STATE OF MICHIGAN

COURT OF APPEALS

In re M M BROWN, Minor.

UNPUBLISHED
April 19, 2016

No. 329275
Wayne Circuit Court
Family Division
LC No. 14-516973-NA

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor daughter under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care and custody), (h) (parent is imprisoned for a period exceeding 2 years, parent has not provided for the child's proper care and custody, and no reasonable expectation parent will be able to provide proper care within a reasonable time), and (j) (reasonable likelihood of harm). For the reasons stated below, we reverse the trial court's order terminating respondent's parental rights and remand for further proceedings consistent with this opinion.

The trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), (h), and (j). Respondent contends that because the trial court based its findings on the length of his past incarceration, the trial court clearly erred on all four grounds. We agree.

"This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). A trial court's findings of fact are clearly erroneous if "we are definitely and firmly convinced that it made a mistake." *Id*. at 709-710.

Natural parents have a fundamental liberty interest in the companionship, care, custody, and management of their children. *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). If termination of parental rights is pursued, the petitioner bears the burden of showing that the allegations establish a statutory basis for termination by clear and convincing evidence. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). Only one statutory ground for termination need be established. *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012). If the court finds that there are grounds for termination, and that termination of parental rights is in the child's best interest, the court must order termination of parental rights. *In re Beck*, 488 Mich at 11.

In order for termination of parental rights to be proper under MCL 712A.19b(3)(h), the petitioner must establish that the parent is imprisoned for such a period that: 1) the child will be deprived of a normal home for over two years, 2) the incarcerated parent has not provided for the child's proper care and custody, and 3) 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 re Mason*, 486 Mich 142, 160-161; 782 NW2d 747 (2010). Termination is proper under MCL 712A.19b(3)(h) only if all three elements are established. *Id*. at 164-165. The two-year period considered in the first factor is prospective, begins at the time of the termination hearing and includes the time of incarceration in addition to the time required to provide the child with a suitable home after release. *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992).

Termination of parental rights is proper under MCL 712A.19b(3)(c)(*i*) if, after 182 days, "the 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." Termination of parental rights is proper under MCL 712A.19b(3)(g) when a parent "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." However, "[a]s under MCL 712A.19b(3)(h), each of these grounds requires clear and convincing proof that the parent has not provided proper care and custody *and* will not be able to provide proper care and custody within a reasonable time. As such, these additional grounds are factually repetitive and wholly encompassed by MCL 712A.19b(3)(h)." *In re Mason*, 486 Mich at 165 (emphasis added). Thus, if the court erred in evaluating whether respondent could care for his children in the future under MCL 712A.19b(3)(h), termination under MCL 712A.19b(3)(c)(*i*) or (*g*) is also premature. *Id*.

Clear and convincing evidence did not support the termination of respondent's parental rights under MCL 712A.19b(3)(h) because petitioner, the Department of Health and Human Services (DHHS), failed to establish the first and third requirements under that subsection. First, to constitute grounds for termination, MCL 712A.19b(3)(h) requires that the petitioner establish that the parent will be imprisoned for such a period that the child will be deprived of a normal home for over two years *following* the time of termination. *In re Perry*, 193 Mich App at 650. Respondent was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and, on June 13, 2011, was sentenced to 3 to 10 years' imprisonment. The termination hearing occurred on June 11, 2015. While respondent was incarcerated for the four years preceding the termination hearing, respondent was set to be released from prison one week following the hearing, which was well within the two-year period.

Despite respondent's set time for release, the court was still able to consider the length of time it would take respondent to provide a suitable environment for MMB after release when determining whether the two-year limit in the first factor would be exceeded. *In re Perry*, 193 Mich App at 650. To that end, Marla Moss, MMB's foster care case worker from Bethany Christian Services, stated several times throughout the proceedings that MMB was diagnosed with various behavior problems and that it was her therapist's opinion that she not be immediately reintroduced to respondent. However, respondent stated several times that he was willing to go to therapy with MMB and engage in intensive efforts to responsibly and gradually enter her life. Further, respondent testified that he had suitable housing and legal employment lined up upon release. There is no evidence in the record of other barriers to respondent's ability

to provide proper care and custody to MMB within the two-year limit. Rather, the record supported that defendant provided over three-thousand dollars to MMB throughout her life and had a history of being able to provide a suitable home for MMB before his incarceration.

At the termination hearing, Carlo Ginotti, the assistant attorney general, argued that

> even if he were to get out next year – next week, as he believes that he will, [MMB] doesn't know him. She doesn't want to see him. The therapist believes that it's not appropriate to have at least an immediate introduction with [respondent]. And given her age and her special needs, *it's not unrealistic to believe that two years might go by before we're even at the point where we can, again, be able to introduce [MMB] to [respondent]*." [Emphasis added.]

However, at no point during the proceedings did MMB's therapist provide a report, testify, or provide an opinion regarding how long it would take to be able to reintroduce MMB to respondent. While the two-year period considered in the first factor includes the time required to provide the child with a suitable home after release, *In re Perry*, 193 Mich App at 650, it was improper for the court to rely on Ginotti's unsupported opinion that it would take two years to effectuate reunification in this case. See *In re Mason*, 486 Mich at 162 (finding that "the court clearly erred by concluding, on the basis of [the DHS worker's] largely unsupported opinion, that it would take at least six months for respondent to be ready to care for his children after he was released from prison."). Because respondent was set to be released from prison within a week of the termination hearing, and because there was nothing in the record, aside from Ginotti's unsupported opinion, to suggest reunification would take longer than the two-year period contemplated in the first factor, the trial court erred in finding that the first element of MCL 712A.19b(3)(h) was supported by clear and convincing evidence.

Not only did the court lack a proper basis for concluding that because of respondent's incarceration MMB would be deprived of a normal home for over two years *following* the termination hearing, but it seems the referee also improperly based its termination decision on the fact that respondent had been incarcerated for more than two years *preceding* the hearing. In concluding that termination was proper, the referee stated that, while she believed respondent's intent was sincere, "the damage is done" and that "[u]nfortunately, [respondent has] been in the position where [he] has been incarcerated and wasn't able to be a father to [MMB]. And whatever happened in those two years has traumatized her in such a way where unfortunately, [], she doesn't want to have anything to do with [respondent]." Thus, in finding that termination was proper under MCL 712A.19b(3)(h), the referee improperly relied on respondent's past periods of incarceration. See *Mason*, 486 Mich at 161 n 12 (noting that "the trial court must consider whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home."); *In re Perry*, 193 Mich App at 650 (finding that the trial court erred when it considered the respondent's past incarceration, as "[t]he focus of the first element . . . is whether the imprisonment will deprive a child of a normal home for two years in the future, and not whether past incarceration has already deprived the child of a normal home."). Thus, the trial court relied on impermissible information in determining termination was proper under MCL 712A.19b(3)(h), and there was no other independent basis in the record for finding that the first requirement under this subsection was established.

DHHS also failed to establish the third requirement under MCL 712A.19b(3)(h). In concluding that termination was proper under this subsection, the court implied that it had determined that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering MMB's age. However, there are no allegations in the record that respondent had a history of drug abuse, contact with DHHS or Children's Protective Services, of being unable to provide a suitable home for MMB before his incarceration, or other barriers to being able to provide proper care and custody to MMB within a reasonable time of his release. Instead, the record demonstrates that respondent had an employment record, complied with his parenting agreement[1] by completing both parenting and anger management classes, completed additional life skills classes in prison, had suitable housing and legal employment lined up upon release, was willing to go to therapy with MMB, and was willing to comply with another parenting plan upon his release. The trial court's erroneous reliance on respondent's past periods of incarceration improperly supported its finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering MMB's age. See *In re Mason*, 486 Mich at 161 (stating that "a parent's past failure to provide care because of his incarceration [] is not decisive."). The record does not support a finding that respondent would be unable to provide proper care and custody for MMB within a reasonable time,[2] and, thus, the court erred when it found grounds for termination under MCL 712A.19b(3)(h) were established by clear and convincing evidence.

For the same reasons discussed above, petitioner also failed to present clear and convincing evidence that termination was proper under MCL 712A.19b(3)(c)(*i*) or MCL 712A.19b(3)(g). Because we have determined that the court erred in determining that respondent would not be able to provide proper care and custody to MMB within a reasonable time upon his release, and because both MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g) require that to be shown by clear and convincing evidence to justify termination, the court also erred in finding that termination was proper under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g). See *In re Mason*, 486 Mich at 165 (stating that "[a]s under MCL 712A.19b(3)(h)" MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g) each require a showing of clear and convincing evidence that the parent will not be able to provide proper care and custody within a reasonable time. "As such, these additional grounds are factually repetitive and wholly

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[1] See *In re JK*, 468 Mich 202, 213-14; 661 NW2d 216 (2003) (finding the "parent's *compliance* with the parent-agency agreement is evidence of her ability to provide proper care and custody.").

[2] Petitioner repeatedly referenced respondent's lack of bond with MMB as grounds supporting termination of his parental rights. However, while a parent's lack of bond with their child can be properly considered in a best interest determination, it is not independent grounds from which to conclude termination is proper. See *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (stating that "[i]n deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent."); *In re Smith*, 291 Mich App 621, 624; 805 NW2d 234, 237 (2011) (concluding that "given the absence of any bond between respondent and the child, the trial court did not clearly err by finding that termination of respondent's parental rights was in the child's best interests.").

encompassed by MCL 712A.19b(3)(h)." Thus, if the court erred in evaluating whether respondent could care for his children in the future under MCL 712A.19b(3)(h), termination under MCL 712A.19b(3)(c)(*i*) or (g) is also premature).

The last ground alleged for termination was MCL 712A.19b(3)(j). For termination to be proper under MCL 712A.19b(3)(j), the petitioner must establish that "[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." In finding that termination was proper under this subsection the court did not address which facts it relied on in making its decision and instead simply restated the standard. In concluding that termination of respondent's parental rights was proper, the court simply reiterated that respondent's past periods of incarceration had deprived him of an opportunity to properly care for MMB. However, "just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination." *In re Mason*, 486 Mich at 165. Termination based on a parent's criminal history is only justified if "the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children." *Id*., citing MCL 712A.19a(2); MCL 722.638(1) and (2). In this case, DHHS made no allegations, and provided no evidence, to suggest that respondent ever harmed MMB. While respondent's most recent criminal conviction was for assault with intent to do great bodily harm less than murder, there is no evidence in the record to suggest that MMB was present or involved in that crime. Moreover, as part of respondent's treatment plan, he completed anger management classes as ordered. There is no evidence in the record to suggest that respondent had a history of substance abuse, emotional instability, or mental health issues. Moreover, respondent complied with his treatment plan and sought services to improve himself while incarcerated. The trial court must state on the record or in writing its findings of fact and its conclusions of law during a termination hearing. See MCL 712A.19b(1); MCR 3.977(I)(1). The trial court in this case erred because it failed to make findings of fact with regard to respondent under MCL 712A.19b(3)(j). Termination on this ground was clearly erroneous because no evidence showed that MMB would be harmed if she lived with respondent upon his release. Thus, the trial court erred when it determined that termination was proper under MCL 712A.19b(3)(j).

In sum, because the trial court relied on respondent's past periods of incarceration, it erroneously determined that termination was proper under MCL 712A.19b(3)(h). Because the record does not support a finding that respondent would have been unable to provide proper care and custody to MMB within a reasonable time, the trial court also erred in finding that clear and convincing evidence established that termination was proper under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g). Last, because the record does not provide any basis from which to conclude that MMB would be harmed if she lived with respondent upon his release, the trial court erred when it determined that termination was proper under MCL 712A.19b(3)(j). On remand, the trial court is to consider respondent's *prospective* ability to provide proper care and custody for MMB.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan