STATE OF MICHIGAN

COURT OF APPEALS

In re ALLEN, Minors.

UNPUBLISHED
November 17, 2016

No. 330400
Oakland Circuit Court
Family Division
LC No. 2013-805901-NA

Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to her youngest child, JMA, pursuant to MCL 712A.19b(3)(b)(*ii*), (i), and (*l*). For the reasons stated in this opinion, we vacate the trial court's order, reverse, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS

Respondent's parental rights to her oldest child, DE, were terminated in 2005 because she failed to protect him from severe physical abuse. She gave birth to a second child in 2005 and a third child in 2010. According to the record, both the second and third child are in the custody of their father, and the Department of Health and Human Services (the Department) has not filed any petitions relating to them. In 2013, respondent gave birth to her fourth child, JA, while she was incarcerated. At the time JA was born, her father had not yet established paternity. The Department, therefore, concluded that she was without proper care and custody and filed a petition seeking removal of her from respondent's care. Subsequently, the trial court authorized the petition, respondent pleaded no contest to jurisdiction, and a case services plan was put in place. JA was placed with her father after he established paternity. In 2014, while incarcerated on a probation violation respondent gave birth to her fifth child, JMA, the child at issue in this appeal. This time, the Department filed a petition seeking termination of respondent's parental rights with regard to JMA.

Respondent requested a trial as to jurisdiction. Following the trial, the court assumed jurisdiction pursuant to MCL 712A.2(b)(1) and (2), and found that there were grounds for termination of respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*ii*), (i), and (*l*).

Following a best interests hearing, the trial court found that termination of respondent's parental rights was in JMA's best interests and terminated her parental rights to him.[1]

II. JURISDICTION

A. STANDARD OF REVIEW

Respondent first argues that the trial court clearly erred in assuming jurisdiction over JMA.[2] This Court reviews a trial court's factual findings underlying its exercise of jurisdiction for clear error. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). Clear error exists "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." *Id*. at 296-297.

B. ANALYSIS

To properly exercise jurisdiction, the trial court must find by a preponderance of the evidence that a statutory basis for jurisdiction exists. *Id*. at 295. The court assumed jurisdiction pursuant to MCL 712A.2(b)(1) and (2). We address them in reverse order.

First, MCL 712A.2(b)(2) provides that the court has jurisdiction over a minor "[w]hose 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." This requires a showing that the child's custodial environment is unfit. See *In re Matter of Curry*, 113 Mich App 821, 830; 318 NW2d 567 (1982). It was undisputed that JMA was in the custody of his father and there were no allegations whatsoever that the father's home, i.e., the child's custodial environment was unfit. Accordingly, the trial court clearly erred in finding that jurisdiction was proper under this subsection.

Next, MCL 712A.2(b)(1) provides that the court has jurisdiction over a minor if (1) the child's "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," (2) if the child is "subject to a substantial risk or harm to his or her mental well-being," (3) if the child "is abandoned by his or her parents, guardian, or other custodian," or (4) if the child "is without proper custody or guardianship. . . ." At the outset, it is plain that the latter four situations are not present in this case. JMA was not without proper care and custody because he was in the custody of his legal father and there were no allegations that the care he was receiving from his

[1] The trial court also terminated respondent's parental rights to her fourth child, JA, in the same order. Respondent, however, only challenges the court's findings as to JMA.

[2] "Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights." *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). However, when, as here, the termination occurs "at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction," a challenge to the adjudication "is direct and not collateral. . . ." *Id*.

father was improper. Further, there were no allegations or evidence suggesting that JMA's mental well-being was at substantial risk of harm. Nor was there evidence suggesting that respondent abandoned JMA. Thus, the question is whether the first situation applies, i.e., whether respondent "when able to do so, neglect[ed] or refuse[d] to provide proper or necessary support, education, medical, surgical, or other care necessary for [JMA's] health or morals[.]" See MCL 712A.2(b)(1).

Respondent was in jail when JMA was born, so she could not directly provide support or care for him. However, she testified that she knew who JMA's father was, told him that she was pregnant with JMA, and that they planned that JMA would be cared for by his father once he was born. Nevertheless, because the hospital would not allow JMA's father to come to the hospital and sign an affidavit of paternity while respondent was at the hospital, JMA's father could not and did not sign the affidavit until after respondent returned to the jail. JMA, therefore, did not have a legal father between the time that he was born and the time that his father signed the affidavit of paternity.

The Department argues that as a result, JMA was without proper care and custody "at the time of his birth and the filing of the petition." The jurisdictional statute, however, "speaks in the present tense, and, therefore, the trial court must examine the child's situation at the time the petition was filed." *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004). Here, contrary to the Department's argument on appeal, the caseworker assigned to the case testified that *before* she filed the petition JMA's father had signed the affidavit of paternity. Likewise, consistent with respondent's plan for the care of her child, the same day that the petition was authorized, JMA was released directly from the hospital into his father's care. Thus, contrary to the trial court's findings, there is no evidence that respondent failed to provide proper or necessary support for JMA's health or morals or that he was without proper care and custody at the time the petition was filed.[3] The trial court, therefore, clearly erred in assuming jurisdiction pursuant to MCL 712A.2(b)(1).

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[3] There was some suggestion during the trial that the affidavit of paternity was insufficient to establish JMA's father as his legal father until it was filed with the state. However, nothing in the Paternity Act, MCL 722.711 *et seq.*, provides that a voluntary acknowledgement of paternity is ineffective until it is filed with the state. Moreover, the limitations period for filing an action to revoke paternity must be filed "within 3 years after the child's birth or *within 1 year after the date that the acknowledgment of paternity was signed* . . . ." MCL 722.1437(1) (emphasis added). We also note that an affidavit of paternity is a signed and notarized document. Although the affidavit signed by JMA's father was not included in the lower court record, a custody order granting JMA's father sole custody over JMA (and the other children) was admitted as an exhibit at the trial. Thus, it is reasonable to infer that the affidavit of paternity he signed was, in fact, notarized, and that it was immediately effective. Accordingly, at the time the petition was filed, JMA had an established legal father.

III. STATUTORY GROUNDS

A. STANDARD OF REVIEW

Respondent next argues that the trial court clearly erred in finding grounds to terminate her parental rights under MCL 712A.19b(3)(b)(*ii*), (i), and (*l*). We review the trial court's findings for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K).[4]

B. ANALYSIS

The trial court first found that there was clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*ii*), which provides:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
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> * * *
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> (*ii*) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

Although there was evidence that JMA's sibling, DE, suffered a severe physical injury that respondent failed to prevent, there is no evidence that establishing a reasonable likelihood that JMA would suffer injury or abuse in the foreseeable future if placed in respondent's home. After respondent's parental rights to DE were terminated in 2005, she had four more children. There are no allegations that respondent physically abused any of them or that she failed to prevent someone else from physically abusing them. Thus, the trial court's finding that JMA was reasonably likely to be harmed if placed in respondent's care was based solely on speculation. We therefore conclude that the trial court clearly erred in finding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(b)(*ii*).

The trial court next found grounds under MCL 712A.19b(3)(i), which provides:

> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

Again, there was proof that respondent's parental rights to DE were terminated due to severe physical abuse perpetuated by DE's father. However, this subsection requires "the court to

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[4] We recognize that we need not reach this issue given our resolution of the jurisdictional issue. Nevertheless, we will address it in order to provide guidance to the trial court in the event that the Department files another petition seeking jurisdiction over JMA and the case again proceeds to termination.

determine the success of prior rehabilitation efforts as of the date of the termination hearing." *In re D Gach*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 328714); slip op at 5. In *Gach*, we concluded that there was no evidence showing that prior rehabilitation efforts were unsuccessful when the testimony established that the mother was no longer in a relationship with her abuser, had no voluntary contact with him for over four years, and was aware that a relationship with her abuser would put her children at risk. *Id*. Similarly, in this case there is no evidence that respondent is still in a relationship with DE's father, that she had any contact with him since 2005, or that she was unaware of the risk continuing a relationship with him would pose to her children. Moreover, as previously noted, there was no evidence that any of respondent's four younger children had been physically abused by anyone. Admittedly, respondent did have a case services plan in JA's case, and there was testimony that she was not compliant with various provisions in that plan. Nevertheless, based on the record before this Court, it does not appear that she was offered services to raise her awareness about protecting her children from abuse, nor was there any indication that if she had been offered such services that she had not completed and benefited from them. The trial court therefore had no evidence upon which to base a conclusion that "prior attempts to rehabilitate" respondent had been unsuccessful. Accordingly, we conclude that the trial court clearly erred in finding that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(i).

Finally, the court terminated under MCL 712A.19b(3)(*l*), which provides:

> (*l*) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state.

The only thing that needs to be proved under this ground is that respondent's rights to another child were terminated, so this ground was clearly met. See *Gach*, ___ Mich App at ___; slip op 6. However, in *Gach*, we held that subsection (*l*) unconstitutionally violates a parent's due process rights because it " 'disdains present realities in deference to past formalities' and simply 'forecloses the determinative issues of competence and care.' " *Id*. at ___; slip op at 8, quoting *Stanley*, 405 US 645, 657; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Accordingly, it cannot be used to uphold termination in this case.

IV. CONCLUSION

Because the trial court clearly erred in assuming jurisdiction over JMA, we vacate the court's order, reverse, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Stephen L. Borrello