

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 4, 2013

In the Matter of BILLS, Minors.

No. 313778
St. Clair Circuit Court
Family Division
LC No. 11-000232-NA

Before: BORRELLO, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), (j), and n(ii). We affirm.

I. BASIC FACTS

During respondent's incarceration for an assaultive crime, the children were placed in a temporary guardianship with their maternal grandparents with the hopes that the mother would be able to address issues of substance abuse, parenting skills, housing, and employment. Unfortunately, the mother failed to make any progress and the trial court took jurisdiction over the children in July 2011.

Respondent was released from prison in December 2011, obtained housing and employment, and began reporting to a probation officer. Respondent participated in a parenting time assessment from January through March 2012, and supervised visitation was recommended. However, no visits took place between respondent and the children because shortly after the parenting time assessment, respondent violated his parole and was sent back to prison.

Following a hearing in October and November 2012, the court entered an order terminating respondent's parental rights.¹

II. STANDARD OF REVIEW

A trial court's finding that a statutory ground for termination has been proven by clear and convincing evidence is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612

¹ The mother's parental rights were also terminated. She is not participating in this appeal.

NW2d 407 (2000); MCR 3.977(K). “A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). The trial court’s decision regarding the child’s best interests is also reviewed for clear error. *In re Trejo*, 462 Mich at 356-357; MCR 3.977(K).

III. ANALYSIS

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence and that termination was in the children’s best interests.

MCL 712A.19b(3) permits termination of parental rights under the following circumstances:

(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.

(j) There 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.

(n) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child’s best interest because continuing the parent-child relationship with the parent would be harmful to the child:

(ii) A violation of a criminal statute that includes as an element the use of force or the threat of force and that subjects the parent to sentencing [as an habitual offender.]

With respect to subsection (3)(c)(i), the condition that led to the adjudication with respect to respondent was his incarceration and the impact of that situation. The trial court noted that respondent's incarceration resulted in respondent having no suitable home for his children, no job, and no substantial contact with his children, and that this situation still existed at the time of the hearing. In concluding that there was no reasonable likelihood the conditions would be rectified within a reasonable time, the trial court noted that respondent's release from prison was conditioned upon his parole, there was no guarantee that would happen, and that, in any event it would take time for him to be ready to care for his children.

Respondent asserts that termination was not warranted because his incarceration is insufficient grounds to terminate under subsection (3)(c)(i). In support of that claim, he relies on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), wherein our Supreme Court concluded that "the mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Id.* at 160.

However, unlike the situation in *Mason*, termination was not granted solely because the respondent was incarcerated. The trial court also cited the fact that respondent was incarcerated for the second time, after already having been in prison for a number of years, and that he reoffended with actions similar to his initial offense. Lisa Stoneberg conducted an in-depth assessment when respondent was released from prison to determine whether he should have visits with the children. Stoneberg concluded that supervised visitation was warranted. However, she read from her report: "Clinician also recommends that if Mr. Bills has any negative law involvement during the course of time when he's attempting to be reunified with his children all visitations be stopped and the case be referred back to Family Court. This clinician believes Mr. Bills is a habitual offender and is incapable of caring long term for his children." Before respondent had even one visit with the children, he violated his parole and was sent back to prison for at least a year. The trial court cited the lack of evidence that imminent parole was likely, and recognized it would necessarily take time for respondent to be able to care for his children, who had been out of his care for years. Given all these circumstances, the trial court did not clearly err in terminating parental rights under subsection (3)(c)(i).

With respect to subsection (3)(g), respondent offered many witnesses who testified about his care of the children prior to his incarceration. Nonetheless, the record reveals that respondent had been in prison for seven years and failed to provide care for his children during those many years. Again, respondent was remanded to prison again after being on parole, his release date was uncertain, and it would take time for respondent to be able to provide for his children upon his release. In addition to Stoneberg's testimony that she felt that respondent was a habitual offender who was incapable of providing long-term care for his children, foster care worker Nicole Ropposch Wood also expressed concern about respondent's ability to provide a stable home for the children. Given these circumstances, the trial court did not clearly err in terminating respondent's parental rights under subsection (3)(g).

With respect to subsection (j), the trial court noted the testimony concerning respondent's parenting abilities, but recognized that others' observation of respondent with his children occurred years ago, and did not necessarily reflect his parenting skills when he was alone with his children. The court also noted that respondent was re-incarcerated after his parole. During the assessment process, Stoneberg discovered that respondent had a history of assaultive

behavior, substance abuse, and multiple instances of incarcerations and she had concerns about respondent's long-term ability to be an appropriate parent. Wood expressed concern about his ability to provide a stable home. Respondent was given the opportunity to reestablish his relationship with his children and begin to plan for them, but instead violated parole and was put back in prison. All of these circumstances suggest a likelihood of future harm to the children if placed with respondent, due to his conduct or capacity, and support termination under subsection (3)(j).

In terminating respondent's parental rights under subsection (3)(n)(ii), the court relied on respondent's 2005 conviction and found that continuing the relationship would be harmful to the children given respondent's lengthy absence from the children's lives and concern about respondent's ability to be a long-term parent. Respondent simply points out that the conviction was eight years old, but has not offered any authority suggesting the court could not consider his original conviction or argue that this conviction did not otherwise qualify under subsection (3)(n)(ii). Moreover, the reasons given by the trial court for concluding harm to the children would result if the relationship continued were valid and warranted termination under subsection (3)(n)(ii). Finally, any error assigned by respondent with regard to the trial court's finding that (n)(ii) provided grounds for terminating his parental rights was harmless, given the evidence that plainly established the other statutory grounds. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

With respect to best interests, the trial court noted that the children had no significant relationship with respondent recently, and there was no guarantee when he would be ready to start rebuilding a relationship with them. The trial court also expressed concern about respondent's continued criminality.

By all accounts, respondent loved his children and was concerned about them. He wrote them from prison and his letters were always appropriate. He spoke with them on the phone and expressed concern to others about their welfare. For their part, the children expressed that they were anxious to see their father. Nonetheless, Wood felt that termination was in the children's best interests. Wood cited the fact that respondent had been incarcerated for most of the children's lives and was remanded back to prison after only a short time on parole with an uncertain release date. Wood pointed out that there had been no face-to-face contact between the children and respondent for many years and she believed they really did not know each other. In fact, respondent went to prison when the youngest child was an infant. He had been absent for seven years. Wood also expressed concern about respondent's ability to provide a stable home for his children. Wood further noted that the children had been in a stable home with their maternal grandparents for several years and the children expressed a desire to remain there. When the children spoke of family life, they referenced life with their grandparents. As previously noted, Stoneberg felt respondent was a habitual offender and also had concerns about his long-term ability to parent. In light of this evidence, the trial court did not clearly err in determining termination was in the children's best interests.

Respondent contends that the trial court failed to consider that the children were with relatives, pointing out that relative placement is an explicit factor to consider in determining whether termination is in the children's best interests. *In re Mason*, 486 Mich at 164. However, contrary to that claim, the trial court did explicitly consider the relative placement before finding

that it was in the children's best interests to terminate respondent's parental rights. The trial court noted that the children had lived with the grandparents since March 2009, that they were successful in school and other activities in the community where they were residing, and that their future plans and view of family related to their life with their grandparents. Also, the children were placed with their maternal grandparents and respondent was not the one who sought the placement.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray