

STATE OF MICHIGAN
COURT OF APPEALS

In re I.L. LECLERC, Minor.

UNPUBLISHED
December 11, 2014

No. 321212
Wayne Circuit Court
Family Division
LC No. 12-509400-NA

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Respondent mother appeals by right the trial court order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(i) (conditions that led to the adjudication continue to exist), (g) (without regard to intent, failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent).¹ We conditionally reverse and remand this case for resolution of the Indian Child Welfare Act-notice issue.

I. STATUTORY GROUNDS

Respondent first argues that the trial court erred when it found that statutory grounds for terminating respondent's parental rights had been proven by clear and convincing evidence. We review a trial court's factual findings, including its determination that a statutory ground for termination of parental rights has been proven by clear and convincing evidence, for clear error. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

A trial court may terminate a respondent's parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) that termination is in the children's best interests. *In re Moss*, 301 Mich App 76, 80, 83; 836 NW2d 182 (2013). The trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), which provide:

¹ The father's parental rights also were terminated, but he is not participating in this appeal.

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(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.

The minor child was brought into care because it was discovered that her right arm was fractured, which the hospital suspected was caused by child abuse. The parents, however, had no explanation for how it had happened. The evidence showed that respondent and the father allowed approximately a dozen different people to have access to the six-week-old infant, including allowing friends to watch the newborn overnight to give the parents a respite. Finding that the injury was serious and that respondent and the father had been neglectful in failing to protect the child, the court removed the child from the home.

Respondent's initial treatment plan required her to complete parenting classes, attend individual therapy, find employment and housing, participate in weekly random drug screens, attend regular supervised visitation, and maintain regular contact with the agency. Shortly thereafter, it was discovered that respondent used marijuana, and substance abuse therapy was added.

At the time of the petition for termination, respondent had completed parenting classes, which took over six months to complete because of her lack of attendance. Other than that, she was not in compliance with the treatment plan. She did not have suitable housing or income. She and the father had moved several times to different locations but never had any housing assessed. She had told the worker that she intended to complete her GED, but she never provided proof of any school attendance. She never complied with the requirement for drug screens and had taken only four screens, two of which had been required following court hearings, and all four screens were positive for marijuana. At the termination hearing,

respondent admitted that she continued to smoke marijuana and had smoked it the day before the hearing. This was done despite evidence that respondent knew that the child would not be returned to her as long as she continued to use marijuana.

While the child was in temporary custody, it was discovered that she had a form of palsy that had paralyzed her left side and required twice a week sessions of occupational therapy and physical therapy. Respondent and the father were encouraged to attend these therapy sessions so that they could learn how to help the child in the future. Although respondent was neither working nor attending school, she could not find the time or inclination to attend more than 25 percent of the therapy sessions. Moreover, during the pendency of this case, respondent had attended only half of the supervised visitations. She testified that she missed some visits because the father had to work. The fact that respondent could not visit her child on her own demonstrated that she had no sense of her own responsibility toward this child. At the time of the termination hearing, it was learned that, for the preceding three months, respondent had stopped all communication with the agency, was unable to be contacted, and had stopped all visitations with the child.

Respondent's failure to comply with her treatment plan is evidence of her failure to provide proper care and custody for the child. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003); *In re Trejo*, 462 Mich 341, 360-363, 360-361 n 16; 612 NW2d 407 (2000). Respondent's haphazard visitation attendance, failure to regularly attend the child's therapies, and the fact that she stopped visiting altogether showed that she had not benefited from the parenting classes. *In re Gazella*, 264 Mich App at 676. Respondent's noncompliance, considered with the fact that the child had serious special needs, supported the trial court's conclusion that there was clear and convincing evidence that respondent had failed to provide proper care or custody for the child and that the conditions that led to the adjudication continued to exist. Additionally, there was no reasonable expectation that she would be able to rectify the conditions or provide proper care and custody within a reasonable time. MCL 712A.19b(3)(c)(i) and (g). Furthermore, based on respondent's failure to comply with the treatment plan, which was an indication of neglect, *In re Trejo*, 462 Mich at 360-361 n 16, and her failure to benefit from the services that she did attend, *In re Gazella*, 264 Mich App at 692, there was clear and convincing evidence to support a finding that, based on respondent's conduct, there was a reasonable likelihood that the child would be harmed if returned to her care. MCL 712A.19b(3)(j); see also *In re Trejo*, 462 Mich at 346 n 3.

Respondent's argument, that the court erred in finding that the conditions that led to the adjudication continued to exist because the child's injuries had healed and respondent currently was not failing to protect her, is both spurious and without merit. The conditions that led to adjudication were not the child's broken bones. Instead, the condition that led to the court having jurisdiction was respondent's neglect in protecting and caring for the child. The fact that the child's arm had healed after a year in foster care is not relevant. Further, having only supervised visitations, respondent did not have any responsibility to protect the child. The question addressed at the termination hearing was whether respondent complied with and benefited from the requirements of the treatment plan, which were structured to give her the skills and understanding to become a committed parent who could provide the proper care and safety for her child. As demonstrated by the facts stated above, it was clear that she had not complied with the treatment plan, had not benefited from any of the services, and had actually

abandoned her child for the last three months by failing to even visit her. Accordingly, there was clear and convincing evidence to show that the condition that led to adjudication (respondent's neglectful behavior) still existed at the time of termination.

Respondent also argues that the court erred in finding that there was no likelihood that the conditions would be rectified within a reasonable time because DHS had failed to provide respondent with a trained, licensed, and qualified substance abuse therapist as the court had ordered. The DHS worker testified that respondent's current counselor, who was providing individual counseling, was also a qualified substance abuse counselor. The worker also made it very clear that if one counselor could provide both types of counseling, a second counselor would not be placed on the case. Respondent has refused to accept these facts but has supplied no evidence on appeal to contradict this testimony. Respondent has not identified the legal or factual basis for her argument as required by MCR 7.212(C)(7). The argument that she would have met the requirements of her treatment plan if DHS had provided a separate, qualified substance abuse counselor is without merit. The evidence shows that, even when given individual and substance abuse therapy, respondent did not stop using marijuana and gave the excuse that she used it because her child was in foster care, although she had been told that she would not regain custody of her child while she continued to smoke marijuana. In addition, although provided with bus tickets, she refused to use the bus to get to visitation, using the excuses that she did not know the bus routes and that it was hard to walk to the bus. There was no evidence that respondent was mentally challenged. If she had truly wanted to visit her child, the information concerning bus routes was readily available. This failure to use public transportation was a demonstration of her lack of commitment to the child. When given the opportunity to participate in her child's therapies, to learn how to care for the child's special needs, respondent attended only 25 percent of the time. Regardless of counseling, respondent should have learned from the parenting classes how important it was to maintain the relationship with her child and to learn how to care for her special needs. It was clear that she did not benefit from parenting classes. *In re Gazella*, 264 Mich at 676. The result of respondent's failure to consistently visit her child was that the child did not feel bonded to respondent. Respondent's noncompliance with the requirements of the treatment plan cannot be blamed on the inaccurate assertion that she did not receive substance abuse counseling from a qualified therapist. The trial court did not clearly err in finding clear and convincing evidence to support the statutory grounds for termination of respondent's parental rights.

II. BEST INTERESTS OF THE CHILD

Next, respondent argues that the trial court clearly erred in addressing and finding, by a preponderance of the evidence, that termination of respondent's parental rights was in the best interests of the child. We review the trial court's best interest determination according to the same clear error standard used in reviewing the trial court's decision regarding the statutory grounds for termination. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012).

In determining whether termination of parental rights is in a child's best interests, "the court may consider the child's bond to the parent, the parent's parenting ability, [and] the child's need for permanency, stability, and finality." *Id.* at 41-42 (citations omitted). "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App at 83.

Respondent did not make a committed attempt to comply with the treatment plan or put herself in a position where she could provide a proper home for her child. She had not addressed her substance abuse and continued to smoke marijuana. She did not have income or a stable home. She visited the child only sporadically and did not attend the child's therapy sessions sufficiently to learn how to care for the child's special needs. Respondent never made the effort to learn the bus routes so that she could visit her child. Her failure to attend visitation and medical appointments was a good indication of the level of parenting she was prepared to do. As a result of her failure to attend visitation and medical appointments, the child had not bonded with respondent. The child cried when she was removed from the foster mother to spend time with respondent. She did not look to respondent for any care or support and did not see respondent as her mother figure.

Respondent testified that she loved her child and wanted to provide a home for her and raise her. However, her actions belied her spoken words. Whether it was immaturity or a lack of commitment, the fact remained that respondent would not be able to provide a stable, caring, permanent home for the child in the foreseeable future. The child needed stability and permanency. She was bonded to the foster family, who were there for her every day, meeting her special needs, caring for and loving her, and hoping to make a permanent home for her. The trial court did not clearly err in finding by a preponderance of the evidence that termination of respondent's parental rights was in the child's best interests.

III. NOTICE PROVISION OF THE ICWA

Finally, respondent contends that the trial court violated the notice provision of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, and that, under *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012), this case must be conditionally reversed and remanded to the trial court for resolution of the ICWA-notice issue. Petitioner agrees that a conditional reversal is warranted, and we concur. The ICWA provides, in pertinent part:

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. [25 USC 1912(a).]

Addressing the recordkeeping requirements of the above notice provision, the Michigan Supreme Court has held:

[T]rial courts have a duty to ensure that the record includes, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice. In addition, it would be helpful—especially for appellate purposes—for the record to

include any additional correspondence between the petitioner, the court, and the Indian tribe or other person or entity entitled to notice under 25 USC 1912(a). [*In re Morris*, 491 Mich at 114.]

The ICWA notice requirement was triggered at the preliminary hearing in this case. Although the court ordered the DHS to comply with copies of notice letters, receipts, and response letters, and despite almost six months of efforts by the DHS worker, all parties agree that DHS did not fully comply with the ICWA-notice provision.

The appropriate remedy when the notice requirements of ICWA are not satisfied is conditional reversal and remand for a resolution of the notice issue. *Id.* at 122. If the trial court determines on remand that ICWA does not apply because the child is not an “Indian child” under the ICWA or because the properly noticed tribes do not respond within the allotted time, the order terminating parental rights is reinstated where there was clear and convincing evidence to support statutory grounds for termination and a preponderance of the evidence indicated that termination of respondent’s parental rights was in the child’s best interests. *Id.* at 123. However, if the trial court concludes the ICWA notice provision does apply, the order terminating parental rights is vacated, “and all proceedings must begin anew in accord with the procedural and substantive requirements of ICWA.” *Id.*

Conditionally reversed and remanded for resolution of the ICWA-notice issue. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro