STATE OF MICHIGAN

COURT OF APPEALS

In re LANDER/OLIVAS, Minors.

UNPUBLISHED
November 26, 2019

No. 346618
Gogebic Circuit Court
Family Division
LC Nos. 15-000019-NA;
17-000043-NA

Before: MURRAY, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Respondent-mother appeals as of right an order terminating her parental rights pursuant to MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (3)(g) (failure to provide proper care and custody) and (j) (likelihood of harm).[1] We reverse and remand.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arose in connection with possession of a stolen U-Haul van, which respondent and ML, the father of the four eldest children at issue, had used to move from Arizona to Michigan, and their attempt to manufacture methamphetamine in their Bessemer home. The four eldest children[2] were removed from the home upon the parents' arrest, but the parents served their jail terms and performed well with services, so the children were returned home approximately 14 months after removal. A few weeks after the children's return, on November 10, 2016, the trial court ordered respondent to leave the family home because her boyfriend at the time, GL, had a physical altercation with ML outside of the home. The court did not grant

[1] We note that the trial court also terminated the parental rights of ML, father of four of the children at issue. He appealed the order, but died while his appeal was pending, and his case was subsequently dismissed. *In re Lander*, *Minors*, unpublished order of the Court of Appeals, entered November 4, 2019 (Docket No. 346616). The father of respondent's fifth child, GL, voluntarily released his rights to the child.

[2] The youngest child had not been born at this point.

respondent parenting time—not even supervised parenting time—at any time after this order to leave the home, and ML became the sole caregiver for the children. Subsequently, on March 2, 2017, the children were again removed from ML's care, in part because he allowed three of the eldest children a weekend visit with respondent and GL. Later in 2017, respondent gave birth to her youngest child, who was placed directly into foster care from the hospital, and after a termination hearing involving all five children in the summer of 2018, the trial court, in October 2018, terminated the parental rights of respondent and ML.

II. ANALYSIS

To terminate parental rights, the trial court must initially find, by clear and convincing evidence, a statutory ground for termination. MCL 712A.19b(3). This Court reviews for clear error the trial court's factual findings and its ultimate determination that a statutory ground has been established. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, even if some evidence supports it, the reviewing court is nevertheless left with the firm and definite conviction that the lower court made a mistake. *Id*.

The court relied on MCL 712A.19b(3)(g) and (j) in connection with all five children. MCL 712A.19b(3) states, in part:

> 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:
>
> * * *
>
> (g) The parent, although, in the court's discretion, financially able to do so, 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.[3]
>
> * * *
>
> (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.

In finding that clear and convincing evidence had established the ground for termination under subparagraph (j) with respect to respondent, the court relied on the U-Haul trip from Arizona to Michigan, during which the four eldest children were transported in the back of a cargo van; the "love triangle" among respondent, ML, and GL; some of the children's needs for counseling; and the alleged fact that "[t]he parents are still not in a safe stable situation."

[3] Subparagraph (g) was amended by 2018 PA 58, effective June 12, 2018, to add the language about finances.

The trip in the U-Haul van was, without question, dangerous, but this trip occurred in the summer of 2015 and there has been no allegation of any unsafe transport of the children since that time. With regard to the "love triangle," the most recent caseworker admitted that all contact between respondent and GL had ended on March 27, 2018, almost three months before the start of the termination hearing on June 19, 2018. The termination hearing concluded on August 3, 2018, and at that point there still was no evidence of any further contact between respondent and GL. In addition, and significantly, there was never *any* allegation or evidence that GL was verbally or physically abusive toward the children. The court opined that respondent and ML were not in a safe, stable situation. However, nobody contradicted the testimony that respondent and ML had reestablished their relationship and recommitted to one another, and nobody alleged that GL, or respondent's earlier boyfriend, ZD, was ever verbally or physically abusive toward the children.

Moreover, ML's Community Mental Health (CMH) case manager, who was a former employee with DHHS (the Department of Health and Human Services), testified about the family bond and how the children "loved to see [respondent]." The New Beginnings instructor believed that respondent had benefited from parenting classes. Respondent's current counselor did not believe that respondent had a current problem with drugs or alcohol. The counselor testified that respondent was attending counseling on a regular basis, had "made progress toward her goals and objectives," and "loves her children very much." The counselor testified that she would not expect any type of abuse or neglect to occur if the children were returned home. She testified that respondent was "stable" and "has the ability to care for her children and maintain their needs, to provide for their needs at this point in her life." The Families First worker also believed that respondent benefited from the services offered. The New Beginnings worker testified that respondent and ML worked very well together, and the CMH case manager believed that respondent and ML had been "wonderful with the children together."

There is no question that respondent and ML had posed a risk of harm to the children in the past, such as when they used and attempted to manufacture methamphetamine. However, the pertinent question was whether there was a *current* likelihood of harm. MCL 712A.19b(3)(j). Petitioner failed to show such a current likelihood by clear and convincing evidence. It is true that respondent missed a number of domestic-violence counseling sessions.[4] Her current individual therapist, however, had very positive comments about respondent's progress and did not believe the children would suffer harm in her care.

The caseworker advocated for termination because of respondent's multiple relationships, but again, respondent was making progress in therapy and had terminated her relationship with GL, and there was no evidence that GL or the prior boyfriend had ever harmed the children. The caseworker often appeared to be focused primarily on issues from the past, such as the U-Haul trip, as opposed to *recent* positive reports from service providers.

[4] Respondent stated that several of the missed appointments were because of her difficult pregnancy with her fifth child.

As an additional and important consideration, the court ordered respondent out of the family home in November 2016 because of the altercation between ML and GL. Despite her attorney's protestations, respondent was not offered parenting time thereafter—not even supervised visitation—even though it was ML and GL, not respondent, who had engaged in the altercation. It is unclear why DHHS[5] advocated for—and the court approved—such a drastic action, especially when respondent and ML, only weeks earlier, had been doing so well that the children had been returned to their parents' home, on October 18, 2016. While the ordering of respondent from the home was arguably justifiable because of the desire to shield the children from then-existing relationship chaos, the denial of all visitation, including supervised visitation, was extreme. In the controlled setting of supervised visitation, the children would not be subject to any altercations between ML and GL or to any "love triangle" situations. Given the evidence that the children were highly bonded with respondent, it is perhaps not surprising that some of the children were in need of therapy, when all physical contact with their mother was suddenly cut off.[6] As stated in *In re Hicks/Brown*, 500 Mich 79, 90; 893 NW2d 637 (2017), "[T]ermination is improper without a finding of reasonable efforts" at reunification. The complete denial of visitation to respondent was not reasonable under the circumstances of this case.

We are troubled that DHHS made, in the termination petitions, many specific allegations that were simply not supported by the witnesses at the termination hearing—many of whom were DHHS's *own witnesses*. Regarding respondent, DHHS alleged that she failed to benefit from CMH counseling, but her counselor flatly denied this. DHHS alleged that respondent failed to benefit from New Beginnings parenting classes, but the instructor flatly denied *this* as well.[7]

---

[5] The case was under contract to Upper Peninsula Family Solutions (UPFS) for foster-care services at a certain point, and a representative from UPFS—as opposed to a representative from DHHS—signed the termination petitions. For ease of reference, however, we use the acronym "DHHS" in referring to petitioner.

[6] This is not to say that respondent's parenting, in general, did not contribute to the need for therapy, but it is not a stretch to conclude that DHHS's actions were a cause for trauma. Petitioner itself states on appeal, "[I]n the CMH case notes . . . it's hinted that the children's issues are due to being removed from [respondent and respondent-father] and a lack of contact with them."

[7] Although now moot, DHHS also made numerous allegations about ML that the record simply did not support. DHHS alleged that ML failed to budget for housing, but he had maintained housing throughout the proceedings, and a Families First worker testified that ML "showed that he could budget." DHHS alleged that ML did not benefit from CMH counseling, but his CMH service providers clearly disagreed and were positive in speaking about ML's progress in therapy. DHHS alleged that ML failed to benefit from New Beginnings parenting classes, but the instructor was positive in her testimony about him. DHHS alleged that ML failed to "consistently attend substance abuse services," but the caseworker admitted that substance abuse was *not even a concern* in relation to ML.

Given the unsupported allegations by DHHS, the extraordinary circumstance of disallowing visitation between respondent and the children—which likely caused some of the children's trauma—and the evidence of respondent's *current* status and progress, we conclude that the trial court clearly erred by finding that petitioner established by clear and convincing evidence that the children would be harmed if returned to respondent. MCL 712A.19b(3)(j).[8]

As for subparagraph (g), the trial court, as part of its findings, stated that respondent had "not established a safe stable place for herself" since moving to Michigan. In referring to respondent's housing situation, the trial court did not delineate how its findings intersected with the requirement of subparagraph (g) that respondent be financially able to provide proper care and custody for the children. Admittedly, respondent and ML provided inadequate care, at least for the four eldest children, regardless of finances when they exposed their children to a methamphetamine laboratory. However, for the reasons set forth in the analysis of subparagraph (j), petitioner did not prove by clear and convincing evidence that respondent would not be able to provide proper care and custody to the children within a reasonable time considering the child's ages. MCL 712A.19b(3)(g).

In terminating respondent's parental rights to her youngest child, the trial court also relied on MCL 712A.19b(3)(c)(*i*), which states:

> 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:

---

[8] DHHS and the trial court were clearly displeased with the fact that respondent had numerous boyfriends, and on appeal petitioner expresses disapproval of respondents' "bohemian lifestyle." However, as stated in *In re Richardson*, ___ Mich App ___, ___; ___ NW2d ___ (2019) (Docket Nos. 346903 and 346904); slip op at 11:

> In matters regarding the termination of parental rights, we must simultaneously recognize the inherent authority of the trial court to control the proceedings, and to some extent the behavior of the parties, to ensure that the parties are mindful of and demonstrate their ability to ensure the health, safety, and best interests of their minor children while also bearing in mind that the fundamental liberty interest of natural parents in the care, custody, and *management of their child does not evaporate simply because they have not been model parents* or have lost temporary custody of their child to the State. [Quotation marks and citation omitted; emphasis added.]

A proper consideration is whether there are "facts within the record demonstrating that the parent's acts are actually harming or presenting an articulable risk of harm to the child, and the trial court cannot simply presume a risk of harm from its own prior experiences or personal disapproval of a parent's choices." *Id*. at ___; slip op at 14.

* * *

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . the following:
>
> (*i*) The 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.

The initial dispositional order regarding the youngest child was entered on February 7, 2018. The 182-day period elapsed, therefore, on August 8, 2018. The last day of the termination hearing was August 3, 2018. Most likely *because* of this timeline, petitioner did not cite subparagraph (c)(*i*) in the termination petition for the youngest child, and conceded below that MCL 712A.19b(3)(c)(*i*) did not apply to this child. "Termination of parental rights is appropriate where the petitioner proves by clear and convincing evidence" a ground for termination. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). Even assuming—without deciding—that the trial court was allowed to ignore the state of the pleadings and petitioner's concession and sua sponte consider subparagraph (c)(*i*) in conjunction with the youngest child, petitioner did not prove the ground for termination in this subparagraph because, at the close of proofs, the requisite 182-day period had not elapsed. In addition, given all the circumstances and the testimony of the service providers, the evidence was not clear and convincing that there was no reasonable likelihood that respondent's issues could be rectified within a reasonable time.

Given our conclusion that the trial court erred by finding that petitioner established grounds for termination by clear and convincing evidence, we need not address respondent's best-interests or due process issues.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Jane M. Beckering