STATE OF MICHIGAN

COURT OF APPEALS

In re WARSINSKI/KIMMEL, Minors.

UNPUBLISHED
February 20, 2018

No. 338104
St. Clair Circuit Court
Family Division
LC No. 16-000243-NA

Before: SAWYER, P.J., and MURRAY and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right the order exercising jurisdiction over her minor children. Respondent also challenges the trial court's determination that at least one of the statutory grounds for termination of parental rights set forth in MCL 712A.19b(3) was proved by clear and convincing evidence and that terminating her parental rights was in the children's best interests. We affirm.

I. STANDARD OF REVIEW

This Court reviews a trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists. Whether a court has jurisdiction is determined by a parent's plea of admission or no contest, MCR 3.971, or by the court or a jury at a trial, MCR 3.911 (A); MCR 3.972. If the court conducts a trial, the trier of fact must find that one or more of the statutory grounds for jurisdiction has been proven by a preponderance of the evidence. MCR 3.972(C)(1) and (E). We also review for clear error a trial court's findings that at least one statutory ground existed to terminate parental rights and that termination was in the child's best interests. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); MCR 3.977(K). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). 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." *In re BZ*, 264 Mich App at 296-297.

II. BACKGROUND

Respondent is the mother of four children, two of which are the subject matter of these proceedings. Respondent acknowledged that she was unable to properly care for her children, then ages 3 years and 3 months, when she agreed to have the maternal grandparents appointed guardians of the children in 2005. Respondent was required to comply with a limited guardianship placement plan designed to maintain her relationship with her children, which included weekly parenting time at the maternal grandparents' home. Respondent also agreed to participate in and arrange positive monthly outings with her children, complete parenting classes, be gainfully employed, establish a new residence, complete a psychological evaluation and follow all recommendations, and successfully complete psychological counseling. Additionally, respondent agreed to follow the rules of the guardians' home. Respondent was not ordered to pay support other than to redirect child support paid to respondent by the children's fathers. A 2008 family court custody order incorporated the terms of the limited guardianship placement plan and additionally required respondent to maintain appropriate levels of communication with her children's counselors, teachers, and medical providers.

Initially, the maternal grandparents were authorized to care for the children as their limited guardians pursuant to MCL 700.5204(2). However, in 2010, their authority was derived from a custody order entered by the family court and the limited guardianship was dissolved. In 2016, the maternal grandparents sought to adopt the children. They petitioned and were appointed full co-guardians of the children. They then filed a petition to terminate respondent's parental rights and proceed with adoptions. Respondent denied the petition allegations. Following an adjudication trial, the trial court concluded that there was sufficient evidence to acquire jurisdiction of the children. The trial court also concluded that the evidence established grounds to terminate respondent's parental rights and that termination of her rights was in the children's best interests.

III. JURISDICTION

The trial court did not clearly err in assuming jurisdiction of the children pursuant to MCL 712A.2(b)(1) and (6)(A) and (B), which provides for jurisdiction in the following circumstances:

> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> (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. . . .
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> * * *

> (6) If the juvenile has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and the juvenile's parent meets both of the following criteria:
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> (A) The parent, having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition.
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> (B) The parent, having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition.

There was sufficient evidence for the trial court to establish jurisdiction pursuant to MCL 712A.2(b)(1). The record shows that respondent neglected or refused to properly care for her children. At adjudication, the maternal grandmother testified that she and her husband had provided daily care of the children for more than 12 years with little or no assistance from respondent. The record showed that respondent was unable or unwilling to establish and maintain suitable housing and financial stability. Respondent relied on the maternal grandparents to care for her children except for a brief period in 2007 and 2008 when she began to show some progress in her willingness and ability to regularly engage in parenting. In 2007, respondent stated: "I made a decision. I said that I want my kids with me and I was going to do what I need to get that done. I was tired of everybody else taking care of them." Sadly, the lengthy record shows that respondent chronically failed to follow through with this declaration. She did not comply with the limited guardianship placement plan or the circuit court custody order that were designed to foster and maintain a relationship between respondent and her children. Respondent's long history of noncompliance was evidence of her continued neglect.

Respondent's contact with her children did not progress beyond a few overnight visits at a time, the last of which was in 2009. Respondent's own testimony showed an unwillingness to improve her relationship with her children in the past six years. Respondent testified that she did not know her children's present grade levels, the names of teachers, and school progress or challenges. Respondent did not attend any of the children's counseling or medical appointments, and she acknowledged, "I've seen my kids a total of maybe 24 times, maybe 30 out of six years." Most visits were brief during holidays and special occasions.

From 2005 through 2017, respondent offered a plethora of reasons for not taking care of her children: medical issues, stress, unsafe housing, financial instability, inability to work, denial of a claim for social security disability benefits, other appointments, caring for her husband, and disagreeing with the maternal grandparents' parenting decisions. Although respondent testified that she provided some financial support in 2007 when she was employed for approximately eight months, the maternal grandmother testified that respondent did not provide any financial support or gifts after that period, except Christmas gifts after the 2016 termination petition was filed. Respondent did not pay any support even when she was receiving base pay from her husband while he was in military service. Respondent claimed that she was disabled and unable to work. However, the record shows that she continued to claim a disability for years because of

a seizure disorder and posttraumatic stress disorder. In 2007 she testified that her claim for Social Security disability benefits was denied. The trial court encouraged her to retain an attorney to further pursue a claim. At the 2017 adjudication trial respondent testified that she had not made any progress in obtaining benefits. Moreover, she had received a release from her doctor to resume work and was caring for her disabled husband 18 hours each day.

These proofs similarly support a finding of jurisdiction pursuant to MCL 712A.2(b)(6)(A) and (B). The maternal grandparents had standing to seek guardianship in 2016 pursuant to MCL 700.5204(1), which states that a person interested in the welfare of a minor may petition the court for appointment of a guardian for the minor. There was sufficient evidence that respondent failed or neglected to provide regular and substantial support for her children, without good cause, for well over two years before the termination petition was filed on July 14, 2016. Also, respondent did not regularly contact or visit with her children, without good cause, for more than three years. The record does not support respondent's claim that the maternal grandparents refused to let her see the children. Over the course of seven review hearings from 2005 through 2010, the maternal grandparents repeatedly encouraged respondent to parent her children and usually facilitated parenting time, often providing respondent with transportation. The maternal grandparents regularly stated that they desired respondent to care for her children and that they viewed their guardianship roles as limited and temporary. The trial court concluded that the maternal grandmother was a credible witness "because of my familiarity with [the maternal grandmother] during this entire process . . . for the last nine years. I've found [the maternal grandmother] to be encouraging of the relationship between [the older child] and her parents when her parents were reasonably available and appropriate to do so." Moreover, the trial court advised respondent that she could file a motion to change a custody order at any time. At one point after 2010, respondent requested a modification of parenting time through the Friend of the Court. The maternal grandparents appeared at the hearing, but respondent did not. Respondent knew there was an avenue by which she could see her children more frequently if the maternal grandparents truly denied her access. The trial court reasonably concluded:

> You really get down to how much contact is appropriate and what's regular and substantial. Being a parent to child is not showing up on major holidays and saying, boy, isn't this nice and, gosh, I'd like to stop by once a month or once every three months and just kind of see how you're doing. . . . They've got to be there. They've got to be there all the time . . . through the good, the bad, the kids are sick, not sick, whatever. You're supposed to be there. I don't think that there's certainly been that level of contact. I also think that [the maternal grandparents] put effort in to ensure that that contact was maintained and I think but for their efforts to do so I don't think [respondent] would have done as well as she did. Even as well as she did I don't believe is sufficient to satisfy the test.

Respondent also challenges the trial court's finding of jurisdiction pursuant MCL 712A.2(b)(4), which provides:

> (4) Whose parent has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the juvenile.

Because jurisdiction was properly exercised on other grounds, it is unnecessary for this Court to review this claim.

IV. STATUTORY GROUNDS FOR TERMINATION

The trial court did not clearly err in finding at least one statutory ground existed to terminate respondent's parental rights.

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(f)(*i*) and (*ii*), (g), and (j) which provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
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> (f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and both of the following have occurred:
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> (i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
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> (ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.
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> (g) 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.
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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The statutory requirements of (g) and (f)(*i*) and (*ii*) mirror those properly used by the trial court to acquire jurisdiction; however, the requisite proof is by the higher standard of clear and convincing evidence.

The evidence that established jurisdiction pursuant to MCL 712A.2(b)(1) and (6)(A) and (B) also meets the clear and convincing evidentiary standard required to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(g) and (f)(*i*) and (*ii*). Respondent unsuccessfully argues that termination was improper because the maternal grandparents were guardians for less than two years prior to the filing of the termination petition. The two-year period required under MCL 712A.19b(3)(f) plainly relates to the parent's conduct and not the length of the guardianship.

The record clearly showed that respondent did not engage in the most rudimentary aspects of parenting for years. She had the ability to visit, contact, or communicate with her children and regularly and substantially failed or neglected, without good cause, to do so for two years or more before the filing of the 2016 petition.

The trial court also did not clearly err in terminating respondent's parental rights under MCL 712A.19b(3)(j) even though there was no evidence that respondent previously had intentionally harmed the children. The trial court reasonably concluded that the weight of the evidence showed that respondent's inability to address her mental health, medical conditions and "juggle all the different demands on her time" would unintentionally cause emotional and potential physical harm to the children if they were returned to her care after living in the maternal grandparents' safe and stable home for 12 years.

Respondent, relying on *In re Boursaw*, 239 Mich App 161; 607 NW2d 408 (1999), argues that she chose to exhibit proper parenting by not demanding a change in custody when she was unable to safely care for her children because of her medical condition. Respondent's argument in effect is an admission that she was unable to parent her children since the 2010 custody order. Unlike the parent in *Boursaw*, there was no evidence that could lead the court to reasonably conclude that with proper motivation respondent could begin serious work in addressing her parenting deficits. After 12 years of reviewing respondent's parenting, there was little reason for the trial court to be "cautiously optimistic" that progress could be made as in the *Boursaw* case. *Id.* at 171-172.

Respondent argues unsuccessfully that the maternal grandparents' 2016 guardianship was improper. There were grounds for terminating respondent's parental rights independent of the maternal grandparents being recently appointed as the children's full guardians. Thus, as properly noted by the trial court, a full guardianship appointment was unnecessary to provide a basis for terminating respondent's parental rights.

V. BEST-INTEREST DETERMINATION

The trial court did not clearly err in finding that terminating respondent's parental rights was in the children's best interests.

If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court must order termination of parental rights and that additional efforts for reunification of the child and parent not be made. MCL 712A.19b(5); *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010). A trial court may consider evidence on the whole record in making its best-interest determination. *In re Trejo*, 462

Mich 341, 356-357; 612 NW2d 407 (2000). A best interest finding must be supported by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). The trial court may consider various factors, in addition to the child's bond to the parent, *In re BZ*, 264 Mich App at 301, including the parent's parenting ability, *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009), and the child's need for permanency, stability and finality, *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992). The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014).

Respondent asserts that there was insufficient evidence for the court to make a best-interest determination because there was no testimony or record of what had occurred with the family from 2010 until 2016. The scant evidence during that period underscored the fact that respondent had a tenuous bond with her children. Respondent asserts that the maternal grandmother's parenting memorandum showed that respondent was heavily involved with the children in 2013 and 2014. That memorandum noted that from 2013 until July 21, 2016, respondent spoke with her children twice and visited 25 times. Visits most often were during holiday celebrations initiated by the maternal grandparents. Respondent arrived late and stayed briefly. Occasionally she would call to make plans to spend time with the children but would not follow through. Respondent was habitually unwilling to commit to any regular parenting schedule despite repeated requests by the maternal grandparents and the court. The maternal grandparents never said "no" to respondent's requests for unscheduled visits and would be "ecstatic" when respondent did call. Respondent testified that seven additional contacts were not included on the memorandum. Even giving respondent the benefit of these additional contacts, the evidence showed that she was unwilling to create and maintain a consistent parent relationship with her children.

The record shows that the children thrived while in the maternal grandparents' care. The grandparents desired to adopt the children. The Legal Guardian Ad Litem advised the trial court that the children had consistently stated that they wanted legal permanency. They wanted to preserve a relationship with both parents but not have the psychological burden that their placement with the maternal grandparents could be undone. The maternal grandmother testified:

> [The oldest child's] one remark was she would belong. She would feel she had family and she would belong. Right now they've been in limbo. . . . I think they sense that they know it's not permanent and that at any point, you know, mom could come in and take them or say that she would like to get custody back or whatever. And I don't really think that's in their best interest to have that fear.

Respondent's claim that the trial court improperly considered in camera interviews with the children is waived because respondent agreed to the in camera interviews. Moreover, the in camera interviews were proper because the children were old enough (ages 14 and nearly 12 at the time of termination) to articulate their desires regarding their placement and the interviews protected them from the trauma of making a custodial choice in open court by direct and cross examination. *Molloy v Molloy*, 247 Mich App 348, 351; 637 NW2d 803 (2001), aff'd in part, vacated in part on other grounds 466 Mich 852; 643 NW2d 754 (2002); *Impullitti v Impullitti*,

163 Mich App 507, 510: 415 NW2d 261 (1987). Moreover, nothing in the record suggests that the trial judge elicited any information other than the children's placement preferences during the in camera interviews. MCR 3.210(C)(5).

The trial court reasonably concluded that the maternal grandparents' home was the only home that the children had ever known. The maternal grandparents lacked the legal capacity to direct the children's care in their absence. The maternal grandmother testified that she and her husband "want a peace of mind. If something happens to us we want to make sure they're taken care of. We don't want them back into the court system or wherever they would go at that point. We want to ensure them and tell them that this is where they're going to be and they don't have to worry about it." Clearly the record showed that the children needed and desired the continuity, certainty, and permanency that only adoption could provide. The trial court did not clearly err in finding that termination of respondent's parental rights was in their best interests.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens