STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 27, 2012

In the Matter of C. M. CONLEY, Minor.

No. 305721
Wayne Circuit Court
Family Division
LC No. 11-500453-NA

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Respondent father appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(f). We affirm.

Petitioner is the maternal grandmother of the minor child and was appointed his legal guardian in November 2007. Petitioner's daughter initiated a paternity action against respondent, and the court entered an order in January 2008 directing respondent to pay child support. Petitioner filed this termination petition in April 2011. After a hearing in July 2011, the trial court terminated respondent's parental rights. Respondent now argues that the trial court's decision is clearly erroneous and contrary to the child's best interests.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds listed in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). If the court finds that a statutory ground for termination exists and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights. MCL 712A.19b(5). This court reviews for clear error a trial court's findings regarding both the existence of a statutory ground for termination and the child's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); see also MCR 3.977(K). "A finding is 'clearly erroneous' if 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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation omitted). This Court gives deference to a trial court's special opportunity to observe and judge the credibility of the witnesses. *Id.*; see also MCR 2.613(C).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(f), which provides that the court may terminate parental rights when a child has a legal guardian upon proof of both of the following:

> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and

> substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition. [MCL 712A.19b(3)(f).[1]]

The petitioner must prove both subsections (*i*) and (*ii*) by clear and convincing evidence before termination can be ordered. See *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

Section 19b(3)(f)(*i*) considers two different situations: (1) whether the respondent provided support if he had the ability to do so and, alternatively, (2) whether the respondent substantially complied with a support order if one had been entered. See *In re Newton*, 238 Mich App 486, 490-491; 606 NW2d 34 (1999). Because a child support order had been entered against respondent, his ability to pay support was irrelevant because ability to pay is a factor that is considered when determining the amount of ordered support; thus, the only issue to be determined is whether respondent substantially complied with the support order for two or more years immediately preceding the filing of the petition for termination. See *In re SMNE*, 264 Mich App 49, 54-55; 689 NW2d 235 (2004); *In re Newton*, 238 Mich App at 492-493. It is undisputed that respondent never paid support under the order. Therefore, the trial court did not clearly err in finding that § 19b(3)(f)(*i*) was proven by clear and convincing evidence.

Section 19b(3)(f)(*ii*) considers whether the respondent maintained a relationship with the child by visiting, contacting, or otherwise communicating if respondent had the ability to do so. Because the terms "visit, contact, or communicate" are phrased in the disjunctive, petitioner was not required to prove that respondent had the ability to perform all three acts. See *In re Hill*, 221 Mich App at 694. Rather, petitioner was only required to prove that respondent had the ability to perform one of the acts and substantially failed or neglected, without good cause, to do so for two or more years preceding the filing of the petition. See *id.* It is undisputed that respondent did not have any contact at all with the child.

Section 19b(3)(f) "does not contain an 'incarcerated parent' exception," and it applies to an incarcerated parent who "may still retain the ability to comply with the support and contact requirements of the statute." See *In re Caldwell*, 228 Mich App 116, 120-121; 576 NW2d 724 (1998). Specifically, while an incarcerated parent may not be able to visit with the child, he may

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[1] MCL 712A.19b(3)(f)(*i*)-(*ii*) is substantially similar to MCL 710.51(6)(a)-(b), the statute authorizing termination of parental rights for purposes of stepparent adoption. Subsections (*i*) and (*ii*) differ from subsections (a) and (b) only with respect to the "good cause" provision. Much of the case law cited in this opinion addresses § 51(6) of the Adoption Code but is equally instructive with respect to § 19b(3)(f).

be able to maintain a relationship through telephone calls, written correspondence, family members, and acknowledgement of important events in a child's life. See *id.* at 121-122. Thus, respondent's incarceration alone did not establish that he lacked the ability to visit, contact, or communicate with the child or establish good cause for his failure to do so. Further, while respondent contends that he was unable to locate petitioner and the child, it is undisputed that, as the child's legal father, he had a legal right to a relationship with the child and could petition the court or the Friend of the Court to enforce his right so that he could access the child. See *In re SMNE*, 264 Mich App at 51. Thus, respondent's inability to locate the child neither demonstrated that he lacked the ability to establish and maintain a relationship with the child nor established good cause for his failure to do so. In any event, it is clear from respondent's testimony that he was not trying to contact petitioner to locate and establish a relationship with the child. Therefore, the trial court did not clearly err in finding that § 19b(3)(f)(*ii*) was proven by clear and convincing evidence.

Relying on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), respondent contends that termination was improper because he was not provided reunification services. As is clear from various provisions of the Juvenile Code, services are to be provided by an agency responsible for a juvenile's care and supervision when the child has been removed from the home of his parent, guardian, or custodian. See, e.g., MCL 712A.13a(1)(a), (1)(d), (8); MCL 712A.18f(1), (3); MCL 712A.19a(1)-(2); see also *In re Mason*, 486 Mich at 156 (discussing statutory rights to participate in a Department of Human Services service plan where a child is placed outside of the child's home). Here, however, a child-welfare agency never removed the child from his home. He remained at all times with his legal guardian who, as a private individual, was not responsible for providing respondent with services to reunite him with his son.

With regard to the child's best interests, record evidence reveals that the child never had any kind of relationship with respondent, who did not even acknowledge paternity of the child. Respondent failed to support, assist, or seek visits with the child and, instead, engaged in criminal activities resulting in his serial incarceration. Meanwhile, the child's maternal grandmother and legal guardian, who had cared for the child since birth, wished to adopt and continue to raise him. The trial court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests. See MCL 712A.19b(5); MCR 3.977(E)(4).

Affirmed.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher