STATE OF MICHIGAN

COURT OF APPEALS

In re P WALKER, Minor.

UNPUBLISHED
November 19, 2015

No. 327229
Berrien Circuit Court
Family Division
LC No. 2012-000095-NA

Before: JANSEN, P.J., and MURPHY and RIORDAN, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights to the minor child, PW, under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood that the child will be harmed if returned to the parent's care). We affirm.

These proceedings were initiated in September 2012 on the basis of allegations of substance abuse on the part of PW's mother. Specifically, the Department of Human Services (DHS)[1] learned that the mother gave birth to PW on September 2, 2012, at which time the mother tested positive for methadone and opiates. PW also tested positive for drugs. On September 27, 2012, DHS petitioned the trial court to assume jurisdiction over PW and remove her from the mother's care. Although respondent father was formally named as a respondent in the petition, the allegations pertained almost exclusively to the mother. In fact, the only allegation concerning respondent was that he was currently incarcerated, awaiting sentencing on convictions of possession of methamphetamine and receiving or concealing stolen property under $200. He was ultimately sentenced to 180 days in jail and two years' probation on October 22, 2012.

The trial court assumed jurisdiction over PW on the basis of the mother's no contest plea and, pursuant to the then-governing one-parent doctrine, see *In re Sanders*, 495 Mich 394, 407-408; 852 NW2d 524 (2014), ordered both parents to comply with a case service plan. DHS

[1] Under Executive Order No. 2015-4 signed in February 2015, DHS was abolished and its functions merged with the newly-created Department of Health and Human Services, but because the bulk of the proceedings in this case occurred prior to the change, we shall continue to simply refer to the DHS.

indicated that respondent's biggest barriers to reunification regarded (1) parenting skills, (2) substance abuse, (3) emotional stability, (4) domestic relations, (5) housing, and (6) employment. Respondent was directed to participate in numerous services to address these issues, including substance abuse, anger management, and mental health counseling, parenting classes, parenting time visits, and drug screens.

Respondent's participation in services did not begin until February 2013, when he was released from jail. From then until May 16, 2013, he participated in parenting time visits, a psychological assessment, a parenting class, and some substance abuse counseling, but failed to engage in mental health counseling. Moreover, he remained unemployed. Respondent tested positive for illegal substances on three occasions; twice for marijuana and once for amphetamines. He was ultimately arrested on May 16, 2013, for a probation violation.

Respondent remained incarcerated until June 26, 2013. Thereafter, he was transferred to an in-patient rehabilitation center, where he remained until late-September 2013. While there, respondent participated in daily substance abuse counseling and other services and made good progress. After his release, he participated in anger management classes and a mental health assessment, but respondent failed to continue substance abuse counseling and did not obtain independent housing or employment. On October 28, 2013, he was arrested again on outstanding warrants for a probation violation (missing a drug screen) and domestic violence involving his mother.

Respondent remained incarcerated until January 15, 2014. Following his release, his participation in services was minimal, and he was ultimately jailed again in late-February after testing positive on two occasions for methamphetamine, amphetamine, and cocaine. Respondent remained in jail until March 5, 2014. For the next couple of months after his release, he re-engaged in services and made good progress, but missed a drug test on May 23, 2014, resulting in a 21-day sentence to a residential probation program. Respondent remained there for a little over two weeks before absconding on June 9, 2014. He was ultimately arrested on June 22, 2014, for driving on a suspended license, and he was incarcerated both for that offense and for violating his probation.

Respondent remained incarcerated until August 16, 2014. Shortly thereafter, he violated his probation again by testing positive for Tramadol, which is an opioid pain medication. On August 28, 2014, his probation was revoked and he was sentenced to 23 months to 10 years' imprisonment. Respondent remained incarcerated throughout the remainder of these proceedings, with his earliest release date being September 4, 2015.

On November 3, 2014, petitioner filed a supplemental petition requesting that the trial court individually adjudicate respondent unfit in accordance with the recent decision in *Sanders*,

495 Mich 394,[2] and that it terminate his parental rights. The trial court did just that following a combined adjudication trial/termination hearing held on February 6, 2015.

Respondent first argues on appeal that the trial court erred in finding that a statutory ground for exercising jurisdiction had been established. We disagree. We review the trial court's decision whether to exercise jurisdiction for clear error in light of the court's factual findings. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed[.]" *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (citation and quotation marks omitted).

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich at 404 (citation omitted). "Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase." *Id*. Jurisdiction is established pursuant to MCL 712A.2(b). *Id*. In order for a court to exercise jurisdiction, the trier of fact is required to find that one of the grounds listed in that statute has been proved by a preponderance of the evidence. *In re BZ*, 264 Mich App at 295; MCR 3.977(E)(2).

Petitioner cited both MCL 712A.2(b)(1) and (2) in its supplemental petition. Those subsections provide that a trial court has jurisdiction over a child under 18 years of age found within the county:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . . [or]
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

We hold that the trial court did not clearly err in determining that these statutory grounds were met by a preponderance of the evidence. As the trial court correctly reasoned, at the time the supplemental petition was filed in November 2014, and still at the February 6, 2015 hearing, respondent was incarcerated, with no chance of being released before September 2015. More

[2] The Supreme Court stated that "[b]ecause application of the one-parent doctrine impermissibly infringes the fundamental rights of unadjudicated parents without providing adequate process, we hold that it is unconstitutional under the Due Process Clause of the Fourteenth Amendment." *In re Sanders*, 495 Mich at 401.

importantly, as the evidence recited above shows, even before he was sentenced to prison, respondent proved that he was unable to provide PW with the necessary care and support by failing to complete the majority of his services, continually testing positive for illegal drugs, violating his probation, and failing to obtain employment and proper housing. Given this evidence, together with his incarceration, the trial court did not clearly err in finding that MCL 712A.2(b)(1) and (2) were met by a preponderance of the evidence.

In support of his argument that the trial court clearly erred in adjudicating him unfit, respondent asserts that the court failed to consider the fact that he made arrangements for PW's placement with the mother while he was incarcerated. We disagree. Simply put, there is no support for respondent's contention that he had anything to do with PW's placement with her mother. To the contrary, PW's placement with her mother was the result of a trial court order, after the trial court determined that mother had sufficiently benefitted from services and that she could adequately care for the child. This did not in any way demonstrate that respondent had provided proper care or support.

Respondent next argues that the trial court clearly erred in finding that a statutory ground for terminating his parental rights was proved by clear and convincing evidence. We disagree. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Moss,* 301 Mich App at 90; *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). A decision is clearly erroneous if, despite some evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012). In applying the clear error standard in parental termination cases, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court did not clearly err in finding that MCL 712A.19b(3)(g) was proved by clear and convincing evidence. That statutory provision states that termination is warranted when "[t]he parent, without regard to intent, fails to provide proper care or custody for the child 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." Here, there was adequate evidence that respondent failed to provide proper care and custody and that he would not be able to do so within the foreseeable future. Throughout these proceedings, respondent's participation in services was sporadic at best. In fact, other than a parenting class, there is no indication that respondent successfully completed any of the services offered to him. Additionally, while respondent generally engaged in services when he was not incarcerated, it was obvious that he failed to benefit from those services, as demonstrated by his repeated positive drug tests and probation violations. At the time of termination, respondent was set to remain incarcerated for a minimum of seven additional months, with no plan for housing or employment upon his release. Moreover, it was apparent that he would require many months of continued services after his release before PW could be returned to his care. Under these circumstances, termination was

appropriate under MCL 712A.19b(3)(g), and the trial court did not clearly err in so finding. Because only one statutory ground for termination need be proved, we need not address the additional ground in any detail, although we conclude that the trial court's decision in that regard was also not clearly erroneous, especially given the dangers posed by defendant's use of cocaine and methamphetamine.

Lastly, respondent argues that the trial court clearly erred in finding that termination of his parental rights was in PW's best interests. We disagree. The record contained sufficient evidence to support the trial court's determination. In the two-plus years this case was pending before the trial court, respondent was never able to resolve his drug addiction and he was incarcerated more often than he was free. He simply never demonstrated that he could be a stable, consistent presence in PW's life. Moreover, given his incarceration, the time that would be required thereafter to engage in and benefit from services, and his history of setbacks, there was a realistic possibility, at the time of termination, that PW would not be able to be returned to respondent's care in the foreseeable future, "it at all." *In re Frey*, 297 Mich App 242, 249; 824 NW2d 569 (2012). Given PW's young age, and the fact that she had been under DHS supervision her entire life, it was not in her best interests to continue to subject her to that kind of uncertainty. On the other hand, PW's mother devoted herself to addressing her barriers to reunification during this case and made sufficient strides such that DHS felt comfortable returning PW to her care. Those strides were made in respondent's absence. Under these circumstances, the trial court did not clearly err in finding, by a preponderance of the evidence, that termination of respondent's parental rights was in PW's best interests.

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Michael J. Riordan