STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 10, 2011

In the Matter of L. A. M., Minor.

No. 298535
Wayne Circuit Court
Family Division
LC No. 09-030027-AF

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

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

MCL 712A.2(b)(5) and MCL 712A.19b(3)(f) allow a court to exercise jurisdiction over a child and to terminate a parent's rights to the child where the child has a guardian and both of the following are shown:

> The parent, having the ability to support or assist in supporting the [child], has failed or neglected, without good cause, to provide regular and substantial support for the [child] for 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 2 years or more before the filing of the petition.
>
> The parent, having the ability to visit, contact, or communicate with the [child], has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition. [MCL 712A.2(b)(5)(A) and (B); MCL 712A.19b(3)(f)(*i*) and (*ii*).[1]]

The only significant difference between the statutes is that regarding the burden of proof. Jurisdiction must be established by a preponderance of the evidence, MCR 3.972(C)(1); MCR 3.977(E)(2), while the statutory ground for termination must be proven by clear and convincing

[1] MCL 712A.19b(3)(f)(*i*) and (*ii*) insert the words "a period of" before referencing "2 years," but the statutory language is otherwise identical.

evidence, MCL 712A.19b(3); MCR 3.977(E)(3). The petitioner bears the burden of proof and must prove both subsections of the statutes. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

A trial court's decision to exercise jurisdiction is reviewed for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). The court's finding that the statutory ground for termination has been proven by clear and convincing evidence is also reviewed for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K). "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 at 296-297.

The trial court did not clearly err in finding that § 2(b)(5)(A) was proven by a preponderance of the evidence and that § 19b(3)(f)(*i*) was proven by clear and convincing evidence. The evidence showed that as a result of a 2006 paternity action, a support order was entered against respondent. Thus, the only issue to be determined is substantial compliance with the support order for the two-year period preceding the filing of the petition in accordance with the second clause of §§ 2(b)(5)(A) and 19b(3)(f)(*i*). *In re SMNE*, 264 Mich App 49, 54-55; 689 NW2d 235 (2004); *In re Newton*, 238 Mich App 486, 492-493; 606 NW2d 34 (1999). The evidence showed that between December 2007 and December 2009, respondent made only one support payment of $323 against an obligation of $158 a month and sent the child "a few packages" of toys and clothing "here and there." On the basis of this evidence, we cannot conclude that the trial court clearly erred in finding that petitioners met their burden of proof with respect to §§ 2(b)(5)(A) and 19b(3)(f)(*i*).

The trial court also did not clearly err in finding that § 2(b)(5)(B) was proven by a preponderance of the evidence and that § 19b(3)(f)(*ii*) was proven by clear and convincing evidence. Although geographical and financial obstacles prevented respondent from visiting often, there was testimony that respondent visited the child only once between December 2007 and December 2009. During that same period, the guardian testified that respondent made a "very limited" number of calls over the previous 12 to 18 months, and he last called more than six months before the petition was filed in December 2009. Conversely, respondent testified that he called at least once a week. The trial court resolved this conflict in petitioners' favor, and this Court must give "special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility." *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999). Given such evidence, the trial court did not clearly err in finding that petitioners met their burden of proof with respect to §§ 2(b)(5)(B) and 19b(3)(f)(*ii*).

Respondent's claim that the guardian somehow lacked standing to petition for termination because she did not provide notice of the guardianship proceeding is without merit. Although a child's parents are interested persons entitled to notice of guardianship proceedings, MCR 5.125(C)(19)(c), "the natural father of a child born out of wedlock need not be served notice of proceedings in which the child's parents are interested persons unless his paternity has been determined in a manner provided by law." MCR 5.125(B)(4). The child was born out of wedlock and respondent testified that his paternity was not established until on or after February 1, 2007, one month after the guardian had been appointed. Therefore, apart from the fact that

this appears to be an improper collateral attack on a probate court proceeding, the evidence does not support a finding that respondent was entitled to notice of that proceeding.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly