

STATE OF MICHIGAN
COURT OF APPEALS

In re BURBY, Minors.

UNPUBLISHED
October 18, 2016

No. 331459
St. Clair Circuit Court
Family Division
LC No. 14-000249-NA

Before: MURRAY, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to his two minor children under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), (g) (parent failed to provide proper care or custody), and (h) (children would be deprived of normal home for more than two years because of parent’s incarceration). We affirm.

Respondent argues that the trial court clearly erred in concluding that the statutory grounds were proven by clear and convincing evidence and that termination was in the best interests of the children. We disagree.

In a termination proceeding, petitioner has the burden of proving at least one statutory ground for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). If one ground is established by clear and convincing evidence, this Court affirms the trial court’s decision even if the court erred in finding sufficient evidence under other statutory grounds. *In re Huisman*, 230 Mich App 372, 384-385; 584 NW2d 349 (1998), overruled in part on other grounds *In re Trejo*, 462 Mich at 352-353 n 10. This Court reviews “for clear error a trial court’s factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence.” *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). If the petitioner establishes a statutory ground for termination, the trial court must terminate parental rights if the court also finds that termination of parental rights is in the children’s best interests. MCL 712A.19b(5). This Court also reviews for clear error the trial court’s decision on the best-interest issue. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

Termination of respondent’s parental rights was proper under MCL 712A.19b(3)(c)(i), which is permitted if at least 182 days elapsed since an initial dispositional order, the “conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.” And termination was proper under MCL 712A.19b(3)(g), which provides for termination if the 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.” At the time of the adjudication respondent was incarcerated and unable to provide for the children’s needs or to care for them. More than 182 days passed between the entry of the initial dispositional order and the termination hearing. By the time of the termination hearing, respondent continued to be incarcerated and was unable to provide the children with a suitable home environment. His earliest possible release date was 13 months after the termination hearing. He had no prospects for employment and had not demonstrated that he could maintain a drug-free or crime-free life for any sustained period of time. Before respondent’s incarceration he had had limited interaction with his children, and there was no evidence that he knew what was required to address their special needs. He had made no plans for the children’s care and custody while he was incarcerated. Thus, termination of parental rights was proper under MCL 712A.19b(3)(c)(i) and (g).

But the trial court erred in finding that MCL 712A.19b(3)(h) was established by clear and convincing evidence. In order for termination of parental rights to be proper under MCL 712A.19b(3)(h), the petitioner must establish that the parent is imprisoned for such a period that: (1) the child will be deprived of a normal home for over two years, (2) the incarcerated parent has not provided for the child’s proper care and custody, and (3) 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. *In re Mason*, 486 Mich at 160-161, quoting MCL 712A.19b(3)(h). The two-year period considered in the first factor is prospective; it begins at the time of the termination hearing and includes the time of incarceration in addition to the time required to provide the child with a suitable home after release. *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992).

In this case the termination hearing was held on January 29, 2016, and respondent would not be released before March 6, 2017, at the earliest. In its oral findings the trial court indicated that the children would be deprived of a normal home for more than two years when considering that the children had been out of the care of either of their parents since September 2014. That is, the period from September 2014 until March 2017 was a period exceeding two years. This calculation was improper. As noted, the two-year time frame referenced in MCL 712A.19b(3)(h) is a prospective one and should be calculated from the time of the termination hearing forward, not from when the children were removed from their parents’ care or when the court asserted jurisdiction (as respondent correctly argues). However, the trial court accurately noted that it would take a long time before respondent could provide a stable home environment for his young children and his release from prison on the earliest possible date was by no means certain.

Although the court erred in calculating the two-year period that respondent’s incarceration would deprive his children of a normal home life, error in finding that MCL 712A.19b(3)(h) was established by clear and convincing evidence was harmless. The court did not err in finding that MCL 712A.19b(3)(c)(i) and (g) were established by clear and convincing evidence, and only one statutory ground need be established to terminate parental rights. See *In re Huisman*, 230 Mich App at 384-385.

Respondent also argues that his incarceration, alone, was insufficient grounds for termination of his parental rights. He claims he was not afforded a meaningful opportunity to participate in services and that the court reports focused on the children's mother. Respondent's arguments are unpersuasive. Respondent did not establish paternity until March 2015, less than a year before the termination hearing, which was why the initial focus was on the children's mother. Respondent failed to provide a plan for the children while he was incarcerated and the caseworker was unable to provide direct services while respondent was incarcerated. Respondent points out that the caseworker's involvement was fixed on the services available to respondent while he was in jail. However, this is as it should have been. Only limited services were available to respondent because he was a prisoner. Respondent's inability to complete services was the result of his own criminal actions. The trial court terminated respondent's parental rights because he was not a fit parent and could not provide a stable or safe home, not because he was incarcerated. Respondent's reliance on *In re Mason*, 486 Mich at 161, is misplaced. Unlike the father in *Mason*, respondent did not provide a plan for his children's care and custody during the period of his incarceration. See *id.* at 163.

A trial court must order termination of parental rights if a statutory ground for termination is established by clear and convincing evidence and the court finds by a preponderance of the evidence that termination is in the children's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In making that determination, the court may consider a number of different factors, such as the parent's history, parenting ability, and participation in a treatment program, the children's ages and bond to the parent, the foster care environment, and children's need for permanency, stability, and finality. See *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012); *In re VanDalen*, 293 Mich App 120, 141-142; 809 NW2d 412 (2011).

Here, the record amply supports the trial court's best-interest decision. Respondent bases his best-interest challenge on the claim that the DHHS worker would not provide the children with the communications that respondent had prepared for them. This claim is without merit. The testimony shows that the children never asked about respondent and there was no evidence he tried to send anything to them.

The record shows that the children were placed with relatives and were doing well in that placement. They were bonded with their caregivers and the half-siblings who shared their home, and not to respondent. Moreover, it was not in the children's best interests to work toward reunification with respondent, a man who had a strong history of drug abuse, with whom they had no relationship. There was no evidence respondent could provide the children with the appropriate home environment they needed or that he could meet any of their special needs. These children needed a safe and stable home and there was no evidence respondent could provide one. He had not been involved with the children since they were born and delayed establishing paternity. There was no evidence he was committed to caring for these children.

Thus, the trial court did not clearly err in concluding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder