STATE OF MICHIGAN

COURT OF APPEALS

In re E. A. MOSES-RUSH, Minor.

UNPUBLISHED
February 16, 2016

No. 328127
Wayne Circuit Court
Family Division
LC No. 13-514910-NA

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right the termination of her parental rights to her minor child, EAMR, pursuant to MCL 712A.19b(3)(a)(*ii*) (desertion), MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), and MCL 712A.19b(3)(g) (failure to provide proper care and custody). We affirm.

I. FACTS

On November 12, 2013, the Department of Health and Human Services (DHHS) petitioned to remove EAMR from respondent's care and terminate respondent's parental rights because (1) respondent's parental rights to three other children had previously been terminated[1] and (2) EAMR was born positive for marijuana. The trial court removed EAMR from respondent's care. On November 20, 2013, the trial court authorized the petition. The child was placed in the care of maternal relatives in Mt. Pleasant.

On December 19, 2013, the parties began their first termination trial. Notably, respondent testified to problems visiting EAMR in Mt. Pleasant while she was living in Detroit, explaining that she had a car, but that the drive took her three and a half hours, and, at one point, she needed new tires on her car to make the trip. Because of these problems, respondent visited EAMR for the first time since he was placed in Mt. Pleasant on February 10, 2014. At the conclusion of trial, on February 18, 2014, the trial court took jurisdiction over EAMR but declined to terminate respondent's parental rights.

[1] The petition alleged that respondent's parental rights to her other children were terminated previously because of "physical neglect, improper supervision neglect, physical abuse and drug positive infant abuse."

The DHHS foster care specialist assigned to the case, Charlene Whitsett, explained the newly developed treatment plan, calling for respondent to secure housing, acquire parenting skills, achieve emotional stability through counseling, and address substance abuse through counseling and drug screening. Additionally, DHHS requested that respondent to complete a psychological evaluation. The trial court also ordered respondent to attend visitation with EAMR in Mt. Pleasant and maintain weekly contact with Whitsett.

Respondent failed to comply with services, so DHHS asked to file a petition to terminate respondent's parental rights. The trial court authorized filing of the petition. During the second termination trial, which began on May 15, 2015, Whitsett explained that respondent failed to maintain suitable housing and moved around a lot. Because of these frequent moves, Whitsett characterized her contact with respondent as "sporadic," consisting of limited phone calls. Whitsett claimed that her last contact with respondent was in court in October 2014. Whitsett described respondent's compliance with the treatment plan as "[t]otally in noncompliance." Respondent had been referred to and terminated from parenting classes and individual therapy four times. Respondent failed to set up drug screens and had at least one positive test for marijuana. Whitsett also characterized respondent's participation in visitation as sporadic, explaining that respondent's last documented visitation was almost 13 months prior, on April 29, 2014. Additionally, respondent failed to provide EAMR financial support.

Respondent explained that she moved to Las Vegas on March 8, 2015 "to try to provide a better life for myself and come back and fight for my son." Now, respondent claimed to have secured housing in both Detroit and Las Vegas. Respondent claimed that she tried to contact Whitsett 30 times and left some voice mails, but Whitsett never called her back. Respondent testified that she could not comply with the treatment plan because she was required to attend visitation in Mt. Pleasant and complete treatment in Detroit, sometimes on the same day. So, respondent enrolled in and completed a different parenting class in Mt. Pleasant. Respondent admitted that she "had a substance abuse issue with marijuana," but claimed that she was now addressing the problem. In explaining her visitation with EAMR, respondent testified that she last visited EAMR on April 29, 2014, and then was informed that her visitation was suspended. Whitsett denied this claim. Further, respondent testified that when she visited EAMR, she brought him diapers, food, clothes, and toys. While in Las Vegas, respondent explained that she gave birth to a fifth child, AEMR, who was the subject of a court case in Las Vegas. She explained that, like EAMR, AEMR was born "positive for substances." But unlike EAMR's case, she explained, she expected to be reunited with AEMR in six months because she was completing her Nevada treatment plan and visiting AEMR regularly.

The trial court found statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), and (g). In doing so, it observed that it had to resolve a direct conflict between Whitsett's and respondent's testimony, remarking that it could not observe respondent's demeanor from over the phone and explaining that it believed Whitsett's testimony was truthful. At the June 16, 2015 best-interest portion of the trial, Whitsett testified that it was in EAMR's best interests to terminate respondent's parental rights because respondent had not rectified any of the conditions that brought EAMR into care. Respondent opposed termination. Respondent, again, testified that she completed parenting classes in Mt. Pleasant and reiterated her difficulties with visiting EAMR in Mt. Pleasant. The trial court found by a preponderance of the evidence that it was in EAMR's best interests to terminate respondent's parental rights.

II. STATUTORY GROUNDS

Respondent argues that the trial court lacked statutory grounds to terminate her parental rights. We disagree.

We review for clear error a trial court's factual findings and determination of whether statutory grounds exist to terminate parental rights. *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). "The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake." *Id*. at 709-710.

In this case, the trial court terminated respondent's parental rights under three statutory grounds: MCL 712A.19b(3)(a)(*ii*), (c)(*i*), and (g). Although only one statutory ground must be found for termination, *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012), we affirm on all three grounds.

A. MCL 712A.19b(3)(a)(*ii*)

The trial court must find statutory grounds to terminate parental rights under MCL 712A.19b(3)(a)(*ii*) if it finds clear and convincing evidence that the "parent has deserted the child for 91 or more days and has not sought custody of the child during that period." MCL 712A.19b(3)(a)(*ii*). Desertion must be an intentional and willful act. *In re B & J*, 279 Mich App 12, 18 n 3; 756 NW2d 234 (2008).

In *In re Laster*, 303 Mich App 485, 492; 845 NW2d 540 (2013), this Court upheld termination under this subsection for a child's father, but found clear error in terminating the mother's parental rights. The children were removed from their parents' care on April 25, 2011, and the termination petition was filed sometime after June 26, 2012. *Id*. at 491. This Court affirmed termination of the father's parental rights because he moved out of state in 2010, had not visited the children since April 2011, failed to provide support for the children, and failed to comply with the one court ordered service. *Id*. at 492. Therefore, the father had not physically seen the children for at least 14 months at the time the termination petition was filed. *Id*. at 491-492. In contrast, the trial court clearly erred in finding that MCL 712A.19b(3)(a)(*ii*) provided a statutory basis for termination with regard to the mother because, in the 1 ½ years before the filing of the termination petition, the mother had "contact with the children and did participate in some, although very few, of the court hearings and required services." *Id*. at 492.

In this case, respondent's conduct is more similar to that of the father in *Laster*. When DHHS petitioned to terminate respondent's parental rights in April 2015, respondent had not visited or contacted EAMR since April 29, 2014. She then moved to Las Vegas before the termination proceedings began. Determining whether the April 29, 2014 end to parenting time was an intentional, willful decision was essentially a credibility contest. Respondent testified that she intended to visit EAMR after April 29, 2014, but that her visits were suspended. Whitsett denied terminating respondent's parenting visits; in fact, the trial court ordered visitation as late as December 23, 2014. The trial court identified this credibility conflict and found Whitsett's testimony credible, and we defer to the trial court's credibility determinations. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Further, respondent participated in few, if any, DHHS referred services for EAMR's case. Respondent testified that she secured housing in Detroit and Las Vegas, but Whitsett lacked this information. Respondent testified that she completed a parenting class, but not the parenting class to which DHHS referred her. Instead, respondent was terminated from the referred parenting class and therapy four times. Respondent missed or failed to set up many drug tests, and had at least one positive test for marijuana. Respondent's attendance at parenting time was sporadic at best. In addition, although respondent claims that she was complaint with her service plan in Las Vegas, respondent cites no authority to support her argument that compliance with a separate service plan for a separate child in separate state shows that she did not desert EAMR. Therefore, the trial court did not clearly err in finding statutory grounds to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(a)(*ii*). See *Laster*, 303 Mich App at 491-492.

B. MCL 712A.19b(3)(c)(*i*)

The trial court finds a statutory basis to terminate parental rights under MCL 712A.19b(3)(c)(*i*) if it finds clear and convincing evidence that "[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 "[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 child's age."

A reasonable time to correct such conditions is determined by considering both the period needed for the parent to rectify the conditions and the period the child can wait. *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991) (affirming termination when the respondent needed two to three years of therapy to care for her children and the "young" children had "pervasive behavior disorders" requiring "extensive attention"). For example, in *In re Williams*, 286 Mich App 253, 272-273; 779 NW2d 286 (2009), the respondent needed a "lengthy" period to address her drug addiction. But the child in question was less than two years old and had been in foster care for her entire life. *Id*. at 273. Therefore, this Court did not find clear error in the statutory grounds finding. *Id*. at 272-273.

In this case, more than 182 days "elapsed since the issuance of an initial dispositional order." MCL 712A.19b(3)(c)(*i*). The trial court took jurisdiction over EAMR and entered the first dispositional order on February 18, 2014. The trial court did not find statutory grounds to terminate respondent's parental rights until May 15, 2015. The conditions that led to EAMR's removal are less clear. DHHS petitioned to remove EAMR because (1) respondent had previous termination cases, and (2) EAMR was born positive for marijuana. The initial petition explained that respondent's rights to her other children were terminated because of "abuse and neglect of the children, which included: physical neglect, improper supervision neglect, physical abuse and drug positive infant abuse." At the termination trial, Whitsett testified that respondent still lacked housing, had positive drug tests, failed to complete drug screens, failed to visit the child, and failed to complete other services. And, again, we defer to the trial court's credibility findings. See *Miller*, 433 Mich at 337.

When addressing the second reason EAMR came into care—his birth positive for marijuana—the facts indicate that respondent has not addressed her marijuana use. Respondent

admitted to a marijuana issue and missed drug tests, and Whitsett testified that respondent had at least one positive drug screen. Respondent explained that she had her first *negative* drug test in Nevada only one month before termination, and EAMR had been in care 18 months before the termination proceedings. Such a situation is similar to that in *In re Conley*, 216 Mich App 41, 43-44; 549 NW2d 353 (1996), in which the respondent gave birth to a child with fetal alcohol syndrome and then continued to use alcohol throughout the termination proceeding. Therefore, the trial court did not clearly err in finding that the "conditions that led to the adjudication continue to exist." MCL 712A.19b(3)(c)(*i*).

No specific timetable was discussed for respondent to rectify the conditions that brought EAMR into care, but by the time that the trial court found statutory grounds to terminate respondent's parental rights, EAMR had been in care for approximately 18 months, and, according to Whitsett, respondent had failed to attend services the entire time. Instead, she was discharged from parenting class and individual therapy four times. EAMR had no special needs, but he had been in care for almost his entire 18-month life. Thus, the trial court did not err in finding no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's young age. Therefore, the trial court did not err in terminating respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*).[2]

C. MCL 712A.19b(3)(g)

The trial court has a statutory basis to terminate parental rights under MCL 712A.19b(3)(g) if it finds clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child 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." In *In re BZ*, 264 Mich App 286, 300; 690 NW2d 505 (2004), this Court affirmed termination when a parent "minimally complied" with her treatment plan. The respondent attended her psychological evaluation, secured temporary employment, and separated from an abusive boyfriend. *Id*. at 298-300. But, the respondent failed to visit her children regularly, interact with her children during visitation, secure stable housing, attend an ordered parenting class, or complete counseling. *Id*. at 297-300.

In this case, respondent failed to comply with her treatment plan. She was ordered to secure housing, acquire parenting skills, attend individual counseling, address her substance abuse, attend supervised visitation, and maintain weekly contact with Whitsett. Instead, respondent constantly moved: living at a hotel near Detroit, then with a relative, then at an

[2] Within her argument on MCL 712A.19b(3)(c)(*i*), respondent advances two additional arguments. First, she argues that MCL 712A.19b(3)(m) did not support termination, but the trial court did not terminate respondent's parental rights under this ground. Second, she argues that DHHS failed to provide reasonable efforts to reunite her with EAMR, but DHHS provided respondent with services in Detroit. See *Frey*, 297 Mich App at 247-248. Respondent provides no support for her argument that DHHS was also required to provide her services in Mt. Pleasant.

address in Mt. Pleasant, then a home in Detroit, and then in Las Vegas. Respondent was terminated from parenting classes and individual counseling four times. Respondent missed drug tests and yielded at least one positive test. Respondent did not visit EAMR from November 12, 2013 through February 10, 2014, visited sporadically until April 29, 2014, and failed to visit her son after April 29, 2014. Lastly, respondent did not maintain weekly contact with Whitsett. At best, respondent was "minimally compliant" with her service plan in acquiring some housing and attending a parenting class, but such minimal compliance would, like in *BZ*, still support termination. Therefore, the trial court did not err in finding statutory grounds to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(g). See *BZ*, 264 Mich App at 297-300.

III. BEST INTERESTS

Respondent argues that the trial court clearly erred in finding that termination of her parental rights was in EAMR's best interests. We disagree.

We review for clear error whether termination of parental rights is in a child's best interest. *White*, 303 Mich App at 713. "The trial court must order the parent's rights terminated if the Department has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the [child's] best interests." *Id*. Best-interest factors include the parent-child bond; parenting ability; the child's need for permanency, stability, and finality; and the advantages of the foster home over the respondent's home. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). Placement with a relative weighs *against*, but does not preclude, termination. *Id*. at 43. "Other considerations include the length of time the child was in care, the likelihood that 'the child could be returned to her parents' home within the foreseeable future, if at all,' and compliance with the case service plan." *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, ___; ___ NW2d ___ (2015); slip op at 7-8, quoting *Frey*, 297 Mich App at 248-249.

In this case, the trial court's findings overlapped with many of the best-interest factors articulated in caselaw. The trial court noted that EAMR had a bond with his foster care parents, not respondent, a conclusion supported by the fact that EAMR had been placed in foster care for almost his entire life and the fact that respondent did not have any contact with EAMR for over a year before termination. It addressed respondent's lack of parenting ability and lack of compliance with her case service plan, a conclusion supported by her failure to attend DHHS-offered services. It addressed EAMR's need for stability and lengthy foster care placement. And the trial court assessed EAMR's ability to maintain his cultural heritage and ties with his extended family in his foster home. Respondent argues that it is often in the best interests of children to be kept in the home with the siblings. This premise is based on the assumption of a sibling bond. See *Olive/Metts*, 297 Mich App at 42. EAMR lacked such a bond because he was born after his three older brothers were removed from respondent's care and was removed from respondent's care himself before his younger brother was born. Thus, the court properly considered relevant factors in determining that termination was in the child's best interests. See *Payne/Pumphrey/Fortson*, 311 Mich App at ___; slip op at 7-8; *Olive/Metts*, 297 Mich App at 41-42.

Respondent argues that the trial court erred in failing to consider the option of a guardianship in light of the fact that EAMR was placed with relatives. The trial court considered the child's placement with maternal cousins and found that placement with the maternal cousins *favored* termination. In *Olive/Metts*, this Court explained that "because 'a child's placement with relatives *weighs against termination* under MCL 712A.19a(6)(a),' 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." *Olive/Metts*, 297 Mich App at 43 (citation omitted; emphasis added). The trial court may terminate the respondent's parental rights if it finds that termination is in the child's best interests, even if the child is placed with relatives. *Id*. However, "the fact that the [child is] in the care of a relative at the time of the termination hearing is an 'explicit factor to consider in determining whether termination was in the [child's] best interests.' " *Id*. (citation omitted). In this case, the trial court *did* explicitly address EAMR's placement with respondent's cousins and found that this weighed in favor of termination. However, the court incorrectly referred to the placement as a relative placement because the maternal cousins with whom EAMR was placed were not "relatives" under the statutory definition of the term applicable to MCL 712A.19a(6)(a).

MCL 712A.13a(1)(j) applies to MCL 712A.19a and defines the term "relative" as including a "first cousin or first cousin once removed" of the child. Whitsett testified at the best-interest hearing that EAMR was placed with respondent's cousins. At the December 19, 2013 bench trial proceeding, respondent's attorney clarified that the cousins were in fact respondent's third or fourth cousins. Thus, the placement was not a "relative placement" under MCL 712A.19a(6)(a) since the cousins were respondent's third or fourth cousins, rather than the child's first cousins or first cousins once removed. See MCL 712A.13a(1)(j). Accordingly, because the placement was not a "relative placement," we conclude that the trial court was not bound to determine that the placement with the maternal cousins weighed against termination. See MCL 712A.19a(6)(a); *Olive/Metts*, 297 Mich App at 43. Respondent does not otherwise challenge the trial court's findings with regard to its conclusion that placement with the maternal cousins weighed in favor of termination. Additionally, there is no indication that the trial court's determination that the placement was a relative placement was detrimental to respondent in any other way. We conclude, therefore, that the trial court did not err when it found by a preponderance of the evidence that termination was in the child's best interests. See *White*, 303 Mich App at 713.

IV. CONCLUSION

The trial court properly found that MCL 712A.19b(3)(a)(*ii*), (c)(*i*), and (g) provided statutory grounds for termination of respondent's parental rights and that termination was in the child's best interests.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro