that termination was contrary to the child's best interests. Where there are statutory grounds for termination of parental rights, MCL 712A.19b(5) provides that the court must order termination "unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." *In re Trejo*, 462 Mich 341, 351; 612 NW2d 407 (2000). In light of the evidence showing that the minor child, three and a-half years old at the time of the termination trial, had limited contact or communication with respondents during the three years before the trial and did not recognize respondents as her parents, the trial court did not clearly err in finding that termination of both respondents' parental rights was not contrary to the child's best interests.

Affirmed.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood