STATE OF MICHIGAN

COURT OF APPEALS

In re T. L. FOWLER, Minor.

UNPUBLISHED
October 18, 2016

No. 332259
Oakland Circuit Court
Family Division
LC No. 2014-825871-NA

Before: MURRAY, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Respondent father appeals as of right an order terminating his parental rights to the minor child, TLF, under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood, based on conduct or capacity of custodian, that child will be harmed if returned home). 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.

First, respondent argues that "there was never a valid subject matter jurisdiction over the child" because his no contest plea was not "knowingly, understandingly, and voluntarily made." We disagree.

Respondent asserts that an improper plea taking procedure deprived the trial court of subject matter jurisdiction. However, "a family court has subject-matter jurisdiction when the allegations in the petition provide probable cause to believe that it has statutory authority to act because the child's parent . . . neglected the child, failed to provide a fit home, or committed any of the other conduct described in the statute." *In re AMB*, 248 Mich App 144, 168; 640 NW2d 262 (2001); see also *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993) (finding that "a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous."). The initial petition in this case alleged that respondent "neglected or refused to provide proper or necessary support" and that respondent's "home or environment, by reason of neglect, cruelty . . . is an unfit place" for TLF to live. Respondent waived probable cause testimony on the allegations contained in the petition, thus, providing the trial court with subject matter jurisdiction. Accordingly, it seems "respondent confuses the distinction between whether the court has subject matter jurisdiction and whether the court properly exercised its discretion in applying that jurisdiction." *In re Hatcher*, 443 Mich at 438.

Further, "[i]n Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). During the adjudicative phase, a trial court determines whether it can take jurisdiction over the child. *Id*. As petitioner notes, while the lack of subject matter jurisdiction may be collaterally attacked, "the exercise of that jurisdiction can be challenged only on direct appeal." *In re Hatcher*, 443 Mich at 439. Thus, when the trial court terminates a parent's rights following the filing of a supplemental petition for termination after the issuance of the initial dispositional order, any attack on the adjudication is an impermissible collateral attack. *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008) (noting that "[o]rdinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights.").

Here, respondent's parental rights were terminated following a supplemental petition for termination, and he did not attempt to withdraw his plea or appeal the initial order of adjudication. Thus, the challenge respondent now raises to the plea taking procedure at adjudication constitutes an impermissible collateral attack since it arises in the course of an appeal of a supplemental order of disposition terminating his parental rights rather than an appeal of the initial order of disposition. Accordingly, respondent is not entitled to relief on this issue.

But even if this Court were to consider this issue, respondent's argument lacks merit. MCR 3.971 governs pleas during the adjudicative stage of child protective proceedings, and states that "[a] respondent may make a plea of admission or of no contest to the original allegations in the petition." Before a court may exercise jurisdiction based on a parent's plea, the trial court must advise the respondent on the record or in writing:

> (1) of the allegations in the petition;
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> (2) of the right to an attorney, if respondent is without an attorney;
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> (3) that, if the court accepts the plea, the respondent will give up the rights to
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> > (a) trial by a judge or trial by a jury,
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> > (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
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> > (c) have witnesses against the respondent appear and testify under oath at the trial,
> >
> > (d) cross-examine witnesses, and
> >
> > (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
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> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent. [MCR 3.971(B).]

Further, the trial court may "not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made," MCR 3.971(C)(1), and may not accept such plea "without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true," MCR 3.971(C)(2). In order to establish the factual basis for the plea, the court may question the "respondent unless the offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true." MCR 3.971(C)(2); see also *In re SLH*, 277 Mich App at 673-674 (finding the respondent's plea was invalid, and therefore the dispositional orders were invalid, because the court failed to comply with the requirements of MCR 3.971).

Here, while the record demonstrates there was some confusion regarding the type of plea respondent intended to offer, it is clear that respondent's no contest plea was knowing, understanding and voluntary. First, respondent was present at the hearing at which the allegations contained in the petition were discussed at length, and respondent's plea form indicates that he received a copy of the petition that contained the allegations, thus fulfilling the requirement of MCR 3.971(B)(1). Second, respondent's attorney indicated respondent wished to plead to the allegations contained in the petition, and the court informed respondent that he had the right: to an attorney; to a trial; to cross-examine witnesses; to present his own witnesses "and if they wouldn't appear voluntarily we would subpoena them and force them to appear;" and to force DHHS to prove one of the allegations contained in the petition by a preponderance of the evidence. The court also informed respondent that if he pleaded to the allegations, he would be treated "in every way as if [he] admitted at least one of the allegations in the petition that rises to the level of neglect and/or abuse," and that "[w]hen you plead no contest or responsible you're giving up those rights." Further, the court explained that respondent's plea "will later be used as a basis to start proceedings for the termination of your parental rights." Thus, the court also complied with the requirements of MCR 3.971(B)(2) through (4).

Third, the court established the factual basis for respondent's plea by questioning Michelle Martin, the Child Protective Services (CPS) worker, regarding the allegations in the petition. While respondent argues that he never stipulated to the use of Martin's testimony to establish the factual basis for his plea, this procedure complied with the court rule. See MCR 3.971(C)(2).

Last, while respondent did not verbally indicate during the hearing that he understood the rights explained to him by the court, he filed a signed plea form that reiterated the rights explained by the court, which indicated he understood those rights and that he was voluntarily pleading to the allegations in the petition. Further, while the referee indicated that he accepted respondent's plea before there was an affirmative indication from respondent that he understood those rights, the court did not sign an order accepting respondent's plea until after respondent filed his plea form which indicated that he understood his rights and the consequences of entering a no contest plea. Accordingly, the court complied with all of the requirements of MCR 3.971 in taking respondent's plea Therefore, respondent's plea was knowing, understanding, and voluntary, and the trial court did not clearly err when it accepted respondent's plea to the allegations contained in the petition for adjudication purposes.

Next, respondent argues that the trial court erred in finding that sufficient evidence established statutory grounds for termination. 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 "care, custody, and control of their children." *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010) (citation omitted). 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). "Evidence is clear and convincing when it 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' " *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (citation omitted). "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 is in the child's best interests, the court must order termination of parental rights. *In re Beck*, 488 Mich at 11, quoting MCL 712A.19b(5).

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). Under MCL 712A.19b(3)(c)(*i*), a court may terminate a respondent's parental rights if "182 or more days have elapsed since the issuance of an initial dispositional order," and there is clear and convincing evidence that "[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). This Court has held that termination was proper under MCL 712A.19b(3)(c)(*i*) where "the totality of the evidence amply support[ed] that [the respondent] had not accomplished any meaningful change in the conditions" that led to adjudication. *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009).

In this case, clear and convincing evidence did not support the termination of respondent's parental rights under MCL 712A.19b(3)(c)(*i*) because the conditions that led to adjudication, and that could justify termination, did not continue to exist at the time of termination. The conditions that led to adjudication in this case were TLF's positive drug screen at birth, the fact that respondent "tested positive for THC" soon after TLF's birth, and that respondent had inappropriate housing. Accordingly, respondent was required to obtain employment, obtain adequate housing, and "be sober for at least six months prior to reunification." At the termination hearing, the trial court found that, while respondent complied with some aspects of his plan, he failed to prove that he had adequate income and appropriate housing, and noted respondent's repeated positive drug tests as evidence that after more than 182 had elapsed, the conditions that led to adjudication continued to exist, making termination under MCL 712A.19b(3)(c)(*i*) appropriate.

However, respondent obtained employment and adequate housing before his parental rights were terminated. When respondent signed his parent-agency agreement he was employed doing part-time yard work, but he obtained more consistent employment at a fast food restaurant. Further, Martin reported that respondent had initially verified that employment by showing her one pay stub, and later indicated that, while respondent had failed to provide her with more pay stubs, she had seen his work schedule and had spoken to his manager. Accordingly, contrary to the trial court's findings this condition that led to adjudication did not continue to exist at the time of termination.

Even if respondent failed to adequately verify his employment before the termination hearing by providing Martin with all of his paystubs, the trial court's reliance on this condition was still error, as the trial court's finding that there was "no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age" was not supported by the evidence. Again, although respondent failed to provide Martin with all of his pay stubs from his fast food job, he obtained and maintained employment as required throughout the pendency of this case. Further, after Martin opined that respondent's income from his fast food job was insufficient to support TLF, respondent obtained higher paying employment at the Oakland Mall before the best interests hearing. Again, even if respondent failed to adequately verify his employment with Martin before termination, the fact that he was employed at the time of termination demonstrates that the trial court erred in concluding that respondent would be unable to obtain employment within a reasonable time.

As for housing, respondent lived with family members when the initial petition was filed, but obtained independent housing. While respondent failed to provide Martin with an address for his apartment or verify his housing by producing a lease before the termination hearing, at the best interests hearing, Martin reported that she had gone to respondent's two bedroom apartment in "early November," assessed it, and agreed that it was an appropriate placement for a child. Accordingly, because respondent obtained adequate housing before the time of termination, the record does not support the trial court's finding that there was no reasonable likelihood that this condition would be rectified within a reasonable time considering TLF's age.

The last condition that led to adjudication was respondent's marijuana use, which indisputably continued to exist at the time of termination. However, Michigan's Medical Marihuana Act (MMMA), MCL 333.26371 *et seq*., addresses parental rights when the parent holds a valid medical marijuana card, and provides, in relevant part:

> A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated. [MCL 333.26424(c).]

Respondent had a medical marijuana card at the time of termination, which means that his use of marijuana, in accordance with the MMMA, could not be grounds for termination unless his marijuana use created a clearly articulated and substantiated unreasonable danger to TLF. See MCL 333.26424(c).

Martin claimed that respondent's marijuana use presented a risk of harm to TLF "[b]ecause you don't know how marijuana will affect the body and it is a [sic] illegal substance and not knowing how it affects the brain." Petitioner asserted that respondent's marijuana use presented a risk of danger to TLF because "you never know what's gonna [sic] happen when you have a parent who's using illegal substances around the child . . . and when you're using illegal substances usually that's a criminal act in itself, of course, . . . [and] the people that you're associating yourself with when you have to purchase those illegal substances . . . that presents another – another risk of harm . . . [and] [t]here's just unsavory people who are involved in the drug dealing business." Similarly, the guardian ad litem asserted that respondent's marijuana use presented a risk of danger to TLF because "if you're hanging with those, playing games who are using drugs . . . that puts this child at risk." However, these general allegations did not rise to the level of "clearly articulated and substantiated unreasonable danger." Further, the trial court did not even make a specific finding related to the unreasonable danger respondent's marijuana use may have presented to TLF. Thus, while this condition that led to adjudication continued to exist at the time of termination, respondent was legally permitted to use medical marijuana, and the trial court failed to make the particularized finding necessary to justify termination of respondent's parental rights on that basis.

Accordingly, the inadequate housing and income conditions that led to adjudication did not continue to exist at the time of termination, and the record did not support a finding that clear and convincing evidence established that there was no reasonable likelihood that those conditions would be rectified within a reasonable time considering TLF's age. Further, because respondent obtained a medical marijuana license, and because the trial court failed to make a specific finding demonstrating that respondent's marijuana use created a clearly articulated and substantiated unreasonable danger to TLF, the trial court erred in finding termination was proper under MCL 712A.19b(3)(c)(*i*).

Termination of parental rights is proper under MCL 712A.19b(3)(g) where "[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." A parent's failure to obtain and maintain suitable housing can be grounds for termination under MCL 712A.19b(3)(g). *In re Trejo*, 462 Mich 341, 362-363; 612 NW2d 407 (2000); *In re Laster*, 303 Mich App 485, 493-494; 845 NW2d 540 (2013).

Clear and convincing evidence also did not support the termination of respondent's parental rights under MCL 712A.19b(3)(g). The trial court found termination was proper under this subsection "based on the fact that [respondent] [is] still using substances that presents a substantial risk of harm to [] the child and . . . [t]here's no expectation that that's going to be taken care of in a reasonable time" as respondent had not demonstrated "any sobriety." However, as discussed above, respondent's medical marijuana use could not justify termination without the required particularized finding that his marijuana use created a clearly articulated and substantiated unreasonable danger to TLF. Further, there was no independent basis for the trial court to conclude that respondent would be unable to provide proper care and custody to TLF within a reasonable time. Respondent obtained and maintained employment, obtained appropriate housing, and complied with all other aspects of his parent-agency agreement. Respondent completed and benefitted from his parenting classes and attended all of his

scheduled parenting time. Additionally, even if respondent was unable to adequately care for TLF at the time of termination, the trial court still erred in concluding termination was justified under this subsection. The record evidence does not support a finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering TLF's age.

Last, termination of parental rights is proper under MCL 712A.19b(3)(j) where "[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." Again, the burden is on petitioner to prove this statutory ground for termination. MCR 3.977(A)(3); *In re Trejo*, 462 Mich at 350.

Clear and convincing evidence also did not support the termination of respondent's parental rights under MCL 712A.19b(3)(j). Respondent complied with his service plan, and obtained and maintained employment, as well as appropriate housing. Further, although there was some testimony that respondent had a temper and argued with TLF's mother during parenting time, Martin testified that TLF had never been "put in danger" as a result of the discord between respondent and TLF's mother, and respondent was not ordered to comply with any anger management services. Thus, petitioner failed to establish by clear and convincing evidence that termination of respondent's parental rights was proper under MCL 712A.19b(3)(j), as there was no evidence establishing that TLF would be harmed if she was returned to respondent.

In sum, the trial court clearly erred by finding that termination was proper under MCL 712A.19b(3)(c)(*i*), because respondent obtained employment and adequate housing and because respondent's marijuana use could not justify termination absent a specific finding by the trial court that his marijuana use created a clearly articulated and substantiated unreasonable danger to TLF. The trial court also clearly erred by finding termination was proper under MCL 712A.19b(3)(g), as respondent obtained employment, obtained appropriate housing, complied with his parent-agency agreement, and there was no independent basis for the trial court to conclude that respondent would be unable to provide proper care and custody to TLF within a reasonable time. Last, because the record does not provide any basis from which to conclude that TLF would be harmed if she was returned to respondent, the trial court erred when it determined that termination was proper under MCL 712A.19b(3)(j).

Finally, respondent argues that the trial court erred in finding by a preponderance of the evidence that termination of his parental rights was in the best interests of the child. Because the trial court erred by concluding that any of the statutory bases for termination were proved, we need not review the court's best interests determination.

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

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder