

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of NICHOLAS DAVISON and
EMMA DAVISON, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JOSHUA LAWRENCE DAVISON,

Respondent-Appellant.

UNPUBLISHED

October 1, 2009

No. 288935

Oakland Circuit Court

Family Division

LC No. 08-745851-NA

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

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

Respondent and the children's mother had a history of severe domestic violence. In April 2002, an incident between them caused respondent to be placed on probation and ordered to attend marriage counseling and anger management courses. In September 2003, another altercation occurred that was witnessed by the young children and which resulted in respondent's conviction on two counts of domestic violence and a court order that he undergo treatment for domestic violence and alcohol abuse. In December 2003, respondent and the children's mother were divorced, and the children were placed in their mother's custody while respondent had visitation rights.

From the date of the divorce until the children's mother moved out of the state with court permission, the violent interaction continued. After a brief reconciliation in March 2005, respondent assaulted the children's mother in a truck and threatened to kill her. Other violence occurred in December 2005 when respondent threw a television at the children's mother. In January 2006 a violent incident occurred with the children present. Then, in a two-day period in early March 2006, respondent sent 35 to 50 random and disturbing text messages to the children's mother in an agitated attempt to get a reply from her. He was arrested the following day after the police found him near the family home. Shortly thereafter, the children and their mother moved to the state of New York. In May 2006, respondent was sentenced to jail after entering a plea of guilty to committing domestic violence (third offense notice), being a felon in

possession of a firearm, felony-firearm, carrying a concealed weapon (“CCW”), resisting or opposing a police officer, and possessing marijuana.

Almost two years later, in April 2008 while respondent was still incarcerated, the prosecutor’s office filed a petition seeking to terminate respondent’s parental rights to the minor children at the initial dispositional hearing. This termination petition recounted respondent’s history of violent behavior and alleged that the violence had negatively affected the children and that respondent’s behavior had not been rectified by any services in which he may have engaged while incarcerated. The petition also argued that the orders issued in connection with the divorce case were inadequate to assure the safety of the children.

At the hearing on this initial petition seeking termination, the children’s mother testified about respondent’s domestic violence and use of marijuana and alcohol. She said that, in addition to witnessing the September 2003 and January 2006 altercations, the children were also present during weekly verbal altercations between her and respondent and witnessed respondent throwing food or plates at her. She stated that, after respondent’s arrest and incarceration in 2006, she maintained contact with respondent’s girlfriend until a no contact order was issued. After that no contact order was issued, respondent’s girlfriend tried to contact her on respondent’s behalf. Lastly, the children’s mother testified that the oldest child exhibited behaviors that were similar to respondent’s abusive conduct and was having difficulties at school. The trial court assumed jurisdiction over the children after finding that the children’s home environment was unfit by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of respondent. The court then found sufficient evidence warranted the termination of respondent’s parental rights.

At the best interests hearing, a copy of a psychological evaluation conducted on the family was admitted into evidence. The children’s mother testified about a custodial agreement involving parenting time that she had agreed to in October 2007 in order to be allowed to change her domicile to New York. She said that during the negotiations for that parenting time provision, respondent rejected all of her suggestions about third parties who could supervise the first several parenting time sessions, and afterward respondent had violated a no contact order by having his girlfriend send her an email asking her and her boyfriend to supervise the parenting time. The children’s mother believed this request was essentially another attempt by respondent to manipulate parenting time as a way of having contact with her.

Respondent testified on his own behalf and spoke of his bond with the children, with whom he had spoken on the telephone when they were with members of respondent’s family. He admitted being near the family home with guns in his car when he was arrested in 2006 but said he had been even closer to his apartment. While incarcerated, respondent participated in programs that taught him how to be a better father and changed his previously-violent behaviors. His earliest release date was in February 2009. He did not blame the children’s mother for his behavior, which he said was solely his responsibility; however, he said that she was a factor in his behavior, that their relationship was a two-way street and he never presented his side of the story, and that he did not accept sole responsibility for any negative behaviors that the oldest child may be exhibiting. Respondent admitted discussing with his girlfriend the possibility that his parenting times be supervised by the children’s mother and her boyfriend, but he said he did not intend it as an actual suggestion and his girlfriend acted on her own when she proposed it to the children’s mother. Respondent’s girlfriend testified that respondent’s relationship with the

children was good. She said there had been no instances of domestic violence between her and respondent, and that respondent would have a job with her parent's company after he was released from prison. The trial court found that termination was in the children's best interests and terminated respondent's parental rights.

Respondent argues that the court assumed jurisdiction on the sole basis of respondent's criminality in contravention of *In re Curry*, 113 Mich App 821, 830; 318 NW2d 567 (1982), which held that MCL 712A.2(b)(2) requires more than just a showing of a parent's criminal status; instead, in order for a court to assume jurisdiction, there must be a showing that a parent's criminality rendered a child's custodial environment unfit. In addition, respondent points out that MCL 712A.2 (which is written in the present tense) confers jurisdiction only where its terms are satisfied by an examination of a child's situation at the time the petition is filed. *In re MU*, 264 Mich App 270, 278-279; 690 NW2d 495 (2004). This Court reviews a trial court's decision to assert jurisdiction de novo as a matter of law, *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992), but reviews factual findings with respect to termination of parental rights for clear error. *In re SR*, 229 Mich App 310, 314-315; 581 NW2d 291 (1998); MCR 3.977(J).

In this case, respondent's past criminality definitely rendered the children's home or environment unfit from 2002 through 2006. The evidence also showed that respondent continued to behave in a criminal fashion when, sometime around the filing of the termination petition in April 2008, he violated the no contact order by having his girlfriend contact the children's mother on his behalf. It was not outside the range of principled outcomes for the trial court to find that, based on respondent's past use of the children as a way to manipulate their mother, it appeared likely that once respondent was released from jail and resumed contact with the children he would continue the same patterns of criminal conduct that had adversely affected the children before his incarceration. Therefore, we conclude that a preponderance of evidence established that respondent's criminality continued to affect the children at the time that the termination petition was filed in 2008, thereby creating an unfit environment for the children, and the trial court did not clearly err in assuming jurisdiction over the children pursuant to MCL 712A.2(b)(2).

Respondent also challenges the trial court's rulings regarding sufficiency of evidence and the children's best interests. To terminate parental rights, the trial court must find that at least one statutory ground for termination in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). If the court finds there are grounds for termination of parental rights, and that termination of parental rights was in the child's best interests, the court must issue a termination order. MCL 712A.19b(5). This Court reviews the trial court's determination that a ground for termination has been established and its best interest determination under the "clearly erroneous" standard. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(J).

The trial court properly based its termination order on MCL 712A.19b(3)(g). Respondent failed in the past to provide proper care or custody for the children when he physically and mentally abused their mother in their presence, used the children to manipulate their mother by sending frightening text messages about the children when they were in his care, used alcohol and/or marijuana to the point that the children's mother was concerned on at least one occasion about leaving the children in respondent's care, and committed felonious acts that resulted in him being incarcerated and thereby unable to provide care or custody for the children. There also

was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time given the children's ages (the oldest child was almost seven years old and the youngest child was five years old when the hearing on the termination petition was held). Respondent presented no evidence on his behalf at this hearing, and it was undisputed that respondent's violent relationship with the children's mother continued after his participation in counseling and treatment programs for domestic violence, anger management, and alcohol abuse and up through his incarceration in 2006. There was also evidence that, after a no contact order was issued, respondent attempted to circumvent it by having his girlfriend contact the children's mother. Therefore, respondent showed he had not changed his behavior toward the children's mother. As such, there was no reasonable expectation that he would change his abusive behavior that had affected the children for almost their entire lives or be able to provide proper care and custody within a reasonable time given the children's ages.

Termination was also proper under MCL 712A.19b(3)(j). The children were already adversely affected by living in a home where their mother was verbally abused on a weekly basis and where the children witnessed at least two physical assaults committed on their mother. In these circumstances, the children likely lived in fear of being respondent's next target, not to mention the possibility that they could start to model respondent's violent behavior, which apparently already had occurred in the case of the oldest child, who exhibited behavioral problems in his treatment of his sister and at his school. The evidence indicated that respondent had not rectified his criminal behavior since, at some point after the issuance of the no contact order, he violated it by having his girlfriend contact the children's mother on his behalf. Given the probable continuation of violent behavior by respondent after his release from prison, the children's mental and emotional well being would at risk of additional harm if they were returned to respondent's care. In addition, the children's physical well being would be at risk since respondent's violent behavior toward their mother placed anyone else in the vicinity at risk and also because respondent had displayed aggression toward the children in the past and this aggression could escalate into physical abuse of the children.¹

With respect to the children's best interests, the psychological evaluation indicated that there was not a strong bond between the children and respondent. This evidence was corroborated by the children's mother, who testified that the oldest child only asked for respondent when angry at her and that the youngest child did not express any memory of respondent. Next, respondent's testimony at the best interests hearing demonstrated that he continued to blame the children's mother for the problems in their relationship, despite his claims to the contrary.² The evidence showed that respondent had not yet accepted responsibility for his actions. During their interviews in the psychological evaluation, the children recalled

¹ Although the trial court clearly erred in basing termination upon MCL 712A.19b(3)(b)(i) because of the lack of evidence that respondent inflicted physical injury or abuse upon a child or sibling, such error was harmless since the trial court properly based termination of respondent's parental rights on other statutory grounds. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

² Even in his appellate brief, respondent devotes several pages to detailing the children's mother's "negative and shameful" behavior.

specific aggressive acts committed by respondent against their mother and, given his unchanged attitudes toward the children's mother, the possibility was great that respondent would repeat this previous pattern of aggression. Furthermore, respondent's pattern of using the children to manipulate their mother showed that the orders issued in connection with the divorce case would be inadequate to ensure the safety of the children. Given this evidence, the trial court did not clearly err when it found that termination was in the children's best interests.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder