STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
February 14, 2013

In the Matter of J.J.M., and J.R.M., Minors.

No. 310797
Dickinson Circuit Court
Family Division
LC No. 11-000501-NA

Before: BECKERING, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(*i*) and (g).[1] We affirm.

This case began in January 2011 in response to allegations of serious domestic violence in the home of respondent and the children's father, along with the accusations of each that the other had a serious problem with drug dependency. Although respondent initially denied having such a problem, she had a history of obtaining and overusing various prescription narcotics and also of being observed in a state of intoxication while the children were in her care. Respondent had previous convictions for obtaining a controlled substance by fraud, driving while impaired, driving on a suspended license, and retail fraud. Petitioner had some earlier involvement with the family when one of the minor children, J.J.M., tested positive for opiates and the active ingredient in marijuana when she was born.

Respondent pleaded to the allegations in the petition in exchange for petitioner's refraining from seeking immediate termination of her parental rights. The trial court ordered that respondent participate in substance-abuse treatment. The court described the relationship between respondent and the children's father as "toxic" and ordered respondent to avoid contact with him and obtain separate housing. Respondent took full advantage of her opportunities to spend time with the children. However, over the months that followed, she showed no benefit from substance-abuse treatment, and she continued to see the children's father.

[1] Petitioner also sought to terminate respondent's parental rights under MCL 712A.19b(3)(j), but the trial court did not find that ground had been proven by clear and convincing evidence.

During the course of this case, respondent served two terms of incarceration, including one in progress at the time of the termination hearing. She was discovered attempting to both falsify a drug test and smuggle drugs into jail with her. Her failure at the former ruse resulted in her admitting to a relapse in her latest attempt to cooperate with treatment and gain control over her addiction problem. A supervisor for the county Child Welfare Department testified that respondent was told during a permanency planning conference in January 2012 that she was facing her "last chance" and that a single relapse into substance abuse would result in a petition to terminate her parental rights. Nonetheless, respondent relapsed just several days later. On May 29, 2012, the trial court terminated respondent's parental rights.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b has been proven by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). If the court finds that a statutory ground for termination exists, it shall order termination of parental rights if it also finds "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5). We review for clear error the trial court's decision terminating parental rights. *In re Trejo*, 462 Mich at 356-357; see also MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Deference is given to the trial court's assessment of the credibility of the witnesses. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

In this case, we find no clear error in the trial court's conclusion that statutory grounds for termination were established by clear and convincing evidence under MCL 712A.19(3)(c)(*i*) and (g). Section 19b(3)(c)(*i*) calls for termination where "[t]he 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." Section 19b(3)(g) calls for termination where "[t]he 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."

Respondent does not contend that she had overcome her drug addiction at the time of parental termination. Rather, she argues that her latest progress in gaining control over her substance-abuse problem now promises a better result than all such earlier attempts. However, the trial court noted that respondent's sobriety had only been during the time that she was in a structured setting, that her addiction still existed, and that she had not even successfully completed treatment. The trial court noted that there was "a chance" or "a possibility" of respondent's continuing recovery after jail, and it hoped for respondent's sake that she would recover from her addiction. But, on the basis of the record before it, the trial court concluded that there was no *reasonable likelihood* that the conditions would be rectified within a reasonable time given the children's ages. The court noted that the focus was on the children, not on giving respondent "one last chance." The court asked, "if we wait and you don't recover, is that reasonable to make your children grow more attached to you during that timeframe; to grow that relationship only to find out you can't overcome your substance abuse addiction?" The court explained, "I'm not going to use your children as carrots to try and guide you into recovery. They're not pawns, . . . they're not tools to be used to get you to successfully recover."

Moreover, respondent's cooperation with, or progress from, the reunification services that were offered was generally poor, with the exception of spending time with the children. "Failure to substantially comply with a court-ordered case service plan is evidence that return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well being." *In re Trejo*, 462 Mich at 346 n 3 (internal quotation marks and citation omitted). Furthermore, a parent's persistent failure to gain control over a substance-abuse problem is ground for termination of parental rights. See *In re Conley*, 216 Mich App 41, 44; 549 NW2d 353 (1996), citing MCL 712A19b(3)(c)(*i*) and (g).

In this case, the trial court explained that respondent began this case "in the throes of active use and addiction[,] . . . incapable of functioning on any level let alone that of a parent," and so remained until she was incarcerated in July 2011. The court observed that respondent's demeanor and appearance improved "markedly" after that but characterized her nonetheless as "a dry drunk," a person cut off from her addiction as a consequence of the "structured environment of incarceration." The court further observed that, even while in jail and during her stay at a 90-day residential drug rehabilitation program, respondent was not well focused on her treatment, which led to her February 2012 relapse (and consequent expulsion from the rehabilitation program) just 12 days after being admonished that her parental rights were at stake.[2] The court then observed that respondent was facing six more months of incarceration and stated that, even if she were granted work release and avoided relapsing during that time, "you still have that structured setting of the jail . . . for the most part," so "[w]e really won't have a test until you're released from jail."

The court additionally faulted respondent for her history of continuing in a violent domestic relationship she should have known could affect the children. See *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009) (considering respondent mother's decision to continue to involve herself in situations of domestic violence); *In re AH*, 245 Mich App 77, 86-88; 627 NW2d 33 (2001) (same). The court acknowledged that respondent was not the perpetrator of the domestic violence of record but explained to respondent, "you lived in that environment and . . . helped expose your children to it . . . ."

The trial court's reasoning was sound. In this case, given respondent's long history of substance abuse and her failure to gain control over that tendency—to the point of trying to

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[2] The court indicated that it did not believe respondent was intentionally depriving her children of an appropriate environment but, because of her intractable addiction, she failed to provide them with proper care or custody "for a lengthy period of time even preceding the filing of the Petition." The court further noted:

> It's clear why. Prior to the filing of the Petition it was because of your use of controlled substances. After the Petition was filed until you went to jail it was because of your use of controlled substances. You got another conviction that resulted in further incarceration because of the use of controlled substances. You were discharged from recovery because of the use of controlled substances. And we're here today because of your use of controlled substances.

smuggle illegal substances into jail and of relapsing into abuse just several days after being warned specifically that such a relapse would trigger a termination petition—the trial court did not clearly err by concluding that respondent had failed to provide proper care and custody for the children, that the conditions of the adjudication continued to exist, and that there was no reasonable likelihood that these conditions would be corrected in a reasonable time considering the children's ages.

In making its best-interest determination, the trial court used the best-interest factors set forth in the Child Custody Act, MCL 722.23, for guidance. Although a court is under no obligation to refer to the best-interest factors in the Child Custody Act when making its best-interest determination, it is perfectly appropriate for the court to do so. See *In re JS & SM*, 231 Mich App 92, 102-103; 585 NW2d 326 (1998), overruled on other grounds by *In re Trejo*, 462 Mich at 353-354 & n 10. Here, the trial court had no doubt that respondent greatly loved her children and that they shared mutual love, affection, and emotional ties. However, respondent could not provide appropriate guidance if she could not succeed in her recovery, and the court did not believe that she could recover any time soon. It also found that respondent lacked the capacity to provide her children with food, clothing, and medical care and that such problem would continue in light of both her drug addiction and existing legal and financial issues. Respondent also lacked the ability to provide her children with a stable environment, and her decision to continue in a relationship with the children's father would expose the children to potential future violence. The trial court noted that the children lived in the home of their grandparents and that the plan was to return them to their father's home. As such, the children would remain in the community and potentially, under appropriate circumstances, continue to have some form of relationship with respondent. The trial court, however, refused to take a chance with the children's mental health by maintaining the current unstable situation on the basis of a guess as to whether respondent would overcome her addiction in the future, which the trial court did not believe would occur in a reasonable period of time, if at all. Given the existing record and our deference to the trial court's assessment of witness credibility, we conclude that the trial court did not clearly err by finding that termination was in the minor children's best interests.

Affirmed.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra