STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 10, 2012

In the Matter of B. N. BROWN, Minor.

No. 307158
Wayne Circuit Court
Family Division
LC No. 11-501339-NA

Before: DONOFRIO, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Respondent[1] appeals as of right the circuit court's order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(f) (child has a guardian and the parent failed to support or contact the child for two years). Because petitioners failed to establish by clear and convincing evidence that respondent failed to visit, contact, or communicate with the child for a two-year period, we reverse.

Petitioners, the minor child's paternal grandparents, were appointed her legal guardians in 2000 when the child was a year old. In June 2011, for purposes of adoption, they filed a petition to terminate both parents' parental rights. When a child has a legal guardian, parental rights may be terminated 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.
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> (*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).]

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[1] Because the child's father is not a party to this appeal, our reference to "respondent" refers to respondent mother only.

A petitioner must prove both subsections (*i*) and (*ii*) by clear and convincing evidence before a court may order termination. *In re ALZ,* 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill,* 221 Mich App 683, 691; 562 NW2d 254 (1997). On appeal, respondent argues that the trial court erred by finding that the requirements of § 19b(3)(f)(*i*) and (*ii*) were established. We review the trial court's findings of fact for clear error. *Id.* at 691-692. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ,* 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Section 19b(3)(f)(*i*) considers two different scenarios: (1) whether the parent failed to provide support despite the ability to do so, or (2) if a support order was entered, whether the parent failed to substantially comply with the order. Because there was no evidence that a support order had been entered in this case, the trial court was required to consider respondent's ability to pay support and, if she failed to pay, whether she had good cause for failing to do so. Good cause means "a legally sufficient or substantial reason[.]" *In re Utrera,* 281 Mich App 1, 22; 761 NW2d 253 (2008).

The evidence showed that respondent had been regularly employed for several years until she was laid off in April 2011, following which she received unemployment benefits. She had sufficient income to support herself, go to school, and buy a few gifts for the child. Respondent was also able to support her 14-year-old daughter, the minor child's step-sister, of whom respondent had custody. Respondent admitted that she never paid support to petitioners during the two years preceding the filing of the petition. Although respondent contended that the paternal grandmother would not allow her to provide support, the grandmother testified that they never discussed the issue of support, and it was unclear from respondent's testimony whether she offered to pay support and was rebuffed or whether she simply assumed, given her difficulties with the grandmother, that an offer to pay support would be refused. Therefore, the trial court did not clearly err by finding that respondent had the ability to support or assist in supporting the child during the two years preceding the filing of the petition, but failed to do so without good cause.

Section 19b(3)(f)(*ii*) addresses whether respondent maintained a relationship with the child by visiting, contacting, or otherwise communicating with the child if respondent had the ability to do so. Because the terms "visit, contact, or communicate" are phrased in the disjunctive, petitioners were "not required to prove that respondent had the ability to perform all three acts. Rather, petitioner[s] merely had to prove that respondent had the ability to perform any one of the acts and substantially failed or neglected to do so for two or more years preceding the filing of the petition." *In re Hill,* 221 Mich App at 694.

Clear and convincing evidence did not support the trial court's determination that respondent regularly and substantially failed to visit, contact, or communicate with the child for at least two years before petitioners filed their petition. The child's paternal grandmother testified that the child stayed overnight at respondent's residence on three occasions during the two years preceding trial. The grandmother admitted that she sometimes did not allow the child to visit respondent because a school project was due or the child had other plans. The grandmother maintained that respondent failed to provide enough notice before visits and told

respondent, "[y]ou just don't call the day before." Failure to allow visits and contact does not equate to failure to visit, contact or communicate.[2]

Respondent testified that the paternal grandmother required two weeks' notice before visits and that, even providing such notice, she often arrived to pick up the child and the child was not there or was running late. On such occasions, the child sometimes never showed up. Respondent recalled an incident in late Spring 2011, in which she arrived to pick up the child and was told that the child was running approximately 20 minutes' late. Respondent waited in her car in the driveway for two hours, but the child never arrived. Respondent's aunt was with respondent in the car and corroborated respondent's testimony. Respondent also testified that when she called and left a message on petitioners' home phone, the child always called her back. According to respondent, she had had approximately ten overnight visits with the child during the previous two years, and the trial court did not find to the contrary.

Therefore, even with deference to the trial court, the record does not support the trial court's determination by clear and convincing evidence that respondent regularly and substantially failed to visit, contact, or communicate with the child for at least two years preceding the filing of the petition. As such, the court clearly erred by determining that petitioners established the requisites for termination under § 19b(3)(f)(*ii*) by clear and convincing evidence.

Reversed. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

[2] We also note that there was substantial contact after the filing of the petition.