

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 27, 2018

In re T. I. SWINDLE, Minor.

Nos. 343362 and 343364
Iosco Circuit Court
Family Division
LC No. 2016-009715-NA

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

PER CURIAM.

In Docket No. 343362, respondent-father appeals by right the order terminating his parental rights to the minor child, TS, under MCL 712A.19b(3)(c)(i) (failure to rectify the conditions leading to adjudication), (c)(ii) (failure to rectify additional conditions), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm to the child if returned to the parent). In Docket No. 343364, respondent-mother appeals by right the trial court’s order terminating her parental rights under the same grounds.¹ After finding that termination was in the child’s best interests, the trial court ordered both parents’ rights terminated. We affirm.

I. FACTS

At birth, TS tested positive for opiates. She suffered from neonatal withdrawal syndrome and had spina bifida. In January 2016, two weeks after the child’s birth, the Department of Health and Human Services (DHHS) petitioned to remove the child from respondents’ care.

¹ The trial court also indicated that former MCL 712A.19b(3)(l) (termination of parental rights to another child) provided a basis for terminating respondent-mother’s parental rights. However, in *In re Gach*, 315 Mich App 83, 97; 889 NW2d 707 (2016), this Court held that MCL 712A.19b(3)(l) “violates the Due Process Clauses of the federal and state Constitutions” Additionally, effective June 12, 2018, MCL 712A.19b(3)(l) has been deleted. See 2018 PA 58. In this appeal, respondent-mother does not challenge this basis for termination. Because we conclude that her parental rights were properly terminated under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j), and only one statutory ground need be established in order to support termination of parental rights, MCL 712A.19b(3); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), this error was harmless.

Respondent-mother previously had her parental rights to four other children terminated. Respondent-mother pleaded responsible to allegations that she had used drugs during the course of her pregnancy without a prescription, and respondent-father pleaded responsible to knowing that respondent-mother was using drugs and not receiving prenatal care. The trial court placed the child in foster care.

At the January 29, 2016, hearing, respondent-mother pleaded responsible to “count 1” of the petition. Respondent-mother acknowledged that TS tested positive for opiates at birth, which created a risk of harm to the child, and that she had tested positive because she was using drugs while pregnant. Respondent-father pleaded responsible to the allegation in “count 7” of the petition. Respondent-father stated that he was aware that respondent-mother was using narcotic substances during her pregnancy and that respondent-mother was not following through with prenatal care. Respondent-mother stated that she intended to seek treatment following the conclusion of the hearing that day. In addition, respondent-father was granted visitation pursuant to the agency’s discretion.

At the June 2016 dispositional hearing, caseworker Jeremy Vance testified that respondents were cooperative and taking steps to comply with their parenting plan. Respondents were moving into a suitable home but still needed to acquire a proper crib. At the next review hearing, Vance and assistant prosecuting attorney Brian Harger indicated that both respondents were making substantial progress. Vance recommended reunification dependent on respondents’ demonstration of sustained progress with the parenting plan over the next 90 days.

In September 2016, Harger testified that respondents were in compliance with the case service plan and DHHS had begun transitioning TS back into respondents’ care. Respondents had stayed in the hospital for the totality of TS’s spina bifida surgery and recovery, aside from attending work and drug screenings. At this point, the trial court concluded that returning TS to respondents’ home would be in the child’s best interests.

In November 2016, DHHS filed a supplemental petition to remove the child from respondents’ care. In the supplemental petition, DHHS alleged that the child had been taken to the hospital with concerns regarding bleeding and drainage from the surgical site on her back. Despite instruction that TS was to sleep on her stomach following the surgery, the child had been kept in a swing and was sleeping on her back. On October 27, 2016, respondent-mother had begun testing positive for Suboxone, for which she did not have a prescription. Caseworker Sharon Becker testified that respondent-mother was arrested in mid-October after a positive drug screen. In addition, DHHS worker Amy Kuzbiel indicated that respondent-mother was arrested for contempt of court and that respondent-father had bailed her out of jail. On October 31, 2016, respondents’ home was without an adequate heating supply and was being heated by a space heater and the oven due to nonpayment of utility bills. On November 3, 2016, respondent-father was arrested for nonpayment of child support, and on November 4, 2016, he was fired from his job. At an unannounced visit on November 22, 2016, TS was found in a car carrier in an unheated room, covered in a blanket. On November 28, 2016, respondents failed to provide necessary documentation for the Food Assistance Program. Two days later, respondents failed to participate in an appointment for cash assistance. The trial court declined to remove the child from the home, but warned respondents to correct the issues.

In February 2017, Becker indicated that respondents had not been in compliance with their case service plan. Most notably, respondents were not compliant with the Families Together Building Solutions program. Neither respondent had kept in contact with the worker from that program, which ultimately resulted in cancellation. In addition, Kuzbiel testified that respondents were involved in multiple domestic altercations². According to Kuzbiel, the utilities issues were corrected, but issues regarding respondent-mother's sobriety remained because she continued to test positive for substances. Becker explained that respondent-mother remained in respondent-father's home for three weeks and that things were going well. However, at the end of January, respondent-mother and the child moved to the home of a friend in Genesee County, where she subsequently tested positive for Suboxone. Moreover, respondent-mother was arrested on February 21, 2017, which impaired her ability to comply with the parenting plan. The trial court again removed the child from respondents' care upon recommendations from Kuzbiel.

In December 2017, DHHS filed a supplemental petition seeking to terminate respondents' parental rights. DHHS alleged that respondent-mother had not addressed her substance abuse, had not attended the child's medical appointments, and could not provide the child with a safe and stable home. DHHS alleged that respondent-father had not addressed his anger issues and emotional instability, had failed to follow through with services, and was unable to maintain employment or housing. At the December 2017 review hearing, Becker testified that respondent-father had moved in with his grandfather, whom respondent-father had previously told Becker was an inappropriate caregiver for the child.

At the termination hearing, Becker and respondent-father each testified about respondent-father's employment history, which involved several terms of employment for short periods. Becker also testified about respondent-father's housing instability, which included his eviction from his home for being unable to pay the rent after he became unemployed. Respondents had moved in with respondent-father's grandfather, who would not have been an appropriate caregiver even if respondents were not living in the home. Becker testified about respondent-mother's issues with substance abuse after the child's second removal and about respondents' strained relationship with the grandfather, who was supporting respondents financially and providing housing and other assistance.

Following the termination hearing, the trial court found that clear and convincing evidence supported terminating respondents' parental rights. Specifically, DHHS had proven by

² Pursuant to *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011), parental rights may not be terminated on the basis of a parent being a victim of domestic violence, but may be based on the parent's own conduct that endangers the child. Nevertheless, only one statutory ground is required for termination. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). Because other grounds were clearly established in this case, we need not consider these incidents as part of a basis for termination.

clear and convincing evidence that MCL 712A.19b(3)(c)(i), (c)(ii), (g), (j), and (l) supported terminating respondent-mother's parental rights. Respondent-mother's continued substance abuse, and her inability to find or maintain work or stable housing, supported these statutory grounds. The trial court also found that DHHS had proven by clear and convincing evidence that MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j) supported terminating respondent-father's parental rights. Respondent-father's housing had been an issue throughout the case, respondent-father had issues finding and maintaining employment, and respondent-father had failed to care for the child's medical needs. Additionally, because the child had been in care for 20 months and respondents had not progressed on their service plans, there was no reasonable likelihood these conditions would be rectified within a reasonable time. The trial court also found that termination was in the child's best interests because of respondents' failure to comply with their service plan, their inability to care for the child, and because of the child's needs for stability.

II. STANDARDS OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, after reviewing the entire record, this Court is definitely and firmly convinced that the trial court made a mistake. *Id.* This Court defers to the special ability of the trial court to judge the credibility of witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). This Court also reviews for clear error the trial court's determination regarding the child's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

III. STATUTORY GROUNDS

The petitioner has the burden to prove the existence of a statutory ground by clear and convincing evidence. *Mason*, 486 Mich at 152. Clear and convincing evidence is "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) (quotation marks and citation omitted; alteration in original).

MCL 712A.19b(3)(c) provides that the trial court may terminate a parent's rights if either of the following exist:

(i) 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.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the

conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

At the time of these proceedings, MCL 712A.19b(3)(g) provided³ for termination of parental rights if

[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.

And MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if

[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.

When a child has special needs, a parent's failure to "undertake the special efforts that those special needs demand[]" may support terminating the parent's parental rights under MCL 712A.19b(3)(c), (g), and (j). *In re LaFrance Minors*, 306 Mich App 713, 728; 858 NW2d 143 (2014). "A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody." *White*, 303 Mich App at 710. It is also evidence both that the conditions leading to adjudication are not likely to be rectified within a reasonable time and that the child may be harmed if returned to the parent's home. *Id.* at 710-711.

A. RESPONDENT-FATHER'S STATUTORY GROUNDS

Respondent-father argues that DHHS did not prove the statutory grounds by clear and convincing evidence. First, respondent-father argues that the trial court clearly erred by finding that his inability to maintain housing and employment supported termination. We disagree.

A parent's inability to maintain a stable environment due to persistent financial problems may support termination. *In re BZ*, 264 Mich App 286, 299; 690 NW2d 505 (2004). In this case, respondent-father, Kuzbiel, and Becker each testified that respondent-father was aware that his barriers to reunification with the child included financial stability. In late 2016, respondents were more than \$2,000 behind on utilities necessary to heat the home. At that time, the child was in respondents' care, and Becker found the child in an unheated room with a blanket over her car carrier. While the specific condition was rectified, respondent-father later lost his job and was evicted due to a failure to pay rent for three months. Becker testified that respondent-father had failed to follow through with services designed to save his housing. Respondent-father's inability to maintain employment was persistent throughout the case. While respondent-father sought employment and worked frequently, he was unable to maintain any given employment

³ MCL 712A.19b(3)(g) has been amended effective June 12, 2018. See 2018 PA 58.

and suffered from periods of unemployment. We are not definitely and firmly convinced that the trial court erred when it found that respondent-father had demonstrated a persistent inability to maintain a stable environment due to financial instability.

Second, respondent-father argues that the trial court erred when it found that his failure to follow through on the child's medical needs supported termination. While there is uncertainty regarding whether or not respondent-father adequately sought necessary medical attention for TS, we need not address this concern because only one statutory ground is required for termination. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

Third, respondent-father argues that the trial court clearly erred by finding that he failed to follow through with services. We disagree.

A parent's failure to comply with and benefit from his or her service plan is evidence supporting statutory grounds MCL 712A.19b(3)(g) and (j). *White*, 303 Mich App at 710-711. In this case, Becker's testimony established that respondent-father frequently failed to follow through with services, including services designed to assist with his housing and address his emotional stability. Respondent-father also refused to participate in services for the child, including Early On services to assist with the child's special needs. Finally, respondents did not successfully complete Families Together Building Solutions, a service designed to help respondents organize and baby proof their home, because respondents did not communicate with the worker. We are not definitely and firmly convinced that the trial court erred when it found that respondent-father had not complied with or followed through with services.

Fourth, respondent-father argues that the court inappropriately considered the fact that he was living with his grandfather in a negative light. We disagree.

A parent need not personally care for a child. *Mason*, 486 Mich at 161. For instance, a parent may, because of reasons of illness, entrust the care of her children to others. *Id.* at 161 n 11. Respondent-father argues that this means that his reliance on his paternal grandfather should not have been held against him. However, the issue was that respondent-father's grandfather was not an appropriate caregiver for the child. Becker testified that, while the home was physically appropriate, relatives had expressed concern about the grandfather. Additionally, respondent-father had stated in September 2016 that the grandfather would not be an appropriate caregiver for the child. Finally, two witnesses testified that respondent-father and his grandfather had a strained relationship, and they had witnessed respondents yelling at the grandfather. We are not definitely and firmly convinced that the trial court erred when it considered respondents' reliance on the grandfather as a barrier to reunification.

Finally, respondent-father argues that he was able to provide support for his two other children, and therefore, the trial court should have considered this as positive evidence that he could support the child in this case. We conclude that respondent-father's argument lacks merit because there was no evidence that his other children had needs similar to those of the child in this case.

"Evidence of how a parent treats one child is evidence of how he or she may treat the other children." *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). However, a

child's special needs are a relevant factor for the trial court to consider. See *LaFrance*, 306 Mich App at 728. It is undisputed that in this case, the child has special physical needs resulting from spina bifida. Becker specifically testified that the child required a stable home that could meet her specific needs. Accordingly, the trial court did not clearly err when it failed to consider respondent-father's treatment of his other children because those children did not have this child's particular needs.

Ultimately, we are not definitely and firmly convinced that the trial court erred when it found that statutory grounds MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j) supported terminating respondent-father's parental rights.

B. RESPONDENT-MOTHER'S STATUTORY GROUNDS

Respondent-mother argues that the trial court clearly erred by terminating her parental rights under statutory grounds MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j), because its supporting findings were clearly erroneous. We disagree.

First, respondent-mother argues that the trial court clearly erred by finding that statutory grounds supported termination, because she was addressing her substance abuse issue. The record indicates that respondent-mother had not, in fact, addressed her substance abuse, and was not consistently attempting to do so.

A parent's failure to participate in and benefit from his or her service plan is evidence that the parent cannot provide the child with proper care and custody and the child may be harmed if returned to the parent's home. *White*, 303 Mich App at 710-711. In this case, the child was removed because respondent-mother had used substances while pregnant, resulting in injuries to the child. While respondent-mother made progress until the child was returned, Becker testified that after the child's return in late 2016 and re-removal in early 2017, respondent-mother returned to substance abuse. Specifically, respondent-mother had tested positive for THC 18 times, tramadol five times, Suboxone six times, and alcohol two times. Respondent-mother did not become involved in substance abuse services until September 2017, and she was discharged from that service for noncompliance, including testing positive for tramadol, which was not prescribed. We are not definitely and firmly convinced that the trial court erred because, in the 20 months the child was in care, there was evidence that respondent-mother repeatedly relapsed on substances, had not addressed her substance abuse issues, and was not likely to do so within a reasonable time.

Second, respondent-mother argues that the trial court erred by finding that she engaged in repeated domestic violence with respondent-father. Pursuant to *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011), parental rights may not be terminated on the basis of a parent being a victim of domestic violence. Nevertheless, only one statutory ground is required for termination. *In re HRC*, 286 Mich App at 461. Because other grounds were clearly established in this case, we need not consider this as part of a basis for termination.

Third, respondent-mother argues that, because she was living in the home of respondent-father's grandfather, who was also paying her expenses, the trial court erred by finding that she had issues with housing and income. We disagree.

Again, a parent's inability to maintain a stable environment may support termination. *BZ*, 264 Mich App at 299. In this case, for the reasons previously described, the home of respondent-father's grandfather was not appropriate. Additionally, respondent-mother demonstrated even more housing instability than respondent-father. She left respondent-father's home in January 2017 to live with a friend in Genesee County, then moved back in with respondent-father in March 2017. Respondent-mother left respondent-father's home again in July 2017⁴, but she moved back in with respondent-father in November 2017. Becker testified that respondent-mother was employed for only a month or two during the case, demonstrating that she was not able to provide for the child's needs. The trial court's findings regarding respondent-mother's income were entwined with its findings regarding respondent-mother's stability and ability to provide for the child. We are not definitely and firmly convinced that the trial court erred when it found that respondent-mother had not rectified her issues with housing and financial instability.

Ultimately, we are not definitely and firmly convinced that the trial court erred when it found that statutory grounds MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j) supported terminating respondent-mother's parental rights.

IV. BEST INTERESTS

Respondent-mother argues that termination was not in the child's best interests. She essentially argues that termination was premature because she was in compliance with her service plan. We conclude that the trial court did not clearly err when it found that terminating respondent-mother's parental rights was in the child's best interests.

Following its decision on the statutory grounds, the trial court must order the parent's rights terminated if it finds by a preponderance of evidence that termination is in the child's best interests. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). The trial court should weigh all the evidence available to determine the child's best interests. *White*, 303 Mich App at 713. To determine whether termination of a parent's parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "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 Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The trial court may also consider, among other factors, "the parent's compliance with his or her case service plan" and "the children's well-being while in care . . ." *White*, 303 Mich App at 714.

As previously discussed, respondent-mother was not in substantial compliance with her service plan. She had not addressed issues of substance abuse or financial and housing stability. The record indicates that respondent-mother had also not addressed her issues with parenting. Respondent-mother's parent-agency treatment plan required respondent-mother to model appropriate emotional responses for the child, but Becker testified that respondent-mother

⁴ During this period, respondent-mother's whereabouts were unknown because she was not in contact with her caseworkers or her attorney.

became frustrated when the child was fussy. Additionally, the trial court found that the child required stability that respondent-mother could not provide. Considering the entire record, we are not definitely and firmly convinced that the trial court erred when it found that terminating respondent-mother's parental rights was in the child's best interests.

Affirmed.

/s/ Michael J. Riordan

/s/ Amy Ronayne Krause

/s/ Brock A. Swartzle