STATE OF MICHIGAN

COURT OF APPEALS

In re R. DAILEY, Minor.

UNPUBLISHED
October 15, 2019

No. 348064
Ingham Circuit Court
Family Division
LC No. 18-001460-NA

Before: REDFORD, P.J., and JANSEN and LETICA, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order granting the petitioner-maternal-grandmother's petition to terminate his parental rights and terminating his parental rights to the minor child, RD, who was under petitioner's guardianship, pursuant to MCL 712A.19b(3)(f) (failure to regularly and substantially provide support for a two-year period or, if there is a support order, failure to substantially comply with a support order, and failure to regularly and substantially communicate) and MCL 712A.19b(3)(h) (the parent is imprisoned for such a time that the child will be deprived of a normal home for over two years, the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time). On appeal, respondent argues that the trial court erred by taking jurisdiction under MCL 712A.2(b)(6). We agree. Therefore, we reverse, vacate the order terminating respondent's parental rights, and remand for proceedings consistent with this opinion.

I. BACKGROUND

In June 2016, petitioner was appointed RD's legal guardian. In October 2016, the trial court determined respondent was RD's biological father and ordered him to pay child support. At that point, respondent was incarcerated. In March 2017, due to respondent's incarceration, the trial court modified its earlier support order, reducing it to $0. It is undisputed that respondent has not paid any support since October 2016.

During the adjudicative portion of the child protective proceeding in February 2019, respondent testified that, due to his enrollment in the boot camp program, he was unable to earn wages while imprisoned and was only working toward an early release in April 2019. Respondent also testified that he attempted to work toward paying his child support while in a

county jail in Tennessee, but was unable to send any money through the program back to Michigan. Respondent represented that he attempted to contact RD at least once a month from December 2016 onward.

Petitioner testified that respondent did not communicate with RD from October 2016 through October 2018. After petitioner filed the petition, respondent sporadically wrote to RD. Petitioner also testified that none of respondent's family members made frequent contact with her or RD.

The trial court determined that petitioner established jurisdiction under MCL 712A.2(b)(6) by a preponderance of the evidence. First, it determined that petitioner was RD's legal guardian. Second, it determined that respondent failed to substantially comply with the support order from October 2016 until March 2017, and that respondent had the ability to provide regular support while incarcerated. The trial court also determined that respondent failed to provide support for RD prior to his incarceration. Third, the trial court determined that petitioner credibly testified that respondent had the ability to contact or communicate with RD and failed to do so for two or more years.

II. JURISDICTION

Respondent argues that the trial court erred by taking jurisdiction under MCL 712A.2(b)(6) based on the finding that he failed to substantially comply with the support order for more than two years when the support order had been suspended. We agree.

We review the trial court's decision to exercise jurisdiction for clear error in light of its findings of fact. *In re Long*, 326 Mich App 455, 460; 927 NW2d 724 (2018).[1] In order to determine that the trial court's factual findings are clearly erroneous, we must be "left with a definite and firm conviction that a mistake has been made." *Id.* (quotation marks omitted). Moreover, when reviewing the trial court's factual findings, we must accord deference to the trial court's opportunity to determine a witness's credibility. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

[1] We note the Supreme Court has ordered briefing to address "(1) whether the Court of Appeals clearly erred in reversing the trial court's decision to exercise jurisdiction over the minor child pursuant to MCL 712A.2(b)(2), where the child was living with a guardian and there was no evidence that the guardian's home was unfit, yet there was evidence that the respondent-father is incarcerated and had a history of criminal conduct; (2) whether the Court of Appeals clearly erred in reversing the trial court's additional decision to exercise jurisdiction over the minor child pursuant to MCL 712A.2(b)(6), based on the respondent-father's conduct in the two years preceding the filing of the petition when he was a putative, not legal, father; and (3) whether the trial court's reliance on *In re LE,* 278 Mich App 1; 747 NW2d 883 (2008), was misplaced." *In re Long*, 503 Mich 985; 923 NW2d 890 (2019).

We review issues of statutory interpretation de novo. *In re MU*, 264 Mich App 270, 276; 690 NW2d 495 (2004). "Child protective proceedings [are] divided into two phases: the adjudicative phase and the dispositional phase." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). "The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child . . . whether the child comes within the statutory requirements of MCL 712A.2(b)." *Id.* If the trial court finds that a child is not within its jurisdiction, it must dismiss the petition. MCL 712A.18(1). To properly exercise its jurisdiction, the trial court must find that a statutory basis for jurisdiction exists by a preponderance of the evidence. *Long*, 326 Mich App at 459-460. When determining a statutory basis for its jurisdiction, the trial court is required to examine the minor's situation at the time that the petitioner files the termination petition. *Id.* at 459. If the trial court finds that a child is within its jurisdiction, the dispositional phase follows. *AMAC*, 269 Mich App at 536.

Here, the sole statutory basis for the trial court's exercise of its jurisdiction was MCL 712A.2(b)(6). That statute provides the family court with jurisdiction over a juvenile who is under 18 years old, who is found within the county, and who has a guardian, if the following two criteria are met:

> (A) The parent,[2] having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition . . . .
>
> (B) The parent, having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition. [MCL 712A.2(b)(6).]

Thus, in order for the trial court to take jurisdiction under MCL 712A.2(b)(6), the petitioner must prove by a preponderance of the evidence that: (1) the parent had the ability to support or assist in supporting the minor for two years or more and failed or neglected, without good cause, to provide regular and substantial support for two years or more before the filing of the petition *or* (2) if a support order has been entered, the parent has failed to substantially comply with the order for two years or more before the filling of the petition *and* (3) the parent had the ability to visit, contact, or communicate with the juvenile and regularly and substantially failed or neglected, without good cause, to do so for two or more years before the filing of the petition. *Id.*

---

[2] In child protection proceedings, a putative father does not qualify as a father or parent for the purpose of exercising jurisdiction. *Long*, 326 Mich App at 464. See footnote 1. Accordingly, before a putative father is declared to be the legal father, he has no legal rights or obligations to the minor, "[r]egardless of any moral obligation." *Id.* "[T]o rely on a putative father's action or inaction in the two years or more preceding the filing of a petition when considering whether to exercise jurisdiction under MCL 712A.2(b)(6) is violative of due process." *Id.* at 464-465.

In analyzing similar language in MCL 710.51(6), we upheld the trial court's determination that the incarcerated respondent-father had failed to substantially comply with his $10 weekly support order. *In re Caldwell*, 228 Mich App 116, 118-119, 122; 576 NW2d 724 (1998). We determined that, when the trial court had previously modified the support order, it considered the respondent-father's ability to pay and, therefore, the petitioner did not need to prove that he had the ability to pay. *Id.* at 122. We further determined that the record reflected that the respondent-father had the ability to assist in supporting his child while incarcerated, as he initially earned $50 monthly while imprisoned and had earned $150 monthly at the time of the termination hearing. *Id.* at 123. Although the respondent-father testified that he could not send money outside of the prison, he conceded that other prisoners with support obligations had arranged for the prison to honor income-withholding orders, an avenue he failed to pursue after obtaining a reduction in his support obligation. *Id.*

Applying *Caldwell*'s reasoning to § 39 of the Adoption Code, MCL 710.39, we then determined that although the respondent-father's incarceration prohibited him from establishing a custodial relationship with his child, it did not necessarily preclude him from providing support for his child by making payments within his means. *In re Lang*, 236 Mich App 129, 139-140; 600 NW2d 646 (1999). Thus, we concluded that an incarcerated respondent-father, who earned $11 a month in prison, but claimed that he had no money left to send to his child after buying personal items, could have provided support for his child because he earned a "modest" income in prison. *Id.* at 132, 139-140.

In this case, we conclude that the trial court did not clearly err in determining that two of the three requirements for establishing jurisdiction under MCL 712A.2(b)(6) were met. First, there is no dispute that petitioner is RD's legal guardian. MCL 712A.2(b)(6). Second, the record also established that respondent had the ability to contact RD and failed to do so regularly and substantially after he was determined to be RD's legal parent in October 2016. *Long*, 326 Mich App at 464-465; MCL 712A.2(b)(6)(B). Petitioner testified that respondent failed to write or send cards to RD and only did so after petitioner filed the petition. Although respondent testified that he attempted to contact RD more frequently than petitioner testified to, we afford deference to the trial court's determination that petitioner was credible. *Fried*, 266 Mich App at 541.

We now turn to the remaining prong set forth in MCL 712A.2(b)(6)(A). We note that this subsection contains two clauses separated by the word "or." One rule of statutory construction instructs us that "[s]eparate meanings should be given to clauses that are separated by the disjunctive term 'or' unless the context of the statute dictates otherwise." *Ruff v Isaac*, 227 Mich App 1, 8; 573 NW2d 55 (1997) (citation omitted). The context of the statute does not dictate otherwise. Rather the statutory language reveals the clauses are distinct with entry of a support order acting as a triggering event for application of the second clause. Implicitly, if a support order exists, this excludes consideration of whether the respondent had the ability to provide support. This is so because entering a support order necessarily requires the trial court to consider if and what a parent has the ability to pay. *Caldwell*, 228 Mich App at 122; *In the Matter of Colon*, 144 Mich App 805, 812; 377 NW2d 321 (1985) (the "ability to pay is already

factored into a child support order, and it would be redundant to require a petitioner to prove the . . . parent's ability to pay as well as that parent's noncompliance with a support order.")[3] Applying both clauses to when there is a support order "would allow a party to circumvent the [earlier] official order of the court." *In re SMNE*, 264 Mich App 49, 54; 689 NW2d 235 (2004).

By analyzing both clauses of MCL 712A.2(b)(6)(A) when a support order was entered, the trial court legally erred. Because a support order was entered, the only relevant question was whether respondent failed to substantially comply with it for a period of 2 years or more. *Caldwell*, 228 Mich App at 122; *Colon*, 144 Mich App at 812. The record establishes that respondent did not fail to substantially comply with the support order for a two-year period preceding the filing of the petition on October 31, 2018; therefore, the trial court clearly erred in taking jurisdiction under MCL 712A.2(b)(6). While respondent indisputably did not comply with the support order from its entry in October 2016 through its suspension in March 2017, he did not fail to comply with it after it was reduced to $0 in March 2017. Accordingly, based on the facts established at the adjudicative phase, the trial court erred in establishing jurisdiction when respondent only failed to comply with the support order for six months, not the two years required under MCL 712A.2(b)(6)(A).

Alternatively, even if the trial court was permitted to determine whether respondent failed to support RD after the support order was suspended, it still clearly erred in its determination that respondent had the ability to support RD and failed to regularly and substantially do so without good cause. MCL 712A.2(b)(6)(A). Although petitioner argues respondent chose to go to boot camp in order to reduce his sentence in lieu of earning wages, this portion of respondent's testimony was from the dispositional, not adjudicative, phase of the proceeding. *AMAC*, 269 Mich App at 536. Thus, based on the adjudicative phase of the proceeding, there is no evidence that respondent was able to earn money in prison, unlike the incarcerated respondent-fathers in *Caldwell* and *Lang* who earned money and failed to support their children. *Caldwell*, 228 Mich App at 123; *Lang*, 236 Mich App at 132, 139-140. Additionally, the respondent-father in *Caldwell* still had a support order in place and, thus, the trial court had already determined that he was capable of providing support, unlike respondent here, who had his support order suspended due to his incarceration. *Caldwell*, 228 Mich App at 122-123. Moreover, the respondent-father in *Caldwell* conceded that he had failed to work with the prison to comply with his support order, unlike respondent, who testified that he inquired and was told he would be unable to send the money earned in Tennessee back to Michigan. *Id.* at 123.

[3] In fact, the Legislature recently amended MCL 710.51(2) in the Adoption Code to add that "[a] child support order stating that support is $0.00 or that support is reserved shall be treated in the same manner as if no support order had been entered." 2016 PA 143, effective September 5, 2016. The Legislature did not add this language to MCL 712A.2(b)(6)(A). Thus, a zero-dollar child-support order, like the one entered here, remains a child-support order under MCL 712A.2(b)(6)(A).

Lastly, the petitioner's reliance on *In re Beck*, 488 Mich 6; 793 NW2d 562 (2010), for the proposition that RD has an inherent right of support regardless of the effect of a support order, is misplaced. In *Beck*, the Supreme Court held that the termination of a legal father's parental rights did not serve to terminate his child support obligation arising under a divorce judgment " ' unless a court of competent jurisdiction modifies or terminates the obligation . . . .' " 488 Mich at 15, quoting MCL 722.3(1). Respondent, unlike the respondent-father in *Beck*, had no legal obligation to support RD until he was her legal father. Moreover, unlike the respondent-father in *Beck*, respondent's support obligation was altered by a court of competent jurisdiction when the court modified it to $0 due to his incarceration. *Beck*, 488 Mich at 15.

Thus, the trial court clearly erred in taking jurisdiction in this case under MCL 712A.2(b)(6) and should have dismissed the petition. MCL 712A.18(1). Accordingly, we reverse, vacate the order terminating respondent's parental rights, and remand for proceedings consistent with this opinion.[4] We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Kathleen Jansen
/s/ Anica Letica

[4] As we determined that reversal is warranted on respondent's jurisdictional claims, we do not address his remaining arguments.