STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
November 15, 2018

In re J. W. PHILLIPS, Minor.

No. 342985
Otsego Circuit Court
Family Division
LC No. 16-000038-NA

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

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to his son, JWP, under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g). JWP's mother, KS, voluntarily relinquished her parental rights to JWP and is not a party to this appeal. We affirm.

I. BACKGROUND

In the spring of 2016, respondent-father "physically assaulted [KS] by punching her in the shoulder when JWP was present." Following this incident, respondent-father and KS exchanged threats of self-harm, culminating in respondent-father sending pictures to KS with cuts on his arms. Respondent-father was convicted of committing a domestic assault and sentenced to probation, shortly after which petitioner filed a petition to remove JWP from his parents' care.

The trial court granted the removal petition and ordered respondent-father to comply with a case-service plan that required respondent-father to (1) complete his probation, (2) attend parenting classes, (3) submit to a psychological evaluation, (4) attend counseling for anger management and domestic violence, and (5) attend parenting time. The next several months did not go well for respondent-father. Respondent-father submitted to the psychological evaluation, but initially failed to complete the written portion of the examination, which was required to complete the analysis. When the report eventually reached the trial court, it indicated that respondent-father was "very dependent" on others and needed to work on his sobriety and relationship with KS before JWP could be returned to his care. Respondent-father admitted to his caseworkers that he was dependent on his mother for scheduling his various appointments, and this dependency worsened after respondent-father was fired from his grocery-store job for poor attendance.

Additionally, respondent-father violated a personal-protection order and failed to appear at the resulting probation-violation hearing. As a result, respondent-father was arrested and placed in jail for a week and a half. Regarding the remaining requirements of his service plan,

respondent-father attended approximately half of his scheduled parenting-time sessions, attended only one counseling session, and did not consistently attend a required family-support group. Moreover, respondent-father tested positive for marijuana use on one occasion and failed to submit to another drug screen.

Despite this lack of progress, the trial court continued services for respondent-father after a hearing in early 2017. Yet, things only got worse for respondent-father. Respondent-father did attend his scheduled parenting times when he was able to, but caseworkers had to remind him to engage with JWP instead of his cellphone and to bring age-appropriate care items to the session. Moreover, respondent-father was convicted of stalking KS, placed on probation, and ordered to complete community service. Respondent-father never completed the service and tested positive for marijuana use in violation of his parole. As a result, respondent-father was sentenced to 90 days imprisonment, which left him incarcerated until the spring of 2017. Respondent-father's time out of confinement was short-lived, however, as he was sentenced to 20 to 30 months of imprisonment in the fall of 2017 for another probation violation.

Although limited services were available to respondent-father while in prison, caseworkers reported that respondent-father was offered various opportunities to complete his service plan during his periods in civilian life. Respondent-father did not, however, take advantage of many of these services. Specifically, respondent-father did not follow-up with counseling or participate consistently in parenting time or the family-support group. Moreover, respondent-father failed to maintain employment or complete his G.E.D., despite petitioner offering him services to do so. Although respondent-father had requested that JWP be placed with respondent-father's mother, petitioner indicated that the home was unfit because respondent-father's mother's psychological evaluation indicated that such a placement was unwise.

Ultimately, the trial court terminated respondent-father's parental rights to JWP in early 2018. The trial court found that JWP would need some sort of permanency within the next six months to one year. The trial court noted respondent-father's lack of progress on his service-plan and repeated probation violations, and concluded that respondent-father was unlikely to be able to provide a suitable home for JWP within any reasonable time. The trial court therefore found that statutory grounds existed to terminate respondent-father's parental rights to JWP under MCL 712A.19b(3)(c)(*i*)[1] and (g). The trial court found that termination was in JWP's best interests, noting that respondent-father's incarceration meant that JWP was unlikely to return to respondent-father in the near future and that even after respondent-father's release it was impractical to expect JWP to be returned to respondent-father.

[1] The trial court errantly cited MCL 712A.19b(3)(c)(*ii*) but applied the provisions of MCL 712A.19b(3)(c)(*i*).

This appeal followed.

II. ANALYSIS

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). Once a ground for termination is established, the trial court may order termination of parental rights if it finds that termination is in the child's best interest. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356–357; 612 NW2d 407 (2000); see also MCR 3.977(K). "A finding of fact is clearly erroneous 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 286, 296–297; 690 NW2d 505 (2004).

Defendant only challenges the trial court's conclusion that statutory grounds existed to terminate his parental rights. Here, the trial court terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*) and (g). Termination is appropriate under subsection (c)(*i*) when "[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," and under subsection (g) when "[t]he 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."[2]

Respondent-father argues on appeal that the trial court improperly terminated his parental rights under MCL 712A.19b(3)(h). Termination is appropriate under this subsection when the parent's imprisonment will deprive the child of a "normal home for a period exceeding 2 years" and the parent has not otherwise provided for the child's care and custody and there is no reasonable expectation that the parent will be able to do so within a reasonable time considering the child's age. MCL 712A.19b(3)(h). The trial court, however, terminated respondent-father's parental rights under subsections (c)(*i*) and (g), not subsection (h). On appeal respondent-father has not addressed the subsections supporting the trial court's ruling. Thus, we could deem his argument waived. *Riemer v Johnson*, 311 Mich App 632, 653; 876 NW2d 279 (2015).

Nonetheless, to the extent that respondent-father's arguments implicate the proper subsections, we find those arguments to be without merit. Respondent-father's primary argument is that the trial court inappropriately based its decision to terminate his parental rights on his incarceration. Indeed, under any subsection, the fact of incarceration is insufficient on its

[2] MCL 712A.19b(3)(g) has since been amended to require the trial court to take into account the parent's financial ability to provide for the child's care and custody. See 2018 PA 58, effective June 12, 2018.

own to support termination of parental rights. *In re Mason*, 486 Mich 142, 160; 782 NW2d 747 (2010). Incarceration, however, "was not the sole reason for termination in this case." *In re Hudson*, 294 Mich App 261, 267; 817 NW2d 115 (2011). Rather, the trial court's termination of respondent-father's parental rights was properly based upon respondent-father's failure to address the conditions leading to adjudication by following his case-service plan and the unlikelihood that respondent-father would be able to provide a proper home for JWP in the future. Respondent-father correctly argues that the lack of services available to him while incarcerated cannot be held against him in a termination proceeding. *In re Pops*, 315 Mich App 590, 598-599; 890 NW2d 902 (2016). Respondent-father, however, fails to explain his lack of participation in the case-service plan during the times that he was not incarcerated.

Respondent-father's case-service plan required him to abide by the terms of his probation, address his mental-health and domestic-violence issues through counseling, and participate in parenting time. Respondent-father, however, violated his probation numerous times by abusing drugs and stalking KS. Moreover, respondent-father failed to attend counseling and, although respondent-father did participate in some parenting time, he had to be reminded to engage with the child instead of his cellphone. Thus, respondent-father failed to address the issues that led to JWP's removal, despite being offered numerous opportunities to do so, rendering termination appropriate under MCL 712A.19b(3)(c)(*i*). Moreover, respondent-father's failure to comply with his case-service plan is evidence of respondent-father's failure to provide proper care and custody for JWP, rendering termination appropriate under MCL 712A.19b(3)(g). *In re JK*, 468 Mich 202, 214; 661 NW2d 216, 223 (2003).

Respondent-father is correct that, while in prison, he is still entitled an opportunity to engage in services and provide for JWP by placing the child with a suitable guardian. See *In re Mason*, 486 Mich at 163-164. Yet, respondent-father has not come forward with a suitable guardian, given that his proffered guardian was deemed unfit to care for the child. Moreover, respondent-father's past failure to engage meaningfully in his service plan indicates that services would be of little benefit to respondent-father or JWP. Thus, the record confirms that respondent-father failed to address the conditions that led to JWP's removal, failed to provide proper care or custody for JWP, and was unlikely to be able to do so within any reasonable time, even after his release from prison. The trial court did not err by terminating respondent-father's parental rights to JWP.

Affirmed.

/s/ Michael J. Riordan
/s/ Amy Ronayne Krause
/s/ Brock A. Swartzle