

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 29, 2013

In the Matter of A.R. PENNINGTON, Minor.

No. 311172
Wayne Circuit Court
Family Division
LC No. 07-463332

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(g), (h), and (j). We affirm.

Respondent argues that the trial court clearly erred by finding that petitioner, the Department of Human Services, provided clear and convincing evidence that the statutory grounds for termination had been met and that termination of respondent's parental rights was in the child's best interests. We disagree.

We review for clear error a trial court's findings that a ground for termination has been established and that termination is in a child's best interests. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009), quoting *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* at 91.

"To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *Id.* "If a statutory ground for termination is established and the trial court finds 'that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.'" *Id.* at 32-33, quoting MCL 712A.19b(5).

We first conclude that the trial court did not clearly err by finding that statutory grounds for termination had been established pursuant to MCL 712A.19b(3)(g) and (h). MCL 712A.19b(3)(g) states that a court must find by clear and convincing evidence that "[1] [t]he parent, without regard to intent, fails to provide proper care or custody for the child and [2] 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." MCL 712A.19b(3)(h) contains the same elements as MCL 712A.19b(3)(g), except that MCL 712A.19b(3)(h) contains the additional element that, due to the parent's incarceration, "the child will be deprived of a normal home for a period exceeding 2 years." MCL 712A.19b(3)(h), in its entirety, states that a court must find by clear and convincing evidence that "[1] [t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and [2] the parent has not provided for the child's proper care and custody, and [3] 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."

In this case, similar facts from the record justify the court's findings in regard to MCL 712A.19b(3)(g) and (h). Respondent was incarcerated for fourth-degree criminal sexual conduct at the time the minor child was born. In addition, respondent had a lengthy criminal history. For the first several months of the child protective proceedings, respondent remained incarcerated. He was released in June 2011 and retained his liberty until March 2012. During that time, petitioner provided respondent with a parent/agency treatment plan and services. Initially, respondent appeared to be doing well with the parent/agency treatment plan and was in substantial compliance, although he did not yet have income or suitable housing. However, in the fall of 2011, respondent stopped contacting DHS, stopped attending visitation with the child, and violated his probation by failing to register as a sex offender, failing to contact his probation officer, and testing positive for cocaine. Additionally, respondent never obtained housing or a legal source of income and did not follow through with substance-abuse treatment, psychological evaluations, counseling, or mental-health services. Respondent also failed to complete parenting classes. In March 2012, respondent was incarcerated for violation of probation and was eventually sentenced to 30 months to 15 years' imprisonment. At the time of the termination hearing, his earliest release date was August 2013, but he could be imprisoned for as long as 15 years.

On the basis of this evidence, there was clear and convincing evidence that respondent had not provided proper care and custody for the child. See MCL 712A.19b(3)(g); MCL 712A.19b(3)(h). Respondent never had suitable housing or legal income throughout the entire proceedings and never provided for the child. Furthermore, respondent was not compliant with his court-ordered parent/agency treatment plan. Respondent's failure to comply with the parent/agency treatment plan pursuant to court order is a valid indication of neglect. See *In re Trejo*, 462 Mich at 360 n 16.

In addition, given respondent's history of noncompliance with the parent/agency treatment plan, substance abuse, and illegal conduct, the evidence showed that there was no reasonable likelihood that respondent would be able to provide proper care and custody within a reasonable time and that the child would be deprived of a normal life for at least two years because of respondent's imprisonment. See MCL 712A.19b(3)(g); MCL 712A.19b(3)(h). Although it is possible that respondent could only be imprisoned for a period of 14 months after the termination hearing, it is also possible that he could be imprisoned for up to 15 years. Furthermore, given respondent's history—particularly the 10-month period when he was not incarcerated and failed to obtain housing and employment—the court reasonably concluded that respondent would not be able to provide the child with a normal life within 10 months of being

released from prison. Respondent also could not be expected to comply with the parent/agency treatment plan while he was imprisoned because, as his Child Protective Services (CPS) caseworker testified, the services respondent was required to complete were not offered in prison. Therefore, the trial court did not clearly err by finding that there was clear and convincing evidence of grounds for termination pursuant to MCL 712A.19b(3)(g) and (h).

We also conclude on the basis of the evidence previously discussed that the trial court did not clearly err by finding that there was clear and convincing evidence of grounds for termination pursuant to MCL 712A.19b(3)(j). MCL 712A.19b(3)(j) states that a court must find by clear and convincing evidence that “[t]here 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.” As previously discussed, the evidence in this case demonstrates that respondent failed to maintain a stable home, legal income, and a life free of criminality, including use of drugs. If respondent cannot provide for the young child’s basic needs (shelter, food, clothing, etc.) because he cannot maintain a legal income and housing, the child will be at risk to physical and emotional harm. When considered in conjunction with respondent’s neglect of the child and his continual illegal conduct and substance abuse, we are not left with a definite and firm conviction that the trial court mistakenly found that there was a reasonable likelihood that the child would be harmed if she were returned to respondent’s home. See MCL 712A.19b(3)(j); see also *In re Trejo*, 462 Mich at 346 n 3 (“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.’”).

Finally, we conclude that the trial court did not clearly err by finding that it was in the child’s best interests to terminate respondent’s parental rights. After finding that at least one of the statutory grounds for termination has been met, a court must then determine whether termination is in the child’s best interests. MCL 712A.19b provides as follows:

(5) If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child’s best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made. [MCL 712A.19b(5).]

“In deciding whether termination is in the child’s best interests, the court may consider the child’s bond to the parent, the parent’s parenting ability, the child’s need for permanency, stability, and finality, and the advantages of a foster home over the parent’s home.” *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (internal quotation marks and citations omitted).

In this case, the child had been placed with her maternal aunt and had lived with the aunt since she was born. The child’s aunt wanted to adopt her. In addition, the child had special needs in regard to speech and language that were being met. In contrast, the child had very little contact with respondent throughout her life. Respondent had supervised visitation with the child for a few months starting in March 2011 but stopped attending visitation in November 2011. Respondent was not always appropriate with the child—his former CPS caseworker had testified that respondent was rough with the two-year-old child during visitation. Given the inconsistent and tenuous bond between respondent and the child and the child’s need for stability and

permanency, the court did not err by finding that placement in a stable, permanent home that the child had known her entire life was in the child's best interests.

Respondent argues that the trial-court record was insufficient for the court to make a determination regarding the child's best interests because the court did not consider the child's placement with a relative at the time of the termination hearing. It is true that, "a child's placement with relatives weighs against termination [of parental rights] under MCL 712A.19a(6)(a)," [and] the fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in a child's best interests." *Id.* at 43, quoting *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best interests determination and requires reversal." *Id.* However, in this case, the record shows that the trial court knew of and considered the child's placement with a relative. In its written order terminating respondent's parental rights, the trial court expressly referred to the findings made in the referee report and recommendation. The referee report and recommendation explicitly noted, "The child is 2 years and 10 months old and is in need of greater permanency. She is in a relative placement and they would like to adopt her." Accordingly, the court knew that the child was placed with a relative, and, therefore, the record indicated that the court considered that fact when making its decision that termination was in the child's best interests. The trial court may still terminate parental rights in lieu of placement with a relative if it finds that termination is in the child's best interests. *Id.*

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering