

STATE OF MICHIGAN
COURT OF APPEALS

In re C. R. SCOTT, Minor.

UNPUBLISHED
November 17, 2015

No. 326813
Wayne Circuit Court
Family Division
LC No. 14-518388-NA

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

Petitioner, the child's maternal grandmother and legal guardian, appeals as of right a circuit court's order denying her petition to terminate parental rights of respondent, the child's father, under MCR 712A.19b(3)(f). We affirm.

I. BACKGROUND FACTS

The child's grandmother has been his legal guardian since 2011. The child and his mother both lived with the guardian until the mother moved into an apartment shortly before her death in April 2013. After the mother's death, in October 2014, the guardian petitioned to adopt the child and terminate the parental rights of the child's father.

The trial court held a hearing on the petition. At that time, the father had a child support order providing that he had owed \$0 a month in child support. He had paid \$141.81 and was \$738 in arrears on child support in the last two years.

The child's guardian and father offered conflicting testimony about whether the father supported or visited the child. According to the child's guardian, she had guardianship over the child because the child's mother had been using drugs and in and out of jail. She testified that the child's father had not given her any gifts or clothing items for the child and had not provided medical insurance. The child's father called about three weeks after the mother's death to offer condolences, but he did not ask to visit the child.

The guardian's testimony was also self-contradictory. At different times, the guardian testified that the father never visited, she would not say he never visited the child but he did not visit the child, he visited the child periodically, he visited the child one time but the visit was brief, and he had not visited the child in the last two years. The guardian testified that she did not prevent the child's father from visiting, but she would only allow the father to visit in her

home if the visit was supervised. The guardian testified that the father had not tried to visit the child.

According to the child's father, he and the child's mother often spoke about the child on the phone. He had been unemployed in the previous year, but had recently secured employment. When he was not working, he did not give the child's guardian support or gifts because he did not have the money and could not afford it. However, when he was working, support payments were deducted from his paycheck. He gave the child little gifts, but not birthday or Christmas presents.

The father testified that he visited the child two to three times a week at the guardian's house before the mother's death. He also visited the child at the mother's apartment after she moved out. He visited in March 2013. After that, he was unable to contact the mother and learned that she had died. He called the guardian's house in May 2013 to wish the child happy birthday. He asked if he could visit the child, but the guardian was devastated by the mother's death and did not answer. After that, he contacted the guardian about visiting the child, but "[s]he wouldn't allow it." He called 10 or more times a month asking to visit the child. She allowed him to visit the child at least once, but "[n]ot a lot." He last visited the child in July 2014. He was not presently able to take care of the child, but hoped to regain custody of the child at some point.

The trial court found that the guardian failed to prove by clear and convincing evidence that the father had substantially failed to support the child in the two years preceding the petition, from October 2012 to October 2014. It found that the father had paid \$141.81 in support, but had not paid \$738 owed. It concluded that the father was unemployed in the past year, which explained why the support payments ceased. It found that the guardian had not proved by clear and convincing evidence that father failed to support the child.

It also found that the guardian failed to prove by clear and convincing evidence that the father had the ability to visit the child but had regularly and substantially failed to do so. It found that the testimony about the father's visits conflicted. The trial court noted that the guardian's and father's testimonies were very different about how often the father visited. The trial court noted that it was not unheard of for someone to want to adopt a child so badly that they would testify "in a manner that would be in their best interest," and noted that there was a personality conflict between the child's guardian and the father. The father said he was visiting often but the visiting fell off, and the last time he saw the child was in July 2014. The trial court ultimately found that "[t]he testimony was too conflicted to make findings that petitioner met their burden by clear and convincing evidence."

II. STANDARD OF REVIEW

We review for clear error the trial court's decision regarding whether a statutory ground for termination has been proved by clear and convincing evidence. *In re Trejo*, 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 286, 296-297; 690 NW2d 505 (2004).

III. ANALYSIS

The guardian contends that the trial court clearly erred when it found that she failed to prove her case by clear and convincing evidence. We disagree.

The trial court has jurisdiction over a child if it finds that the child has a legal guardian under the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, and the child's parent neglected or failed, without good cause, to (1) provide regular and substantial support for the child in the two years preceding the filing of the petition, and (2) had the ability to visit, contact, or communicate with the child, but regularly and substantially failed or neglected to do so. MCL 712A.2(b)(6). The trial court may terminate the parent's parental rights at the initial dispositional hearing if it finds by clear and convincing evidence that these grounds are true and establish grounds for termination under MCL 712A.19b(3).¹ MCR 3.977(E). The petitioner must establish both the failure to support and the failure to contact for termination to be appropriate. See *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001).

The question in this case is whether the guardian provided clear and convincing evidence to establish grounds for termination. Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks and citation omitted, alteration in original). Evidence may be clear and convincing even when contradicted, but sometimes uncontradicted evidence is not clear and convincing. *Id.*

Regarding support, the father had some ability to pay in the previous two years, and he to some extent failed to support the child by only paying \$141.81 in child support while being \$738 in arrears. However, the father also testified that he provided the child with some gifts and clothes on a regular basis. The guardian testified that the father did not provide the child with any gifts or clothes.

Regarding visitation, the testimony continued to conflict. The father testified that before the mother's death in April 2013, he visited the child two to three times a week. He also testified that after the mother's death, the guardian prevented him from regularly visiting the child. The guardian testified that the father did not regularly visit the child, and she did not deny him the opportunity to do so.

Ultimately, this case presented a credibility contest between the child's guardian and the child's father, who offered vastly different testimonies. The trial court is in the best position to judge the credibility of the witnesses. See *BZ*, 264 Mich App at 296-297. The trial court determined that, to some extent, the guardian was not credible and that the father's testimony was credible. Further, the burden was not on the father to show that he *did* support and visit the child, but rather it was on the guardian to provide clear, direct, and weighty evidence that he *did*

¹ MCL 712A.19b(3)(f) mirrors the language of MCL 712A.19(b)(6), allowing termination if the child has a guardian and the parent failed to substantially support or contact the child.

not. Given the vastly conflicting evidence in this case, we are not definitely and firmly convinced that the trial court made a mistake when it found that the guardian failed to prove a statutory ground to terminate the father's parental rights to the level of clear and convincing evidence.

We affirm.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher