STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 29, 2011

In the Matter of T. MASSEY, Minor.

No. 302467
Kalamazoo Circuit Court
Family Division
LC No. 2003-000134-NA

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the child under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (g), and (m)(*i*). For the reasons set forth in this opinion, we affirm the termination of respondent's parental rights.

On July 7, 2009, petitioner filed a petition alleging that respondent was facing life in prison for conspiracy to manufacture methamphetamines. On July 14, 2009, the trial court authorized the petition but released the child to the mother, who apparently was no longer incarcerated, on the condition that the mother comply with random drug screens, submit to a substance abuse assessment, and refrain from using or selling illegal drugs in the home. The child was removed from the mother's home on September 15, 2009, after the trial court determined that she was not complying with the specified conditions and petitioner placed the child with the grandmother. The mother's parental rights were terminated following a hearing on September 8, 2010.

While the trial court ordered that a case service plan be developed for the mother, there is no indication in the record that a case service plan was developed for respondent, who remained incarcerated throughout these proceedings. Hence, on July 16, 2010, petitioner filed a supplemental petition seeking termination of respondent's parental rights under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (c)(*ii*), (g), (h), (j), and (m). Specifically, the supplemental petition alleged that respondent refused to participate in services to reunify with his other child, and that respondent had released his parental rights to his other child on May 17, 2010. The supplemental petition also stated that since the disposition hearing, respondent had failed to comply with the case service plan because he remained incarcerated with an earliest release date of 2032. The petition also stated that respondent wrote a letter to the trial court on July 21, 2009, indicating that he did not wish to be transported to hearings or to be involved in services due to the length of his prison term.

Although the termination hearing was scheduled to begin on November 4, 2010, the trial court adjourned the hearing because respondent had not yet been personally served with notice of the hearing. The trial court ordered that personal service be attempted via the Newaygo County Sheriff and by publication in the Kalamazoo Gazette.

The termination hearing was continued to January 4, 2010. Respondent was present at the hearing by telephone from prison. Respondent indicated to the trial court that he had not received a copy of the petition. After reviewing the attempts the trial court and petitioner had made to serve respondent with notice of the proceedings throughout this case, the trial court denied respondent's request for an adjournment due to insufficient service. The trial court found that respondent had both actual and constructive notice of the proceedings and that the file contained proof of service of the petition on respondent.

Thereafter, the court proceeded with the termination hearing, with respondent testifying as the first witness. Respondent testified that he was currently incarcerated in a federal prison after having plead guilty to conspiracy to manufacture, possess, and distribute methamphetamines. Respondent testified that he had been sentenced to 27 years in prison, and that he had 21 years remaining on his sentence. Respondent explained that he was appealing his conviction and sentence, and that he expected a decision on his appeal within six to eight months. Respondent admitted that he had been incarcerated for most of the child's life but noted that he supported the child when he was first born. He noted that he last saw the child in the summer of 2009, when the child was brought to visit respondent in jail.

Respondent acknowledged that he wrote a letter to the court in July 2009, indicating that he did not want to be involved in the proceedings and that he did not want to be transported to the hearings due to the length of his prison term. Respondent did not believe that he was given a case service plan in this case but stated that he may have been given one in the case involving his other child. Respondent acknowledged that he released his parental rights to his other child.

The second and final witness at the hearing was a foster care worker assigned to the case since the child was removed from the home in September, 2009. She noted that the child lived with a grandmother, and respondent's other child ever since September, 2009. She commented that the child's grandmother and respondent's other child were "a very, very bonded family," and that there was no question that the child should remain with the grandmother, who, despite the recent death of her husband was committed to adopting the child.[1]

Following all of the testimony, the trial court found that petitioner had presented clear and convincing evidence of the grounds for termination set forth in MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (g), and (m). The trial court emphasized the evidence that respondent had been incarcerated for most of the child's life and that there was no reasonable likelihood that his situation would change. The trial court found that the ground for termination set forth in § 19b(3)(m) was proven on the basis of evidence that respondent terminated his rights to his

[1] The grandmother had already adopted respondent's other child.

other child during a proceeding initiated under the juvenile code. The trial court concluded that § 19b(3)(c)(*ii*) had not been proven because there was no evidence that respondent had ever received a case service plan, and further found that § 19b(3)(j) was not proven. The trial court then found that termination of respondent's parental rights was consistent with the child's best interest. Thereafter, the court entered an order terminating respondent's parental rights to the child and this appeal ensued.

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) was proven by clear and convincing evidence. MCL 712A.19b(3); *In re JK*, 468 Mich 202, 210; 661 NW2d 216, reh den 468 Mich 1239 (2003); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once a statutory ground for termination of parental rights is established, the court must terminate if it finds that termination of parental rights is in the child's best interests. MCL 712A.19b(5).

This Court reviews a trial court's finding that a ground for termination was established by clear and convincing evidence for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Mason*, 486 Mich at 152. Furthermore, this Court must give regard to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 455 NW2d 161 (1989).

Respondent's parental rights were terminated under MCL 712A.19b(3)(a)(*ii*), (c)(*i*)**,** (g), and (m)(*i*), which provide as follows:

> (3) 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:
>
> (a) The child has been deserted under any of the following circumstances:
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> * * *
>
> (*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.
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> * * *
>
> (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.
>
> * * *

> (g) The 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.
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> * * *
>
> (m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state and the proceeding involved abuse that included 1 or more of the following:
>
> (*i*) Abandonment of a young child.

MCL 712A.19b(3)(a)(*ii*)

Termination is proper under this subsection if "the child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period." MCL 712A.19b(3)(a)(*ii*). The trial court found as follows:

> The fact that an individual is incarcerated in and of itself the Court would not find that to be desertion. However, in this case, as is indicated by the respondent's own testimony, when he was under the belief that the respondent mother was going to handle the situation, so to speak, he had no interest in even participating in these proceedings. And, he has not, since his incarceration, made any efforts to make contact with the child, or provide the child with any gifts, or financial assistance, or even — and understanding that he may not have the monetary means, but even to making contact, even sending letters, even having family members of his make contact, if available. Nothing was done. He relied on the mother to be the one to hopefully raise this child, and to support the child.

The record contained clear and convincing evidence to support the trial court's finding that respondent abandoned the child for at least 91 days. There was evidence that respondent wrote a letter to the court in July 2009, indicating that he did not want to be involved in the proceedings regarding the child, and that he did not want to be transported from prison to the hearings, because he believed the mother was cooperating with services and would care for the child. Further, respondent testified that he did not learn of the mother not cooperating for a significant time period after petitioner had assumed custody of the child.

The trial court also found that respondent did not make any efforts to contact the child or to send the child any gifts or letters since he became incarcerated. Respondent argues that this finding was clearly erroneous. While there was evidence that respondent had not seen the child since the summer of 2009, when the child was brought to jail to see respondent, there was no evidence indicating whether he sent cards or gifts to the child. Even assuming there was, respondent's letter in July 2009 informing the trial court that he did not want to participate in the proceedings, and that his failure to participate continued through November 2010 constitute clear and convincing evidence that respondent deserted the child for 91 or more days and did not seek custody of the child during that time. This evidence was sufficient to prove that respondent

"deserted the child for 91 or more days and ha[d] not sought custody of the child during that period." MCL 712A.19b(3)(a)(*ii*). Therefore, the trial court properly terminated respondent's parental rights on the basis of MCL 712A.19b(3)(a)(*ii*).

MCL 712A.19b(3)(c)(*i*)

The trial court found that termination under § 19b(3)(c)(*i*) was appropriate because respondent "has been incarcerated for most of this young child's life, and given the child's age, there is no — and — and the condition upon which the respondent father finds himself, there's no reasonable likelihood this will be changed." Respondent does not appear to challenge this ground for termination in his brief on appeal. Despite this failure to challenge this basis for termination, for the reasons set forth in this opinion, § 19b(3)(c)(*i*) was not a proper ground for termination because the trial court found that § 19b(3)(c)(*i*) was satisfied solely on the basis of respondent's incarceration and thus did not consider whether respondent could have rectified his failure to provide proper care and custody for the child due to his incarceration by placing the child with a suitable relative.

MCL 712A.19b(3)(g)

With respect to § 19b(3)(g), the trial court found:

> Relative to 712A.19b(3)(g), I do find by clear and convincing evidence that the parent without regard to intent failed to provide proper care or custody for the child, and there's no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable period of time given the child age — child's age. Again, for the reasons and the fact already stated on the record, that is true.

Respondent argues that the trial court's finding that he failed to provide proper care and custody for the child in the past was clearly erroneous because there was evidence that respondent provided for the child for the first seven months of the child's life.

While respondent testified that he provided financial support for the child when the child was first born, the evidence that respondent was convicted of conspiracy to manufacture methamphetamines and was imprisoned for most of the child's life, without making arrangements for the child's care, constituted clear and convincing evidence that respondent failed to provide proper care and custody for the child.

The trial court's finding that there was no reasonable expectation that respondent will be able to provide proper care and custody for the child's within a reasonable time appears to have been based on solely on respondent's incarceration. Our Supreme Court has held that incarceration, alone, is not grounds for termination and that a trial court must consider whether an incarcerated parent can provide proper care and custody for a child by placing the child with relatives during the parent's prison term. *In re Mason*, 486 Mich at 160-165. In *Mason*, our Supreme Court acknowledged that Michigan permits a parent to provide proper care and custody through placement with a relative. The *Mason* Court concluded that the trial court erred by failing to consider whether the respondent could fulfill his duty to provide proper care and custody by voluntarily granting custody to his relatives during the remaining term of his

incarceration.[2] *Mason*, 486 Mich at 163-164. The *Mason* Court noted that, because the children had already been placed with the respondent's relatives, "it was unnecessary for respondent to make ongoing arrangements with the relatives that would permit him to preserve his rights and remain in contact with his sons." *Id.* at 164. The *Mason* Court held that termination under (g) was premature because "the court erred in evaluating whether respondent could care for his children in the future, either personally or through his relatives." *Id.* at 164-165.

Here, it was undisputed that the grandmother's home was a proper placement for the child. Hence, because the trial court failed to consider whether respondent could provide proper care and custody for the child in the future by placing the child with the grandmother, and no testimony was presented as to how long it would take respondent to provide proper care and custody of the child in the event his appeal was successful, the trial court's finding that there was no reasonable expectation that respondent would be able to provide proper care and custody for the child within a reasonable time was not supported by clear and convincing evidence. Accordingly, the trial court erred in granting termination on the basis of § 19b(3)(g).

MCL 712A.19b(3)(m)

Termination is proper under § 19b(3)(m)(*i*) when the parent's rights to another child were voluntarily terminated following the initiation of proceedings under MCL 712A.2(b) or a similar law of another state and the proceeding involved abuse that included abandonment of a young child. MCL 712A.19b(3)(m)(*i*). With respect to § 19b(3)(m), the trial court found as follows:

> I specifically cite, in the Court's file, and I referenced it when we were — we were going through the — through the case file earlier… it is clear to the Court that there was an initial proceeding under the juvenile code brought…[a]nd that as a result of that there was a vol — voluntary termination. And so, again, 712A.19b(3)(m) has been proven.

Respondent argues that the trial court's findings are clearly erroneous because respondent released his parental rights during an adoption proceeding rather than during a neglect proceeding under MCL 712A.2(b). The lower court record, however, supports the trial court's findings. Respondent testified that he voluntarily released his parental rights to his child in May 2010, after neglect proceedings were initiated. Under these circumstances, it does not appear that the trial court clearly erred in finding that the statutory ground for termination set forth in § 19b(3)(m)(*i*) was proven by clear and convincing evidence.

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[2] We recognize the factual distinction between this case and *Mason*. In *Mason*, the respondent's release from prison "was potentially imminent at the time of the termination hearing." *Mason*, 486 Mich at 159. Here, respondent testified that he had approximately 21 years remaining on his 27-year sentence. However, the trial court, in reaching its decision, did not point to this factual distinction but rather failed to adhere to the analytical framework set forth in *Mason*.

Respondent contends that the trial court clearly erred in finding that respondent received sufficient notice of the petition and the termination hearing. Again, we review the trial court's factual findings for clear error. MCR 3.977(K); *Mason*, 486 Mich at 152. Generally, a respondent must be notified of a termination hearing by personal service of a summons with a copy of the petition attached. MCR 3.920(B)(2)(b), (B)(3)(d), (B)(4) and (G); MCL 712A.12. However, "if the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved," the court may order alternative service in any manner that is reasonably calculated to give notice of the proceedings, including publication. MCR 3.920(B)(4)(b); MCL 712A.13.

Here, a review of the trial court record reveals that, after numerous attempts to personally serve respondent with a summons and copy of the supplemental petition, the trial court entered an order for alternative service, and respondent was served at the Newaygo County Jail by ordinary mail on November 4, 2010, and by publication pursuant to MCR 3.920(B)(4)(b) and MCL 712A.13. Respondent has not shown clear error in the trial court's findings.

Finally, the trial court did not clearly err in its best-interest determination. Respondent had been incarcerated for most of the child's life and last saw the child in the summer of 2009, shortly before the child was removed from his mother's care. Respondent was currently serving a 27-year prison sentence for conspiracy to manufacture methamphetamines. The child had been placed with his maternal grandmother, who had already adopted the child's brother and intended to adopt this child as well. It is appropriate for the court to consider the potential advantages of a foster or adoptive home when determining the best interests of a child. *In re Foster*, 285 Mich App 630, 634-635; 776 NW2d 415 (2009). There was evidence that the grandmother was "very, very bonded" with the children, and there appeared to be no dispute among the parties that the grandmother's home was a stable environment for the child. On the basis of this evidence, we find no clear error in the trial court's finding that termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5); MCR 3.977(K).

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello