STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 6, 2013

In the Matter of ROSE, Minors.

No. 312819
Emmet Circuit Court
Family Division
LC No. 09-005822-NA

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Respondent father appeals as of right from the order terminating his parental rights to the minor children under MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.[1]

Respondent has been incarcerated since July 2008 on charges of fourth-degree criminal sexual conduct and two counts of resisting and obstructing a police officer. At the time respondent committed those offenses, he was on parole related to prior convictions of uttering and publishing and felon in possession of a firearm. Respondent's maximum discharge date is in March 2021 He has been denied parole during the pendency of the child protective proceedings. He is currently scheduled for a parole hearing in September 2013. Since 2005, respondent has been available to parent his children for a total of ten months.

"In a termination of parental rights proceeding, a trial court must find by clear and convincing evidence that one or more grounds for termination exist and that termination is in the child's best interests." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). An appellate court "review[s] for clear error both the [trial] court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The court's termination decision "is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). To uphold the trial court's termination decision, only one ground for termination

[1] We affirmed the circuit court's termination of respondent mother's parental rights in *In re Rose*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2012 (Docket No. 306745).

must be proven by clear and convincing evidence. *In re CR*, 250 Mich App 185, 195; 646 NW2d 506 (2002).

Defendant argues that the court erred in finding that the statutory grounds for termination had been established. Section 19b(3)(c)(*i*) is established if petitioner produces clear and convincing evidence that:

> (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.

The trial court concluded that based on respondent's incarceration, clear and convincing evidence existed to support termination under § 19b(3)(c)(*i*). However, "[i]ncarceration alone is not a sufficient reason for termination of parental rights." *In re Mason*, 486 Mich 142, 146; 782 NW2d 747 (2010).

Nonetheless, the court correctly found that termination of parental rights was warranted under MCL 712A.19b(3)(g) and (j). Section 19b(3)(g) is established if petitioner produces clear and convincing evidence that "[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 has been incarcerated for long periods of time during the lives of the children, with his latest imprisonment beginning in 2008. He will remain incarcerated until 2021 unless granted parole. Further, even if respondent is granted parole, the evidence shows he would not be able to provide for his children's care and custody "within a reasonable time" given their ages. The clinical psychologist who performed a complete psychological evaluation of respondent diagnosed him with polysubstance abuse/dependence (alcohol, marijuana, and cocaine) and antisocial personality disorder with narcissistic and histrionic features. The psychologist testified that it would take years of therapy before respondent had a realistic chance of successfully parenting the children.

Respondent argues that the trial court erred because it failed to consider whether he could fulfill his duty to provide proper care and custody in the future by granting legal custody of the children to relatives during his remaining term of incarceration. Respondent relies on *Mason*, 486 Mich at 163, in which our Supreme Court held that the trial court erred, in part, because it "never considered whether respondent could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." *Mason* is distinguishable because the children there had already been successfully placed with the respondent's family. *Id.* In the present case, the children were in foster care, and there is no evidence that respondent ever tried to have a relative caregiver step in during his incarceration. Indeed, respondent never requested placement with relatives while he was in prison. Accordingly, the trial court did not clearly error in finding that termination of respondent's parental rights was appropriate under MCL 712A.19b(3)(g).

Section 19b(3)(j) is established where petitioner produces 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." When considering termination of parental rights under MCL 712A.19b(3)(j), it is appropriate to consider the potential for physical and emotional harm to the children. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Respondent argues that the trial court erred when it terminated his parental rights under MCL 712A.19b(3)(j) because it improperly considered his CSC IV conviction. Although the trial court noted that respondent was presently incarcerated on the CSC IV conviction, the record does not indicate that the court reasoned as respondent suggests. Instead, the court found "that the children would be at significant emotional risk if placed in [respondent's] care." The court's conclusion is clearly supported by the record. Respondent was diagnosed with antisocial personality disorder with narcissistic and histrionic tendencies. The psychologist who diagnosed him stated that individuals with antisocial personality disorder tend to be extremely prone to neglectful behavior:

> [T]here is a clear cluster of behaviors that tend to go with antisocial personality in parenting. They tend to be extremely neglectful. They tend not to follow-up, for example, with parent/teacher conference. They tend not to follow-up with medical issues. They tend not to be aware of the children's health issues. They may forget immunizations. They tend to spend money one themselves first and the children's needs tend to be neglected. They will associate with . . . other criminal people in front of the children. They don't have much concern about keeping children or not exposing them to dangerous people or dangerous situations. So they would tend to be extremely prone towards educational, emotional, physical neglect, and lack of supervision.

Being neglectful about following up on medical and health issues, and not being concerned about placing the children in a dangerous situations portend the possibility of severe emotional harm, particularly for children who are in such dire need of stability and permanency in their lives. Respondent's past actions and lack of involvement have resulted in significant emotional difficulty for his children, and his capacity to protect them from future harm is highly suspect given his personal and environmental circumstances. Accordingly, the trial court did not clearly error in finding that termination of respondent's parental rights was appropriate under MCL 712A.19b(3)(j).

Lastly, respondent argues that the trial court erred when it concluded that termination of his parental rights was in the children's best interests. MCL 712A.19b(5). We disagree. The trial court did not err by finding by a preponderance of the evidence that termination was in the children's best interests. *In re Ross*, ___ Mich App ___; ___ NW2d ___ (2013), slip op p 6. The record consistently shows that the children cannot afford to wait for respondent to be ready to care for them. They need permanency and structure. Respondent has been absent from his youngest child's life. The youngest child was born while respondent was in prison and has no connection with him. In fact, the psychologist testified that the child has no recognition of who respondent is. The psychologist testified that this child was making progress in foster care, but would regress quickly if put under stress. Given the child's fragile development, respondent's

physiological assessment, and the lack of a recognizable bond between the child and respondent, the petitioner proved by a preponderance of the evidence that termination was in the children's best interests.

The court also did not clearly error with respect to the best interests of the three older children. Although respondent has parented all three in the past, he has been absent for a significant portion of their lives because of his lengthy incarcerations. There is evidence that all three tended to avoid telephone contact with respondent, which the psychologist opined meant that they were disconnected from him. As with the youngest child, these three children have shown progress while in foster care. However, they still had issues they needed to deal with—issues the psychologist attributed to the lack of permanency in their lives. As with the youngest child, the fragile development of the three, respondent's psychological assessment, and the lack of certainty to when respondent would be able to care for the children support the court's best interests determination.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra