STATE OF MICHIGAN

COURT OF APPEALS

In re Phillips, Minors.

UNPUBLISHED
June 26, 2018

Nos. 340675, 340676
Kent Circuit Court
Family Division
LC Nos. 15-053191-NA,
16-050236-NA

Before: RONAYNE KRAUSE, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

In this consolidated appeal, both parents appeal by right the trial court's order terminating their parental rights to two children, AP and SP, pursuant to MCL 712A.19b(3)(c)(i), (3)(g), (3)(i), and (3)(j).[1] The parties previously had child protective services actions pursued against them in Texas for similar issues to those that arose in this matter, and those actions culminated in the voluntary termination of the parties' parental rights there. In this matter, the parties did actually improve substantially; however, there was a history of making progress and regressing. Father never fully overcame his issues with aggression and emotional dysregulation, and he continued to use marijuana, albeit eventually with the benefit of a medical marijuana card. Mother, in contrast, while not perfect, appears to have mostly substantially complied with what was asked of her. We affirm as to father in Docket No. 340676; regarding mother in Docket No. 340675, we vacate and remand for further proceedings.

Due process is violated when a parent's parental rights are terminated merely on the conclusion that doing so would be in the child's best interests; rather, the petitioner must establish the existence of at least one statutory condition, as set forth in MCL 712A.19b(3), by clear and convincing evidence. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). "Once a statutory ground for termination is established by clear and convincing evidence, the trial court must terminate parental rights unless it finds from the whole record that termination clearly is not in the child's best interests." *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004), citing MCL 712A.19b(5). This Court reviews both findings of fact, that a ground for termination has been sufficiently proven and that the decision to terminate is in the child's best interests, for clear

[1] Mother argues that the trial court also relied on 712A.19b(3)(m). Although we might have hoped for more clarity than the trial court's bench ruling provided, we can find no indication in the record that the trial court did rely on that section, nor can we find any indication in the record that it would have been at all appropriate for the trial court to have done so.

error. *In re BZ*, *supra*, 264 Mich App 296. In general, a trial court's conclusions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). Notwithstanding the above, this Court will not disturb a lower court's order unless "failure to do so would be inconsistent with substantial justice." *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002), citing MCR 2.613(A). Because establishment of only one statutory ground is necessary, erroneous termination on one ground is harmless if another ground was also properly established. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

The overwhelming majority of the trial court's ruling concerned father, and the gravamen of mother's argument is that the trial court improperly terminated her parental rights strictly because it was terminating father's parental rights even though she was never told, nor ordered, that she needed to leave him. We will address this issue, but we will initially address the trial court's findings as to father, whose critical faults were found to be his emotional volatility and aggression and his persistence in using marijuana.

Without going into an excess of detail, we find the trial court's findings pertaining to father's emotional volatility and aggression, and the harm to the children as a result, amply supported by the record and more than adequate to support termination of his parental rights. Mother argues generally that father's emotional outbursts were not directed at her or at the children and notes that the trial court gave the agency the option of reunification at one point. The latter of mother's arguments is misleading: the trial court held that the case had gone on too long and needed to be brought to a close, and it did not believe it had good evidence before it to make an immediate determination of how to do so. The former of mother's arguments is contradicted by the record, which reflects that some of father's outbursts *were* directed at children. Indeed, there was evidence that visits with father left the children essentially "shell-shocked" or resulted in disturbing acting out. We completely agree with the trial court's finding that the children needed permanence immediately, if not sooner, and father was clearly not yet a person who should be permitted to be around the children.

Because only one ground for termination needs to be established, it is therefore not necessary to address father's marijuana use, and we decline to do so.

Mother makes the reasonable argument that the trial court clearly erred by stating that respondents had not done *anything* to rectify the conditions that led to the previous termination of their parental rights in Texas. We agree that the trial court's statement was unfair and unwarranted given the strides respondents made in housing, finances, and therapy. There was considerable testimony to the effect that respondents had made improvements. We do, however, appreciate the trial court's concern that respondents had a known history of making progress and then regressing. The trial court clearly did *not* err in finding that the children needed permanence immediately if not sooner, and there simply was no more time to wait to find out whether that pattern would repeat itself. Indeed, there was evidence that after father terminated his therapy, he *did* begin regressing in areas of self-control and aggression. Nevertheless, because termination as to father was clearly appropriate in any event, any error made by the trial court regarding this issue is harmless.

Father also argues that the trial court erred in finding that termination was in the children's best interests. Leaving aside for the moment whether termination was appropriate as

to mother, we disagree. The evidence showed that the children were severely suffering because of a lack of permanence, and *also* suffering because of father's emotional outbursts and aggression. The children *needed* the matter resolved. Regrettably, parents may simply not be afforded an indefinite length of time in which to become adequate, and at some point the courts *must* evaluate them as they are now rather than as they might become.

Finally, as noted, most of the trial court's concerns centered on father, not mother. At most, there was some concern that mother could get overwhelmed by both of the children and possibly that she smoked around the children despite one child's asthma. The latter is concerning, but we are unpersuaded that it warrants termination of her parental rights by itself. The trial court's opinion makes it very clear that the only real reason mother's rights were terminated consisted of the notion that she and father were evaluated "as a team" and she refused to part ways with him. This is, of course, not *necessarily* impermissible: father should not be around the children, and if the evidence shows that mother will not keep father out of their lives, then indeed it is proper to treat their parenting as inextricably linked, and the failure of either is the failure of both.

Critically, the evidence fails to establish that mother was made aware that she faced a choice. The evidence shows that mother was made aware that she *could* separate from father, and that she *could* receive an independent treatment plan. The evidence does not in any way support a finding that mother was explicitly made aware, in plain terms, that remaining with father directly meant that if his rights were terminated, hers would be as well irrespective of her own individual merits. Rather, the evidence is clear that the agency and the trial court danced around the issue, offering mother a choice but failing to explain the significance and full implications of that choice. We do not necessarily take issue with the trial court's belief that mother's conduct suggested it to be unlikely that she would elect to separate from father, but that is beside the point. It is simply unacceptable to terminate one parent's parental rights purely on the basis of the other parent's unacceptability unless the parent was *explicitly and expressly advised in no uncertain terms* that such an outcome was possible. Merely advising the parent that a separate treatment plan was an option will not suffice.

Because nothing in the trial court's opinion convinces us that mother's parental rights were terminated for any reason other than the termination of father's parental rights, nor does anything in the evidence suggest that she was unambiguously informed of the possibility of that outcome, we vacate the termination of her rights and remand for reconsideration. At oral argument, we were advised that mother would separate from father if offered the chance to do so: we now offer her that chance. Nevertheless, while it would have been proper for her to be given advanced warning, the needs of the children are paramount, and we agree entirely with the trial court's observation that the children need permanence *now*. Unfortunately, that means that under the unique circumstances of this case, mother's adequacy as a solo parent with no involvement from father permissible must also be evaluated based on her present situation and capabilities, not what she has the potential to achieve. We do not preclude the trial court from finding that even without father's involvement, mother is not capable of adequately parenting the children and that one of the enumerated factors in MCL 712A.19b(3) is satisfied. We only hold that, for the reasons stated above, mother must be evaluated on her own individual merits and that she be given the opportunity to confirm that she will or has left the father---as this was the trial courts main concern in the matter.

In summary, we affirm the trial court's termination of father's parental rights entirely; we vacate the termination of mother's parental rights, and we remand Docket No. 340675 only to the trial court for reconsideration consistent with this opinion. The trial court shall consider up-to-date information, including the present circumstances of both mother and the children. See *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). In the event the trial court finds at least one of the factors in MCL 712A.19b(3) satisfied as to mother individually, we would otherwise affirm the trial court's finding that the children's need for permanence overwhelmingly establishes that termination would be in their best interests. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Michael J. Riordan

Court of Appeals, State of Michigan

ORDER

In re Phillips, Minors

Docket No. 340675

LC No. 15-053191-NA

Amy Ronayne Krause
Presiding Judge

Jane E. Markey

Michael J. Riordan
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 14 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

/s/ Amy Ronayne Krause

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 26, 2018
Date

Chief Clerk