STATE OF MICHIGAN

COURT OF APPEALS

In re S. A. NASSER, Minor.

UNPUBLISHED
November 17, 2016

No. 332502
Wayne Circuit Court
Family Division
LC No. 14-515833-NA

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

PER CURIAM.

Respondent appeals by right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(g) (without regard to intent, failure to provide proper care or custody) and (j) (risk of harm if child returned to parent). We affirm.

Respondent first contends that the trial court clearly erred in ruling that the statutory grounds for jurisdiction under MCL 712A.2(b) were established because he failed to present a plan for the care or custody of his child at the time of the filing of the permanent custody petition. Respondent argues that he did have a plan for the care and custody of his child. We disagree.

To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists. *In re PAP*, 247 Mich App 148, 152-153; 640 NW2d 880 (2001). Jurisdiction must be established by a preponderance of the evidence. MCR 3.972(C)(1); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). This Court reviews the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact. *Id.*; *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

The record reveals that the trial court held a specific adjudication for respondent once it was determined that he was the child's biological father. See *In re Sanders*, 495 Mich 394, 422-423; 852 NW2d 524 (2014). Addressing jurisdiction with regard to respondent under MCL 712A.2(b), the trial court found by a preponderance of the evidence that the child came within the statute and that, at the time of the filing of this petition, respondent "did not present a plan to care or provide for his son."

The child was born in August 2012 and removed from his mother's custody in February 2014. At that time, respondent's whereabouts were unknown and he had not maintained contact with the mother concerning his child. Respondent was finally located and first appeared by telephone from Jordan on November 18, 2014. At that time, the child was over two years old.

Respondent said he wanted to plan for his son and was instructed regarding what he needed to do in order to establish paternity and to obtain a visa to come to the United States. The DHHS workers provided aid and instructions in order to help him establish paternity. However, respondent did not establish paternity until almost a year later, just before the petition for termination of his parental rights was filed. And, at the time of the termination hearing, the child was three and a half years old, and respondent had never financially provided for his son's care and maintenance, even though he claimed to have a job and housing, and he never sent cards or gifts or made effort to establish a bond with the child, even long distance. When questioned about his plans for his child, respondent stated that he would like to care for his son, but because he had been denied two visas and could not come to the United States, he would not be able to personally care for his son. Therefore, he wanted his child to be adopted by his sister. Adoption is not a plan for respondent to care and provide for the child. It is not a plan for reunification; it is a plan for termination. We find that trial court did not clearly err in exercising jurisdiction under MCL 712A.2(b)(1).

Next respondent contends that his due process rights were violated because the state created the conditions that led to the filing of the permanent custody petition. We disagree.

"The essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests." *In re TK*, 306 Mich App 698, 706; 859 NW2d 208 (2014). Substantive due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *McAvoy v H B Sherman Co*, 401 Mich 419, 436; 258 NW2d 414 (1977). Ultimately, due process requires fundamental fairness. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009).

Respondent relies on *In re B and J*, 279 Mich App 12; 756 NW2d 234 (2008), to support his claim. This reliance is misplaced, however, as the facts are clearly distinguishable from this case. In *In re B and J*, the parents were Guatemalan citizens who were illegally residing in this country. Following a trial on the original petition for termination, the court found that the petitioner failed to meet its burden to establish grounds for termination but found sufficient evidence to take jurisdiction over the children. The court ordered the petitioner to prepare a parent/agency agreement, allow supervised visitation, and provide services toward reunification. *Id*. at 15. The parents fully and actively participated in all proceedings, visited their children, and had a bond with them. However, "[p]etitioner made meager attempts to provide services and made little effort to locate Spanish-speaking assistance for respondents" and failed to produce the children for at least two scheduled visits. Before the petitioner could remedy these issues, the respondents were deported and the record showed that it was the petitioner who had reported the respondents to Immigration and Customs Enforcement. *Id*. at 15. Once the parents were deported, the DHHS sought termination on the basis of abandonment. At a subsequent hearing, the court found that the respondents had fully and actively participated in the proceedings and visitations, and that the petitioner's actions were "in bad faith" and "morally repugnant." Nevertheless, the court determined that MCL 712A.19b(3)(g) had been established, as the parents could not provide proper care and custody because they had been deported, and termination was not clearly contrary to the children's best interests. *Id*. at 16-17. On appeal, this Court found:

> Petitioner was not entitled to seek termination of respondents' parental rights under § 19b(3)(g) in this case because petitioner, itself, intentionally set out to create that very ground for termination. . . . We conclude that when the state deliberately takes an action with the purpose of "virtually assur[ing] the creation of a ground for termination of parental rights," and then proceeds to seek termination on that very ground, the state violates the due process rights of the parents. [*Id.* at 19-20 (citation omitted).]

In the present case, the facts that resulted in the termination of respondent's parental rights already existed when the child came to the attention of the DHHS. Respondent was born in Yemen and was living in Jordan. He had never been in the United States, had never met the child, and had never provided support for the child. Unlike the parents in *In re B and J*, then, respondent had no relationship whatsoever with the child and never provided any support or took any effort to create a bond with him. Also unlike in *In re B and J*, petitioner ensured that a translator was present for every transaction with respondent, including not only his court appearances, but also his conversations with the workers and made all attempts to assist in obtaining and locating the necessary and appropriate documentations. In this case the state was not responsible for the circumstances that led to the termination of respondent's parental rights. Accordingly, respondent's due process rights were not violated.

Next, respondent contends that the trial court clearly erred in finding clear and convincing evidence to support the statutory grounds for termination. Again, we disagree. The petitioner bears the burden of establishing at least one statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350-351; 612 NW2d 407 (2000). On appeal from termination of parental rights proceedings, this Court reviews the trial court's findings under the clearly erroneous standard. MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Gazella*, 264 Mich App 668, 672; 692 NW2d 708 (2005). A finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The child was in foster care for almost nine months before respondent was located and appeared in court by telephone from Jordan. Clearly, he had not maintained contact with the mother or his child. The record reveals that respondent claimed to have a home and a job that paid $300 a week. Documentation of those claims was requested but never produced by respondent. Respondent contends that there was no evidence that he failed to provide proper care or custody for his child. He argues that he could not provide proper care or custody because the mother left him in Jordan and he was denied a visa. However, there were several things that respondent could have done to assume responsibility for his child. He could have maintained contact, he could have provided financial support, and he could have made attempts to build a relationship with his child. Instead, he never attempted to make contact with his son or send him cards, letters, or gifts. During the two years of this case, respondent made minimal efforts to establish that he was the child's legal father or to learn what was required. However, after instructed by the worker and the trial court about what was needed to establish paternity and obtain a visa, he procrastinated in contacting the authorities in Jordan. Finally, it was determined that, after two tries, respondent would not be able to obtain a visa to come to the United States. Respondent finally acknowledged this and requested that his sister be allowed to adopt the child.

In seeking adoption for the child, it was clear that respondent agreed with the trial court's conclusion that there was no reasonable expectation that he would be able to provide proper care or custody within a reasonable time, considering the child's age.

The trial court did not clearly err in finding clear and convincing evidence to support termination under MCL 712A.19b(3)(g). Respondent did nothing to provide for or building a relationship with his son. Although respondent lived in Jordan, modern technology provides numerous ways to build relationships. Respondent did not attempt to establish a relationship and never inquired about his child. Respondent made more efforts to obtain a visa to come to this country than he did to establish his paternity. There was clear and convincing evidence that, without regard to intent, respondent had failed to provide proper care or custody for his child and there was no reasonable expectation that he would do so within a reasonable time, considering the child's age. The trial court did not clearly err in finding clear and convincing evidence to support termination under MCL 712A.19b(3)(g). That being the case, we need not consider whether there was also clear and convincing evidence that the child would be at risk of harm if placed with respondent as only one ground for termination need be established by clear and convincing evidence.

Finally, respondent argues that the trial court erred in finding that termination of his parental rights was in the child's best interests. We disagree. Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court must find that termination is in the child's best interests before it can order termination of parental rights. MCL 712A.19b(5). Whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). This Court reviews a trial court's decision regarding a child's best interests for clear error. *In re Laster*, 303 Mich App 485, 496; 845 NW2d 540 (2013). "[T]he Legislature did not intend that children be left indefinitely in foster care, but rather that parental rights be terminated if the conditions leading to the proceedings could not be rectified within a reasonable time." *Matter of Dahms*, 187 Mich App 644, 647; 468 NW2d 315 (1991). Further, "[w]hile [the agency] has a responsibility to expend reasonable efforts to provide services to secure reunification; there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Respondent had been denied two applications for a visa to the United States. The reasons for these denials were never explained. Respondent had never provided any financial support for his child. He had not made any contact or sent any letters or gifts. Even after the worker suggested that he send some support for his child, respondent never complied. Although he lived in Jordan, he could have attempted to form a relationship with his son through the internet, but he did not. He was unable to be located by the DHHS and the court for almost nine months, demonstrating that he had not maintained contact with the mother or with his son. Although he stated on the record that he wanted to provide care and custody for his son, his efforts to establish paternity were late coming. He claimed to have a home and income, but he never produced any documentation to prove this. Under these circumstances, the trial court would never send the child to Jordan to live with respondent. There was no evidence that this situation would be rectified within a reasonable time. There was no evidence that respondent would ever be allowed to obtain a visa to come to the United States. Respondent had indicated that he wanted his sister to adopt the child, the child had been placed with respondent's sister and her

husband, and they had expressed a desire to adopt him. The child should not be left in limbo indefinitely. He needed stability, permanency, and a loving home, where he could receive the specialized attention he needed for his special needs. Therefore, the trial court did not clearly err in finding by a preponderance of the evidence that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto