STATE OF MICHIGAN

COURT OF APPEALS

In re PATTERSON, Minors.

UNPUBLISHED
April 10, 2018

No. 340180
Macomb Circuit Court
Family Division
LC No. 2016-000007-NA

Before: MURRAY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals by leave granted[1] the trial court's order[2] terminating her parental rights to her two minor children under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm to the children if returned home). For the reasons stated herein, we reverse and remand for further proceedings consistent with this opinion.

Respondent first argues that the trial court clearly erred when it found clear and convincing evidence to terminate her parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). In so doing, she asserts that the trial court relied on inadmissible evidence to support its findings.

To terminate parental rights, a trial court must first find that "at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). A trial court's findings of fact are clearly erroneous if "we are definitely and firmly convinced that it made a mistake." *Id*. at 709-710. Deference is granted to the trial court's "special opportunity to judge the credibility of witnesses." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). This Court reviews questions of law de novo. *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

[1] *In re Patterson Minors*, unpublished order of the Court of Appeals, entered October 17, 2017 (Docket No. 340180).

[2] The order appealed from is the trial court's August 25, 2017 order affirming the referee's recommendation to terminate respondent's parental rights.

In support of her argument that the trial court improperly relied on inadmissible evidence to make its termination decision, including the hearsay and unqualified expert opinion testimony of Department of Health and Human Services (DHHS) worker Jennifer Mockeridge, respondent cites MCR 3.977(F). MCR 3.977(F)(1) provides that a trial court "must order termination of the parental rights of a respondent" if "the court finds on the basis of clear and convincing *legally admissible evidence* that one or more of the facts alleged in the supplemental petition" are true and constitute statutory grounds for termination, and that termination is in the best interests of the child. (Emphasis added.) However, MCR 3.977(F) only applies to supplemental petitions for termination based on "circumstances new or different from the offense that led the court to take jurisdiction." MCR 3.977(F); see also *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000) (where a petition to terminate parental rights is based on circumstances not "related to the court's initial assumption of jurisdiction," the allegations in the petition must "be proved by legally admissible evidence").

MCR 3.977(F) does not apply because the factors relied on by the trial court to terminate respondent's parental rights related to the same issues that led the court to assume jurisdiction.[3] Mockeridge reported that DHHS placed the children in foster care on January 7, 2016, because the children's father,[4] and respondent's former husband, allowed respondent to move back into the home while DHHS was involved, despite her history of domestic violence towards him. And the trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), on the basis that she continued to act aggressively toward the father, extended family members, and DHHS workers, resulting in police contact. Although the rules of evidence apply at the adjudicative stage of child protective proceedings, they generally do not apply at the dispositional stage. *In re Gilliam*, 241 Mich App at 136-137; MCR 3.972(C); MCR 3.973(E); MCR 3.977(H). Instead, when a termination hearing involves the same issues that existed at adjudication, the trial court may consider "all relevant and material evidence, including oral and written reports[.]" MCR 3.977(H)(2). Accordingly, the trial court did not err to the extent that it considered evidence potentially inadmissible under the rules of evidence.

Nor did the trial court err when it found that petitioner proved at least one statutory ground by clear and convincing evidence. A court may terminate a respondent's parental rights under MCL 712A.19b(3)(c)(*i*) if "182 or more days have elapsed since the issuance of an initial dispositional order" and "[t]he 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." MCL 712A.19b(3)(c)(*i*). Again, Mockeridge testified that domestic violence between respondent and the father led to adjudication,[5] and the trial court

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[3] We note that although respondent cites MCR 3.977(F) for her assertion that the trial court erred by considering inadmissible evidence, she fails to argue that the trial court terminated her rights based on issues new, different, or unrelated to the initial petition.

[4] The trial court also terminated the father's parental rights to the children, but he is not a party to this appeal.

[5] According to the order of adjudication, respondent pleaded no contest to the allegations in the initial petition for child protective proceedings.

found that this condition continued to exist at termination, and that there was no reasonable likelihood it would be rectified within a reasonable time.

The evidence presented at the termination hearings supported the trial court's findings and conclusion. Respondent acknowledged her long history of domestic violence, both verbal and physical, towards the father, and admitted that the children had witnessed some of the verbal abuse. And this aggression continued even after the children were removed and placed in care on January 7, 2016. Mockeridge testified about several concerning incidents between respondent and the father. In June 2016, for example, respondent was arrested for operating a vehicle while intoxicated after police found her arguing with the father on the side of I-696. Then, in September 2016, respondent showed up at the motel where the father had been staying and threw out all of his belongings, and in October 2016, she confronted him at his domestic violence assessment and was asked by staff to leave. Finally, in November 2016, the police found respondent and the father together and arrested both on outstanding warrants.

Respondent's aggressive behavior towards the father also affected his parenting time with the children. Donna Hewelt, the children's paternal grandmother and foster placement, testified that she had to alter the days she supervised the father's visitation with the children as a result of respondent's interference via telephone. Thus, petitioner produced clear and convincing evidence that respondent's domestic violence issues continued to exist throughout the case.

Moreover, the evidence presented clearly supported the trial court's finding that no reasonable likelihood existed respondent's behavior towards the father would be rectified within a reasonable time. Respondent admitted that at 18 years old, she stabbed the children's father, and had been charged with domestic violence multiple times throughout their relationship. This behavior led to the Child Protective Services (CPS) involvement with the family, and subsequent removal of the children, and continued well after respondent began domestic violence classes in August 2016.[6] Further, despite completing the domestic violence classes in March 2017, and showing improvement according to the instructor, respondent continued to exhibit aggressive behavior leading up to termination. At the termination hearing on February 10, 2017, for example, Mary Chojnowski, respondent's sister, testified that the Friday before the hearing, respondent had an outburst at her parent's house. Thus, the trial court did not err when it found clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*).

As only one statutory ground must be established by clear and convincing evidence to proceed with termination, *In re Trejo*, 462 Mich 341, 360; 612 NW2d 407 (2000), we need not address respondent's challenge to the trial court's findings under MCL 712A.19b(3)(g) and (j). However, to terminate parental rights, a trial court must find not only that a statutory ground has been proven by clear and convincing evidence, but that termination is in the children's best interests.

[6] We note, as well, that prior to the child protective proceedings, respondent completed domestic violence courses through the Warren District Court.

A trial court must find that termination is in a child's best interests by a preponderance of the evidence, *In re White*, 303 Mich App at 713, and we review a trial court's decision for clear error, *In re Trejo*, 462 Mich at 356-357. To make its best-interests determination, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The 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 at 714. A child's placement with relatives weighs against termination. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010).

The trial court determined that it was in the children's best interests to terminate respondent's parental rights based on respondent's behavior throughout the case and the likelihood of adoption by the paternal grandparents, finding that the paternal grandparents were hesitant to enter into a guardianship because of respondent's inappropriate behavior towards them. While we recognize that evidence existed to support the court's findings, we are still left with a definite and firm conviction that the trial court made a mistake.

Although petitioner presented extensive testimony regarding respondent's aggression and behavioral issues, it offered no evidence, aside from testimony of some tense visits with the older child, that respondent directed any of her anger at the children. To the contrary, the testimony demonstrated that much of respondent's aggression stemmed directly from her unhealthy relationship with the father. For example, Chojnowski, who initially supervised respondent's visits with the children, testified that she did not have concerns about respondent's parenting skills unless she and the father were together, stating: "When [respondent's] by herself or [the father] is by himself, they're great. Everything is okay. But when the two of them together, the kids suffer." And Hewelt testified that she had not wanted to supervise visits for respondent throughout the case because she did not want to be in the middle of the parents' bad relationship, but that respondent could be a very good mother and had always kept the children clean, well presented, and well fed. As the parents are now divorced[7] and, according to the Offender Tracking Information System (OTIS), the father will be in prison for home invasion until at least January 2021, the children are significantly less likely to be exposed to respondent's aggression or violence.[8]

Moreover, the evidence demonstrates that respondent complied with significant portions of her case service plan, and presented viable alternatives to termination. Respondent completed

[7] The parents finalized their divorce through a consent judgment of divorce entered on July 13, 2017, between the issuance of the initial termination order on April 13, 2017, and the order affirming that decision on August 25, 2017.

[8] This Court may take judicial notice of public records not included in the record on appeal. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015), citing MRE 201.

parenting and domestic violence courses, and attended the majority of her visits with the children. She also presented documentation of income, and testified that until she could afford a home of her own, she and the children could live with her parents. Although Mockeridge testified that the maternal grandparents' home was not safe and suitable for the children because the grandfather had been verbally aggressive toward DHHS, and the grandmother, suffering from dementia, had contacted DHHS throughout the case to say that she wanted respondent out of the home, we do not believe this testimony justifies the trial court's conclusion that it was in the children's best interests to terminate respondent's parental rights. A parent's fundamental liberty interest in the care and custody of her child, *In re B & J*, 279 Mich App 12, 23; 756 NW2d 234 (2008), should not be negated by a temporary living situation that may be less than perfect, but was not shown to be unsafe. Further, a guardianship with the paternal grandparents in lieu of termination was also an option. Mockeridge questioned the viability of this option, but Hewelt testified that she would be open to a guardianship, especially if she did not have to put herself in the middle of respondent and the father's bad relationship. And, as provided above, the parents divorced following termination, and the father is currently in prison. Thus, we reverse the trial court's order terminating respondent's parental rights, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood