STATE OF MICHIGAN

COURT OF APPEALS

In re L. N. WINTERS, Minor.

UNPUBLISHED
October 15, 2019

No. 348031
Montcalm Circuit Court
Family Division
LC No. 2018-000814-NA

Before: MARKEY, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Respondent-mother appeals by right the trial court's order terminating her parental rights to her minor child, LNW.[1] We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioner, the Department of Health and Human Services (DHHS), filed a petition with the trial court on January 24, 2018 seeking the removal of LNW from respondent's home. The petition alleged that Children's Protective Services (CPS) had received a complaint in November 2017 that respondent was addicted to Tramadol (a prescription opiate) and cocaine, and improperly supervised LNW while under the influence of drugs. The petition further alleged that respondent's home had been raided and searched by the Michigan State Police on January 23, 2018, that police had found methamphetamine and syringes in a bedroom that respondent shared with LNW, that respondent had admitted to using methamphetamine, and that respondent had been arrested. The petition noted that LNW was voluntarily placed in the care of her maternal grandmother after respondent called her and asked her to take LNW.

The trial court authorized the petition that same day and ordered that LNW's relative placement continue and that petitioner conduct a home study regarding the suitability of the placement within 30 days. Respondent was in jail at the time but participated in the hearing by

[1] LNW's father was also a respondent in the proceedings below and his parental rights to LNW were also terminated. He is not a party to this appeal.

telephone. She was granted two hours per week of supervised parenting time. Respondent pleaded no-contest to the allegations in the petition on February 26, 2018 and the trial court took jurisdiction over LNW.

A dispositional hearing was held on March 19, 2018; respondent, although no longer incarcerated, did not attend the hearing. The lawyer-guardian ad litem (LGAL) for LNW stated that LNW was still placed with her maternal grandmother and that "for all intents and purposes, the child had been staying there a substantial amount of time, even prior to removal." The LGAL opined that the placement was appropriate. The trial court ordered that respondent comply with a case service plan that included a substance abuse and psychological evaluation, random drug screens, refraining from criminal activity, and maintaining adequate housing and employment.

An initial review hearing was held on June 11, 2018. Respondent was not present. Respondent's caseworker testified that respondent had not completed a substance abuse evaluation, but noted that there had been issues with providers not accepting her insurance. The caseworker also stated that respondent had been in a serious car accident and had sustained injuries requiring hospitalization; this hospitalization occurred during the time originally scheduled for her psychological evaluation, and that evaluation had been rescheduled for July. The accident had left respondent with a broken hip and arm as well as other injuries, and she was temporarily wheelchair-bound. The caseworker noted that respondent had missed some drug screens and had tested positive for controlled substances when she did submit to screens. Respondent was staying with her grandmother and was not then working.

At the next review hearing on September 4, 2018, the trial court noted that respondent was incarcerated after being arrested on various outstanding warrants, including for possession of methamphetamine and retail fraud. The caseworker stated that respondent had not yet completed a substance abuse assessment, but added that there were still issues with her insurance. The LGAL testified that respondent had attended some parenting time visits but had missed others. The trial court held that respondent had failed to complete any aspect of her case service plan, but ordered that services be continued with the goal being reunification. However, the trial court declined to order any parenting time for respondent because of her current incarceration.

At the next review hearing on December 4, 2018, respondent was still incarcerated. Respondent's caseworker informed the trial court that respondent had received a psychological evaluation while in jail, and had participated in Alcoholics Anonymous and Narcotics Anonymous. The trial court again held that respondent had failed to complete any aspect of her case service plan and ordered petitioner to change the goal from reunification to termination of parental rights.

Petitioner filed a supplemental petition on January 16, 2019, seeking termination of respondent's parental rights to LNW under MCL 712A.19b(3)(c) (conditions that led to the adjudication or other conditions continue to exist with no reasonable likelihood they will be rectified in a reasonable time), (g) (parent fails to provide proper care or custody), and (j) (reasonable likelihood of harm if the child is returned to the parent's home).

A termination hearing was held on February 25, 2019. Respondent had been released from jail on January 18, 2019. Respondent's caseworker testified that respondent had received a psychological evaluation while in jail, had participated in NA/AA services, and had participated in a "Christian group." The caseworker testified that "[a]s far as other services . . . Montcalm County Jail wasn't able to really provide those." Respondent had been referred for supportive visitation services after her initial disposition, but the program had a long waitlist; respondent had been scheduled to begin the service in August 2018, but was incarcerated by that time. The caseworker testified that out of 38 possible parenting time visits, respondent had fully completed 10, had been late for 11 more, and had missed the remaining 17. However, the caseworker did say that the parenting time visits respondent did attend went "very well." The caseworker testified that respondent was in a wheelchair as a result of her accident in April of 2018 until she was incarcerated in July. Respondent had completed 8 of 16 offered drug screens between January and July 2018, and they were all positive for controlled substances. Respondent had missed her rescheduled psychological evaluations in June and July 2018, although as stated she ultimately received an evaluation while incarcerated. As of the time of the termination hearing, respondent had not been cleared medically for work. Respondent was living with her grandmother after her release from jail; although the caseworker stated that "[i]t would be recommended that [respondent] obtain independent housing," she also stated that she had visited respondent's grandmother's home and it was appropriate for LNW.

Respondent testified at the termination hearing. She admitted to using methamphetamine before her incarceration in July 2018 and that her drug use had caused her to inconsistently participate in her service plan. She testified that she began attending AA/NA meetings regularly while incarcerated, and had continued to attend them after her release; she also testified that she had a sponsor as well as a "recovery coach." Respondent was participating in random drug screens since her release and had not tested positive. Respondent was taking a weekly "cognitive thinking" class offered by the Sheriff's Department. Respondent had begun mental health counseling services. Respondent testified that she had applied for some jobs pending being medically cleared to return to work, and had made some money in the meantime by making and selling craft items. Respondent identified her recovery coach, her sponsor, people she met at NA/AA meetings, and her grandmother and grandfather as supportive individuals in her life. Respondent stated that she was 208 days sober as of the day of the termination hearing.

Respondent offered best-interest witnesses including her grandmother, her aunt, her father's fiancée, and two unrelated friends. In general, they testified that they believed respondent was capable of remaining sober and was a good parent when she was not using drugs.

The trial court held that there was clear and convincing evidence to terminate respondent's parental rights under MCR 712A.19b(3)(c)(*i*), (g), and (j). It noted that respondent had missed several parenting time sessions and had failed to take advantage of several services to which she was referred before her incarceration, including substance abuse evaluation, drug screens, and counseling. The trial court also noted that respondent was not currently employed and was not living "independently." It concluded that respondent had failed to rectify the

conditions that had led to her adjudication.[2] It also found that the statutory grounds in subsections (g) and (j) were proven by the same evidence. And it found that termination was in LNW's best interests, stating that the "rationale for that finding is the lack of concern that the mother showed for this child in its placement out of the home until she was incarcerated." The trial court noted that respondent continued to use controlled substances and have issues with criminality after LNW was removed from the home.

The trial court issued an order terminating respondent's parental rights. This appeal followed.

II. STANDARD OF REVIEW

We review for clear error a trial court's determination regarding statutory grounds for termination. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding of fact is clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). We also review for clear error a trial court's best-interest determination. *Mason*, 486 Mich at 152. We review de novo issues of statutory interpretation. *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016).

III. ANALYSIS

Respondent argues that the trial court erred by holding that clear and convincing evidence supported termination of her parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Those statutory sections permit termination under the following circumstances:

> (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 either of 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.
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> * * *
>
> (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.

[2] The trial court did not explicitly refer to subsection (c)(*i*), but made reference to numerous conditions that led to respondent's adjudication that, in the court's view, continued to exist.

* * *

> (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 bulk of the trial court's analysis was devoted to whether respondent had rectified, or was reasonably likely to rectify in a reasonable time, the conditions that led to her adjudication. The trial court noted that respondent had not made progress in rectifying the conditions that led to her adjudication before her incarceration—she had not participated in counseling services or substance abuse evaluation, had missed drug screens and tested positive for controlled substances, and had failed to obtain employment or income. Respondent essentially agrees with that assessment (although she notes, and the record confirms, that repeated issues with her insurance not being accepted and providers having long waitlists accounted for at least some of the delays in her beginning services) but argues that the trial court erred by failing to consider anything that occurred from the date of her incarceration to the time of the termination hearing. We agree.

MCL 712A.19b(c) states that a parent's parental rights may be terminated if "[t]he parent was a respondent in a proceeding brought under this chapter" and the court finds that "[t]he conditions that led to the adjudication *continue* to exist" or "[o]ther conditions *exist*" that have not been rectified. The use of the present tense supports no other conclusion than that the trial court should consider whether the conditions that led to adjudication are in existence at the time of the termination hearing. See *Deschaine v St. Germain*, 256 Mich App 665; 671 NW2d 79 (2003) (noting that statutory language in the present tense referred to something "currently occurring"). While the trial court is of course permitted to consider the history of the case as a whole, the trial court was required to consider respondent's progress up to the termination hearing in making its determination.

The record reveals that the trial court gave short shrift to any of respondent's progress after respondent's incarceration in July 2018. For example, substance abuse was obviously a core issue that led to adjudication, yet the trial court merely stated that respondent "didn't attend AA or NA until after she was incarcerated, and didn't attend counseling to address her substance abuse issues." The trial court did not explain how respondent's issues with substance abuse were "currently occurring" when, although it may have taken her incarceration to do it, respondent had received a substance abuse evaluation, was attending substance abuse support groups with a sponsor and relapse coach, was 208 days sober, and had provided negative drug screens since her release from jail. With regard to respondent's lack of employment, the trial court heard that respondent had been in a serious car accident that left her injured and wheelchair-bound until she was incarcerated in July, and that she was not yet medically cleared to work (and had a doctor's appointment to discuss the issue the following day). Yet the court stated that it didn't "know why she hasn't been cleared to work" when she was "healthy enough to go to jail in July," speculating that respondent's incarceration had delayed her medical clearance. While it is possible that this is true, the fact remains that no party challenged respondent's inability to resume work until medically cleared. Moreover, respondent was severely injured months before her incarceration, undoubtedly hampering her ability to seek work. Finally, since her release from jail, respondent had taken steps to apply for jobs, to make an appointment to receive

medical clearance, and to obtain government food assistance. We find the evidence far from clear and convincing that there was "no reasonable likelihood" that respondent could rectify her lack of employment in a reasonable time considering LNW's age. MCL 712A.19b(3)(c)(*i*). And with regard to respondent's housing situation, the court merely discussed her housing at the time LNW was removed, and stated that respondent currently was "not living independently." We are not aware of any statutory or caselaw authority holding that respondents must lease or purchase property themselves rather than securing adequate housing for themselves and their children by living with relatives. Further, the caseworker even testified that, apart from the fact that it was not "independent," respondent's living situation with her grandmother was a suitable environment for LNW.

In sum, we are left with the definite and firm conviction that the trial court made a mistake by not fully considering respondent's post-incarceration circumstances up to the date of the termination hearing, and therefore by concluding that the conditions that led to adjudication continued to exist and that there was no reasonable likelihood that respondent could rectify them in a reasonable time. *Terry*, 240 Mich App at 22.

With regard to the two remaining subsections, the trial court essentially relied on the "same reasons" that it believed warranted termination under MCL 712A.19b(c). Under subsection (g), the trial court only added that it found respondent's participating in some sort of religious group study while incarcerated to be of limited value. The trial court stated that respondent could not provide proper care and custody without "proper counseling, including substance abuse counseling" but did not acknowledge the undisputed testimony that respondent *had* begun mental health counseling and substance abuse counseling through North Kent Guidance, as well as her participation in recovery groups and a "cognitive thinking" class. See *In re Newman*, 189 Mich App 61, 70; 472 NW2d 38 (1991) (finding that clear and convincing evidence did not support the trial court's finding that the respondent-father had failed to complete counseling when he was in fact engaged in counseling at the time of the termination order). Under subsection (j), the trial court merely noted the possibility that respondent might relapse and stated that "not one of the barriers that led to the removal of the child have been rectified." As discussed, we do not agree with that characterization of respondent's progress as of the date of the termination hearing. We are left with a definite and firm conviction that the trial court also made a mistake by holding that statutory grounds for termination under MCL 712A.19b(g) and (j) had been established. *Terry*, 240 Mich App at 22.

We note that, despite the trial court's characterization during the best-interest portion of its ruling that respondent wanted it to find that she had "turned over a new leaf and everything's better," a consideration of respondent's post-incarceration circumstances would not require it to do so. But we believe the trial court did not credit the substantial progress respondent managed to make, even if it took incarceration for her to begin making such progress.[3] Moreover, the trial

[3] This phenomenon is sometimes known in recovery circles as "a nudge from the judge." See "A Nudge from the Judge," http://www.aagrapevine.org/node/26885 (last visited August 20, 2019).

court simply erred by concluding, without considering those post-incarceration circumstances that certain issues had not been and would not be rectified.

Because we conclude that the trial court erred by holding that statutory grounds for termination existed, we need not consider respondent's arguments concerning the best-interest determination. However, we note that, although throughout the case the trial court noted that LNW was placed with her maternal grandmother, the trial court made no reference to LNW's relative placement in making its best-interest determination; nor did it explicitly consider many relevant factors, including the child's bond to the parent, the parent's parenting abilities, the parent's compliance with his or her case-service plan, the parent's history of visitation with the child, the child's need for permanency, stability, and finality, the advantages of a foster home over the parent's home, and the possibility of adoption. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014); *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012). And our Supreme Court has explained that a child's placement with relatives is "an explicit factor to consider in determining whether termination was in the children's best interests." *Mason*, 486 Mich at 164. Therefore, were we to consider the trial court's best-interest determination, we would conclude that the trial court clearly erred by making such a determination without addressing the impact of LNW's relative placement or analyzing many of the relevant *Olive/Metts* factors.

We reverse the trial court's order terminating respondent's parental rights and remand for further proceedings consistent with this opinion. On remand, the trial court shall fully consider all of the relevant circumstances up to the date of the continued hearings. *Mason*, 486 Mich at 152. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra