STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of C.W., Minor.

MARY GENIX and SAM GENIX,

Petitioners-Appellees,

v

CHARLES PRESTON WHEELER,

Respondent-Appellant,

and

JANET PARKER,

Respondent.

UNPUBLISHED
May 19, 2009

No. 289125
Jackson Circuit Court
Family Division
LC No. 08-002240-NA

In the Matter of C.W., Minor.

MARY GENIX and SAM GENIX,

Petitioners-Appellees,

v

JANET PARKER,

Respondent-Appellant,

and

CHARLES P. WHEELER,

Respondent.

No. 289127
Jackson Circuit Court
Family Division
LC No. 08-002240-NA

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Respondents Charles Wheeler and Janet Parker appeal as of right from a circuit court order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(f). Because the trial court clearly erred in finding that § 19b(3)(f)(i) was established by clear and convincing evidence with respect to respondent Wheeler, we reverse in Docket No. 289125. Because respondent Parker does not challenge the evidence as it relates to § 19b(3)(f)(i) and the trial court did not clearly err in finding that § 19b(3)(f)(ii) was established by clear and convincing evidence, we affirm in Docket No. 289127.

Petitioners Mary and Sam Genix began caring for the child when she was four days old and were appointed her guardians in June 2006, because respondents had been in and out of prison the previous several years. In July 2008, petitioners filed a petition to terminate respondents' parental rights, which the trial court granted following an evidentiary hearing.

We review the trial court's findings of fact for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "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).

The trial court terminated respondents' parental rights under MCL 712A.19b(3)(f), which provides:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:
>
> (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.

Petitioners had the burden of proving both subsections (i) and (ii) by clear and convincing evidence. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

Respondent Wheeler does not dispute that he failed to provide regular and substantial support for the child during the statutory two-year period, but argues that he lacked the ability to do so because of his incarceration. Section 19b(3)(f)(i) considers whether a respondent provided support if he had the ability to do so or, if an order of support had been entered, whether the respondent substantially complied with the order. It was undisputed that no support order had been entered against respondent Wheeler and thus petitioners were required to prove that Wheeler had the ability to provide support and failed or neglected to regularly and substantially do so for at least two years without good cause.

The evidence showed that Wheeler had been continuously incarcerated since late 2005. Although he was in prison, the statute does not provide an exception for incarcerated parents who, despite their incarceration, "may still retain the ability to comply with the support and contact requirements of the statute." *In re Caldwell*, 228 Mich App 116, 121; 576 NW2d 724 (1998). In this case, petitioners proved that Wheeler was in prison and that he had not paid support during the two-year period preceding the filing of the petition. However, they presented no evidence to show that he had the ability to pay support. Indeed, Mary Genix admitted that Wheeler did not have the ability to pay support while he was incarcerated. Therefore, petitioners failed to prove § 19b(3)(f)(i) by clear and convincing evidence, which alone is fatal to their request to terminate Wheeler's parental rights under § 19b(3)(f)(i).[1] Accordingly, in Docket No. 289125, we reverse the trial court's order terminating respondent Wheeler's parental rights.

Respondent Parker does not challenge the trial court's finding that she failed to provide regular and substantial support for the statutory two-year period despite an ability to do so. Instead, she argues only that she did not have the ability to visit, contact, or communicate with the child and, therefore, the evidence was insufficient to prove § 19b(3)(f)(ii).

Section 19b(3)(f)(ii) considers whether a respondent maintained a relationship with a child by visiting, contacting, or otherwise communicating with the child if she 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 [Parker] had the ability to perform all three acts." *In re Hill*, *supra* at 694. They were only required "to prove that [she] had the ability to perform any 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. *Id.*; see, also, MCL 712A.19b(3)(f)(ii). The evidence showed that respondent Parker had no contact with the child after a visit in November 2005.

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[1] We note that even if respondent Wheeler's testimony is also considered, it fails to establish his ability to provide support. Although Wheeler testified that he worked as a porter in prison, his testimony indicated that he was not able to apply for a work detail until he first obtained his GED. He did that and obtained a position as a porter in May 2008, six months before the hearing, earning $1.31 a day. Thus, the evidence showed that Wheeler was not able to earn any income in prison for 18 months of the two-year statutory period (i.e., between June 2006 and April 2008), and then earned only $1.31 a day during the last six-month period.

This Court has held that a parent does not have the ability to visit, contact, or communicate with a child when a court order has been entered terminating visitation rights. *In re Kaiser*, 222 Mich App 619, 623-625; 564 NW2d 174 (1997). In this case, there was no evidence that any order prohibiting visitation had been entered at any time between July 2006 and October 2007. Respondents' motion to terminate the guardianship was denied in November 2007. While respondent Parker asserts that she interpreted the court's decision as prohibiting any contact with the child and petitioners, the trial court took judicial notice of the order that was entered after that hearing, which simply continued the guardianship and did not address the issue of visitation. Parker has not shown that she was legally prohibited from contacting the child between November 2007 and July 2008.

This Court has held that a father whose paternity has not been established does not have the ability to visit, contact, or communicate with a child if the mother refuses to allow it, because he does not have a legal right to visitation or communication, and thus has no recourse to the courts, until paternity is established. *In re ALZ*, *supra* at 273-274. In this case, by contrast, Parker's parentage was never in doubt and thus she was vested with the legal right to a relationship with her child. Because Parker had a legally enforceable right to maintain a relationship with her child and could have sought relief from the court if she believed that petitioners were interfering with that right, petitioners' alleged attempts to hamper visitation or other contact did not prevent her from having regular and substantial contact with her child. *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004). While Parker did seek relief from the court in October 2007, the trial court took judicial notice of the guardianship file, which indicated that respondents had sought to terminate the guardianship and reclaim custody, not to request visitation, and that the resulting order did not prohibit contact or communication with the child. Accordingly, the trial court did not clearly err in finding that Parker had the ability to contact or communicate with the child, and regularly and substantially failed or neglected to do so for the statutory two-year period.

Finally, the trial court did not clearly err in finding that termination of respondent Parker's parental rights was in the child's best interests. MCL 712A.19b(5). Therefore, in Docket No. 289127, we affirm the trial court's order terminating respondent Parker's parental rights.

Reversed in Docket No. 289125, and affirmed in Docket No. 289127.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering