STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 20, 2011

In the Matter of R. G. BRINKER IV, Minor.

No. 302305
Crawford Circuit Court
Family Division
LC No. 09-003712-NA

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(*i*). We affirm the order terminating respondent's parental rights, but conclude that termination was appropriate under § 19b(3)(c)(*ii*) rather than § 19b(3)(c)(*i*).

Respondent first argues that the trial court erred by finding that petitioner provided adequate services to him to allow him to rectify the conditions that prevented reunification with the child. We review the trial court's findings of fact for clear error. MCR 3.977(K). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

When a child is removed from a parent's custody, petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal. MCL 712A.18f; *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). "Reasonable efforts to reunify the child and family must be made in all cases" except those involving aggravated circumstances not present in this case. MCL 712A.19a(2); see also *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "The state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." *Id.* Here, there was evidence that petitioner provided respondent with a case service plan and attempted to actively engage him in services. Furthermore, there was evidence that respondent had sufficient time to complete the required services while he was out of jail. We perceive no clear error in the trial court's finding that petitioner made reasonable efforts to rectify the conditions that caused the child's removal.

Respondent further argues that he was wrongly denied participation in two hearings because he was incarcerated. Although respondent cites *Mason* to support his argument that he is entitled to relief, *Mason* was decided on the basis of MCR 2.004, which only applies to individuals under the jurisdiction of the Michigan Department of Corrections. MCR 2.004(A);

see also *Mason*, 486 Mich at 152-154. In the present case, however, respondent was incarcerated in the Missaukee County jail during the missed hearings. Importantly, we note that respondent was represented by counsel at all hearings and was present at all but the two missed hearings. Therefore, unlike in *Mason*, in this case respondent was not denied a meaningful opportunity to participate in the proceedings. Under the circumstances, respondent has not shown that he is entitled to relief.

Respondent next argues that the trial court erred by finding that termination of his parental rights was in the minor child's best interests. We review the trial court's findings on this matter for clear error. MCR 3.977(K).

The psychologist who evaluated the child testified that the child had been emotionally harmed by his parents' irresponsibility and by respondent's unavailability due to repeated incarcerations. Specifically, the psychologist testified that the child was oppositional and pessimistic, had impaired reality, was moderately depressed, was not in control, and that his coping mechanisms were overwhelmed. There was evidence that respondent had an extensive criminal history, a long history of substance abuse, and was noncompliant with the services offered to him through the pendency of this case. While there was certain evidence to suggest a bond between respondent and the child, after review of the record as a whole we find no clear error in the trial court's determination that termination was in the child's best interests.

Respondent makes several additional arguments in a supplemental brief filed *in propria persona*. He first argues that the trial court erred by ignoring the presumption set forth in MCL 722.25, which provides that in a child-custody dispute between a parent and an agency or third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents unless the contrary is established by clear and convincing evidence. This issue presents a question of law that we review de novo. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). MCL 722.25 is part of the Child Custody Act, and is not applicable to termination proceedings. Therefore, we find no merit in respondent's argument.

Respondent next argues that the trial court erred by failing to give adequate weight to his fundamental liberty interest in the care and custody of his child. Again, this issue presents a question of law that we review de novo. *Rood*, 483 Mich at 91. A parent's interest in the care and custody of his or her child is an element of the liberty protected by the Due Process Clause, and this liberty interest does not disappear merely because the respondent was not a "model parent." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); see also *In re B & J*, 279 Mich App 12, 23; 756 NW2d 234 (2008). However, once clear and convincing evidence of parental unfitness has been introduced, the parent loses his or her fundamental liberty interest in the care and custody of the child. *Id*. There is simply no indication in the record that the trial court ignored, or failed to give adequate weight to, these constitutional principles.

Respondent also argues that the trial court based its decision to terminate his parental rights on the doctrine of anticipatory neglect and that the court's decision was not supported by the evidence. To terminate parental rights, the trial court must first find that at least one of the statutory grounds set forth in MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re JK*, 468 Mich at 210. Once a statutory ground for termination of parental rights

is properly established, the court must terminate the respondent's parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). We review the trial court's findings for clear error. MCR 3.977(K).

We conclude that the trial court made an error of law when it terminated respondent's parental rights under § 19b(3)(c)(*i*), which authorizes termination when the conditions that led to adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time. Termination on the basis of § 19b(3)(c)(*i*) was improper because it appears that adjudication in this case was based solely on admissions made by the child's mother about her own conduct.

However, the trial court's error in this regard was harmless because termination was nevertheless appropriate under § 19b(3)(c)(*ii*), which was alleged in the supplemental petition. This subsection authorizes termination when

> [o]ther conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. [MCL 712A.19b(3)(c)(*ii*).]

Here, the "other conditions" were respondent's drug use, criminal history, repeated incarcerations, and the effect these conditions had on the child, all of which were established by legally admissible evidence.[1] These conditions would have been sufficient to cause the child to come within the court's jurisdiction under MCL 712A.2(b)(1). Respondent was offered a case service plan intended to rectify these conditions but failed to resolve the issues by following through with substance abuse treatment, individual counseling, and other services to which he was referred. In addition, there was testimony that, because of respondent's drug addiction and failure to comply with services, it would take a minimum of one more year before the child could be placed with respondent. We conclude that the statutory ground for termination set forth in § 19b(3)(c)(*ii*) was proven by clear and convincing, legally admissible evidence.

Finally, respondent argues that the trial court erred by finding that his testimony regarding participation in substance abuse classes while in prison was incredible and by placing undue emphasis on his prior perjury conviction when assessing his credibility. We review the trial court's findings of fact for clear error, giving regard to the trial court's special opportunity

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[1] Because termination under § 19b(3)(c)(*ii*) involves circumstances different from those that led to the initial adjudication, only legally admissible evidence may be used to prove the ground for termination. MCR 3.977(F)(1)(b).

to assess the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Having observed respondent's demeanor and having considered the conflicts between respondent's testimony and that of the other witnesses, the trial court determined that respondent's testimony regarding his attendance at substance abuse classes in prison was not credible, especially in light of the fact that no verification of his attendance was offered in evidence.[2] As respondent points out, the trial court also considered his prior perjury conviction when assessing his credibility. But we find no error in the court's consideration of this conviction. Just as a prior perjury conviction may be used to impeach a witness's credibility, MRE 609(a)(1), we conclude that the trial court was entitled to consider the conviction when assessing the trustworthiness of respondent's testimony. We perceive no error in the trial court's credibility determination.

Despite the trial court's ruling to the contrary, the proper statutory ground for termination in this case was § 19b(3)(c)(*ii*) rather than § 19b(3)(c)(*i*). Nonetheless, we affirm because the trial court reached the correct result. See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

[2] Although respondent has submitted a certificate of completion and proof of his enrollment in the prison substance abuse classes on appeal, such proof was not submitted to the trial court. Therefore, the certificate of completion and proof of enrollment are not part of the record on appeal. MCR 7.210(A)(1).