STATE OF MICHIGAN

COURT OF APPEALS

In re J. M. MCADORY, Minor.

UNPUBLISHED
September 15, 2016

No. 330235
Wayne Circuit Court
Family Division
LC No. 13-514666-NA

Before: CAVANAGH, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals the trial court's order that terminated his parental rights to the minor child, JMM. His rights were terminated under MCL 712A.19b(3)(g) (failure to provide proper care or custody), (h) (parent imprisoned for period exceeding two 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 provided below, we affirm.

JMM came into care because his mother abandoned him with a nonsuitable relative. At the time, respondent was incarcerated.

I. STATUTORY GROUND

Respondent argues that trial court erred when it found clear and convincing evidence to terminate his parental rights pursuant to MCL 712A.19b(3)(g), (h), and (j). "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. Further, "[w]e review de novo the interpretation and application of statutes and court rules." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010), citing *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

To terminate parental rights, the trial court must first find that the Department of Health and Human Services (DHHS) has established, by clear and convincing evidence, a statutory ground for termination. *In re White*, 303 Mich App at 713. Because MCL 712A.19b(3)(g) is "wholly encompassed by MCL 712A.19b(3)(h)," this Court should first consider whether the trial court erred when it terminated respondent's rights under (h). *In re Mason*, 486 Mich at 164-165.

MCL 712A.19b(3)(h) provides that a court may terminate a respondent's parental rights if

> "[t]he parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years, and [2] the 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." [*Id*. at 160-161, quoting MCL 712A.19b(3)(h) (emphasis omitted).]

Thus, each of these three criteria must be proven by clear and convincing evidence to support termination under this subsection.

To determine whether a child will be deprived of a normal home for a period exceeding two years, the court should look to the future, " 'and not whether past incarceration has already deprived the child of a normal home.' " *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992), quoting *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987). The parties agreed that respondent would be released from prison on October 25, 2017. The termination proceeding took place in August and October 2015. Thus, at the time of termination, respondent still had nearly two years to serve in prison. Respondent also testified that he could care for JMM *once he established himself after prison*, which he believed would take *up to a year* after his release. Thus, the court did not clearly err in finding that JMM would be deprived of a normal home for in excess of two years from the time of the termination proceedings.

For the second consideration under MCL 712A.19b(3)(h), a parent's imprisonment, by itself, does not preclude a parent from providing proper care and custody for a child because a parent "need not *personally* care for the child." *In re Mason*, 486 Mich at 161. In addition, to determine whether there is a reasonable expectation that the parent will be able to provide proper care and custody for a child within a reasonable time, the court should look to the future. *Id*. "Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative." *Id*. at 161 n 11.

In its order, the trial court acknowledged that respondent did care for JMM for the first eight months of JMM's life. However, once incarcerated, respondent left JMM in the mother's care, and she subsequently abandoned JMM with a nonsuitable relative. Further, when the court took jurisdiction, JMM was placed with a nonrelative foster family. Although respondent made efforts during incarceration to have JMM placed in the care of respondent's sister-in-law, he said that DHHS ultimately failed to approve the placement because of an issue with income. After removal on October 18, 2013, JMM was not placed with his maternal grandmother, Rannie Moore (Rannie), until June 2015. Thus, the court did not clearly err by finding that respondent had failed to provide proper care and custody for JMM.

The third consideration under MCL 712A.19b(3)(h) is a closer call, but we find that the court did not clearly err when it found that there was no reasonable expectation respondent would be able to provide proper care and custody for JMM within a reasonable time. The record demonstrates that respondent cared for JMM from the child's birth until JMM was eight months old, at which time respondent was incarcerated. At the time, respondent received social security

benefits and believed that he would again be eligible for such assistance upon release from prison. Respondent testified that he would like to plan for JMM upon his release; he could secure legal employment from two friends and live with his sister-in-law, whose home had already been approved for placement by DHHS. Further, the record supports the fact that respondent availed himself of a number of beneficial services while in prison. The court took these facts into consideration when making its decision to terminate respondent's parental rights and also considered JMM's placement with Rannie, a relative.[1] Placement with relatives weighs against termination under MCL 712A.19a(6)(a).

Despite these considerations, the court concluded that clear and convincing evidence existed to terminate respondent's rights under MCL 712A.19b(3)(h). In so doing, the court looked to the future. It found that respondent had been in prison for most of JMM's life, and it would be another two years before respondent was released, plus it would take respondent up to another year to establish himself and be ready to care for JMM. As a result, JMM would be five or six years old by the time respondent was finally ready to care for him. Because JMM was only three years old at the time of the termination proceeding and JMM was only eight months old when respondent last was in contact with him, we cannot conclude that the trial court erred when it found that waiting another two to three years for respondent to be ready to care for JMM was unreasonable. In other words, the court did not clearly err when it found that respondent would not be able "to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(h).[2]

Thus, with all of the criteria under MCL 712A.19b(3)(h) proven by clear and convincing evidence, the trial court did not err when it terminated respondent's parental rights under this provision.

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[1] In contrast, in *In re Mason*, 486 Mich at 163, "the court never considered whether respondent could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." There, the Michigan Supreme Court found that the children at issue had already been placed with the respondent's family, so it was unnecessary for the respondent to continue to try and make arrangements with relatives to preserve his rights. *Id*. at 163-164.

[2] We further note that the trial court did not err when it commented on the fact that, prior to his current incarceration, respondent had been in prison for 9½ years. "[C]riminal history alone does not justify termination," and "termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances," which are not present here. *In re Mason*, 486 Mich at 165, citing MCL 712A.19a(2) and MCL 722.638(1) and (2). The court did not consider respondent's criminal history or present incarceration alone to terminate his rights under MCL 712A.19b(3)(h). Instead, it can be inferred from the court's ruling that it believed respondent's repeated criminal troubles, along with the amount of time he would still be in prison, made it unreasonable to expect that respondent would be able to provide proper care and custody for JMM within a reasonable time. Thus, because the court looked to the future in making its termination decision and did not rely solely on respondent's current incarceration or past criminal history, it did not commit clear error by making this determination.

The court also terminated respondent's rights pursuant to MCL 712A.19b(3)(g). A trial court may terminate parental rights under MCL 712A.19b(3)(g) if it finds by 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." As already noted, the requirements for this subsection is entirely subsumed within the requirements for MCL 712A.19b(3)(h). *In re Mason*, 486 Mich at 164-165. Therefore, because the trial court did not clearly err when it terminated respondent's parental rights under MCL 712A.19b(3)(h), it likewise did not err when it terminated his rights under MCL 712A.19b(3)(g).

Because only one statutory ground has to be proven by clear and convincing evidence to support the termination of parental rights, we need not determine whether the trial court erred when it relied on MCL 712A.19b(3)(j) as well. See *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009).

II. BEST INTERESTS

Respondent argues that the court erred when it found that termination of his parental rights was in JMM's best interests. This Court reviews a trial court's determination regarding best interests for clear error. *In re White*, 303 Mich App at 713. "A trial court's decision is clearly erroneous '[i]f 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 has been made.' " *In re Olive/Metts*, 297 Mich App 35, 41; 823 NW2d 144 (2012), quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

"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." *In re White*, 303 Mich App at 713; see also MCL 712A.19b(5). To make its best-interest determination, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). Further considerations may include "a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. In addition, placement with a relative weighs against termination under MCL 712A.19a(6)(a).

The court considered JMM's placement with Rannie, a relative, and respondent's compliance with his case service plan, both appropriate considerations when making a best-interest determination, but still concluded that it would be in JMM's best interests to terminate respondent's parental rights. In so doing, it found that respondent would not be able to work on establishing a bond with JMM for at least another two years and concluded that termination would encourage permanency and stability for JMM with Rannie, who planned to adopt.

The evidence presented supported the court's findings and best-interest determination. Respondent will not be released from prison until October 25, 2017, at which time JMM will be

five years old. Respondent testified that he could establish himself and be ready to care for JMM within a year of his release. Although Rannie testified that JMM recognized respondent's picture, by the time of respondent's release, he will have only had a relationship with JMM for the first eight months of JMM's life. Further, Rannie testified that she would like to raise JMM, and that she believed she and JMM have a bond. JMM deserved "permanency, stability, and finality," *In re Olive/Metts*, 297 Mich App at 41-42, and waiting up to three more years when JMM would be perhaps six years old was not in his best interests. Thus, we are not left with a definite and firm conviction that the trial court erred when it found that termination would be in the best-interests of JMM.

III. REASONABLE EFFORTS

Respondent argues that DHHS failed to make reasonable efforts to reunify the family and provide him services before terminating his parental rights. To preserve a claim that DHHS failed to make reasonable reunification efforts, a respondent must object to the services provided, or challenge the adequacy of the services. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). " 'The time for asserting the need for accommodation in services is when the court adopts a service plan . . . .' " *Id*., quoting *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). Respondent failed to object to, or challenge the adequacy of, the services provided by DHHS. Thus, we review this unpreserved issue for plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

Pursuant to MCL 712A.19a(2), "[r]easonable efforts to reunify the child and family must be made in all cases," except under aggravated circumstances that do not exist in this case. See *In re Mason*, 486 Mich at 152. "Before the court enters an order of disposition, the [DHHS] must prepare a case service plan, which must include, among other things, a '[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement.' " *Id*. at 156, quoting MCL 712A.18f(3)(d). In addition, the court must consider a respondent's compliance with the case service plan at each review hearing. *Id*., citing MCL 712A.19(6)(a) and (c).

The court required that respondent be provided with a case service plan and insisted that Adrienne Brown, JMM's caseworker, contact respondent's resident unit managers in prison to discuss available services. DHHS did provide respondent with a case service plan, which was to avail himself of all beneficial services while in prison, and Brown spoke with respondent's prison service coordinator at his first prison, but not his second. Although the court often focused on the mother's progress with her case service plan at review hearings, it also always considered respondent's compliance with his own case service plan. For example, at the review hearing on July 15, 2014, Brown confirmed that respondent had a treatment plan and said that his prison service coordinator told her parenting classes and substance abuse treatment would be offered. In its order following the review hearing on October 21, 2014, the court found that respondent was participating in parenting classes and therapy in prison. At the hearing on January 13, 2015, Brown testified that respondent had enrolled in a 32-week program covering issues related to women and children, and respondent testified that he completed a program entitled Changes for Life. Further, the court acknowledged that respondent availed himself of those services available to him in prison when making its termination decision. Thus, it is

apparent that DHHS complied with its statutory obligations to make reasonable efforts to reunify JMM with respondent, and respondent has failed to establish plain error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Karen M. Fort Hood