STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 26, 2012

In the Matter of A. D. KETCHUM, Minor.

No. 307471
Saginaw Circuit Court
Family Division
LC No. 09-032274-NA

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Respondent appeals of right an order terminating his parental rights to his daughter based on MCL 712A.19b(3)(c)(*i*),(g), and (j). We affirm.

Termination of parental rights requires a finding that at least one of the statutory grounds under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court must then order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). The trial court's decision that a ground for termination of parental rights has been proved by clear and convincing evidence is reviewed for clear error, as is the decision regarding the child's best interests. The decision "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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

Respondent notes that during the pendency of the termination proceedings he had a criminal case pending[1] and argues that the trial court erred in concluding, before resolution of the criminal case, that there had been domestic violence. The trial court discussed domestic violence in connection with § 19b(3)(j) ("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"). At the hearing on termination of the mother's parental rights, the mother denied that there had been any domestic violence. However, she acknowledged having filed police reports charging

[1] The record indicates that respondent was awaiting trial on charges of operating a vehicle while intoxicated, resisting and obstructing a police officer, assault and battery, assault with intent to murder, torture, carrying a dangerous weapon with unlawful intent, felonious assault, and mayhem.

that defendant had assaulted her on October 30, 2009 and November 19, 2009. We are not left with a definite and firm conviction that a mistake was made in determining that the domestic violence occurred based upon those reports.

Further, the determination that grounds were established under § 19b(3)(j) was not based solely on domestic violence. The court also noted that respondent had elected to terminate therapy during his lengthy incarceration and that he had exhibited "explosive behaviors." We find no clear error in the determination that these factors, taken together, gave rise to a reasonable likelihood of harm to the child should she be entrusted to respondent's care.

Respondent next suggests that the termination of his parental rights was based on his incarceration and that this was error because he had not yet been incarcerated for two years. MCL 712A.19b(3)(h) allows for termination of parental rights if

> The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

The trial court did not rely on subsection (h). Thus, this two-year reference is not significant.

Respondent next asserts that the foster care worker and the guardian ad litem tried to prevent parenting time even though he was not a threat to the child. Since their efforts were unavailing, this issue is irrelevant except as it relates to his allegation that DHS did not genuinely seek to reunifiy him with his children. It is in that context only that we will discuss the issue. Supervised parenting time at the Department of Human Services (DHS) was ordered at the initial hearing on December 21, 2009. The court indicated that visitation would end if there was any volatility and that it might become more liberal if respondent had a psychological evaluation and substance abuse screens. The guardian ad litem then filed a motion to defer or delay parental visitation. In the motion, he averred in relevant part that at or around the time of the hearing on December 21, respondent was "defiant, verbally abusive to the Court staff and Referee and in general manifesting general hostile intent commencing his vowed status/membership in the 'Aryan Nation,'" that he "verbally refused psychological evaluation and substance abuse testing, and berated the [DHS] Agent in attendance," that he "manifests domineering/dominating/oppressive attitude" toward the child's mother, and that "it is not in the best interests of the minor ward for either parent to enjoy/have/attend visitation, as they are openly refusing both psychological and substance abuse evaluation, both of which are components of the overall service plan." At the motion hearing, the foster care worker testified that respondent told a caseworker not to call again when he sought to set up a psychological evaluation and that respondent and/or the mother had been in touch with the relative caretaker of the child in an attempt to arrange visitations without either the knowledge or approval of DHS. During one of these phone conversations, respondent was overheard stating, "It's the f------ b---- that's holding our baby hostage and she's got to pay for it." The caretaker was going to try to get a personal protection order. Despite these allegations, the trial court left intact the order providing for supervised visitation at DHS.

Respondent seems to suggest that seeking to suspend visitation pending a psychological evaluation indicates that the foster care worker and the guardian ad litem were not genuinely interested in facilitating reunification. However, the evidence showed that DHS, in light of serious allegations, was trying to arrange a psychological evaluation so that it could be determined which services were needed. They were only trying to suspend visitation until such an evaluation could be done. DHS contacted respondent in an attempt to schedule the evaluation. This demonstrates that DHS was, at that time, making efforts consistent with evaluating reunification.

Respondent next takes issue with the court's reliance on certain information in finding that he was not credible regarding his claim that his solitary confinement in jail was due only to the behavior of others toward him. The foster care worker testified that jail personnel had informed her that respondent's isolation resulted from having acted inappropriately in jail. Respondent did not object to this hearsay and correctly noted in cross-examination that the foster care worker neither had personal knowledge of this issue nor made any efforts to substantiate the information.

Respondent argues that he should have been allowed to subpoena other inmates who would have allegedly testified that his problems in jail and isolation were related to the inability to keep him safe. The request was made at the end of the second day of a three-day hearing. The trial court denied the request based on MRE 403, finding that it would be "delaying, time-wasting and inappropriate." MRE 403 permits the exclusion of relevant evidence on this basis. "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Here, respondent's therapist had testified that respondent's solitary confinement was at least in part motivated by the need to keep respondent safe from other inmates. While the other inmates may well have testified that the institution could not keep him safe within the general population, this is not materially different from the argument of respondent or his therapist's testimony. There was no abuse of discretion in deciding that the evidence would have been a waste of time and in declining to arrange for the inmates to be brought over from the jail to testify.

Respondent next suggests that he would have worked better with DHS but for the fact that he was in jail. We note that it was his own behavior that caused the incarceration and that he both declined services before his incarceration and terminated them while incarcerated. This suggests that respondent's decisions, not his incarceration, were the more significant impediments toward reunification.

Respondent seems to be suggesting that § 712A.19b(3)(c)(*i*) ("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") would not have been established if DHS had worked with him on getting services and if the circumstances of his incarceration had not precluded him from receiving services while in jail. However, because he did not take advantage of services while he was out of jail and, for whatever reasons, could not or would not partake in services offered in jail, there was no clear error in the determination that the conditions that led to the adjudication continued to exist. Moreover, the failure to take any steps to rectify the problems, save a brief engagement in therapy, coupled with the fact that his

disorder would not be addressed under the best of circumstances until after one to two years, supported a finding that there was no reasonable likelihood that the conditions would be rectified within a reasonable time. The age of the child further supported this determination given that the two-year-old had been in foster care effectively since birth.

The court also found that respondent had failed to provide for proper custody under subsection (g). Respondent's only suggestion for proper care was his mother and he thwarted the attempt to make a placement with her. Accordingly, this factor was established by clear and convincing evidence.

Finally, respondent takes issue with the best-interest determination. However, again, the child had been in foster care since birth with the exception of a few hours. The record indicated that even if respondent were released from jail, he would not be able to readily assume responsibility for the child and thus she would remain in foster care. Given the age of the child and respondent's history, there was no clear error in the court's determination that her best interests would be served by terminating rights so as to afford her the opportunity for stability and permanence.

Affirmed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens