

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KIRBY, Minor.

UNPUBLISHED
October 15, 2013

No. 314148
Dickinson Circuit Court
Family Division
LC No. 11-000512-NA

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist) and (g) (failure to provide proper care or custody). Because the trial court clearly erred by finding that the statutory bases for termination were proven by clear and convincing evidence, we reverse and remand for further proceedings.

The Department of Human Services (DHS) received a referral indicating that the home of respondent and the child's mother¹ was unkempt and that drug abuse was occurring there. On August 17, 2011, police officers found two spoons containing drug residue and four syringes with hypodermic needles. The home was "in general disarray and unsanitary." At that time, respondent was on parole for two counts of uttering and publishing. He was arrested for violating his probation by possessing the drug paraphernalia.

The trial court obtained jurisdiction over the child after the child's mother entered a plea admitting that she did not have adequate housing, that she had been evicted for nonpayment of rent, and that drug paraphernalia had been found in the home. An updated case service plan prepared on January 11, 2012, indicated that respondent's barriers to reunification with the child were his parenting skills, substance abuse, and housing. With regard to parenting skills, the plan assessed respondent's progress as "partial," noting that respondent "is attending all his parenting time visits and is appropriate with his child and interacts well with her[.]" but that he "continues to need direction with his parenting and needs to attend to providing his child with a safe and appropriate living environment." Respondent's progress in the area of substance abuse was deemed poor because he had tested positive for Suboxone, was not attending AA or NA

¹ The child's mother ultimately voluntarily relinquished her parental rights to the child.

meetings, and was just beginning outpatient treatment. Regarding housing, the service plan noted that respondent was “currently living in a residence which is not safe or appropriate for his child.” The service plan also indicated that referrals had been made for “assistance with parenting skills, resource availability/management, and housing,” and that respondent had been participating in those services.

At a January 23, 2012, dispositional review hearing, petitioner asserted that respondent had been arrested on a felony warrant and was again incarcerated. Apparently, respondent had used drugs while incarcerated and had used Suboxone and alcohol after being released. The court questioned whether respondent was “going to have any real chance to demonstrate within a reasonable period of time that he’s going to change his lifestyle such that he can be an appropriate caretaker for [his] daughter” given his incarceration, and stated that it was “not terribly optimistic about [respondent]’s ability to put himself in a position to provide care and custody.” The court ordered that respondent continue to follow DHS recommendations.

At an April 19, 2012, dispositional review hearing, the trial court addressed respondent, stating:

To your credit you have, I think, taken advantage to the extent possible of the limited services that can be offered during incarceration whether that be through parenting education or self-help groups within the jail.

There isn’t a lot that the Court or the [DHS] is going to be able to do for you while you are incarcerated that isn’t already occurring.

An updated service plan prepared on July 9, 2012, indicated that respondent had “participated in [DHS] services provided by [a DHS case worker] to the extent possible while incarcerated.” Respondent was attending AA meetings and bible studies while incarcerated, but was “currently facing criminal charges for bringing Suboxone into the jail and distributing it to other inmates.” Respondent appeared to be generally progressing toward the goal of reunification to the extent possible while incarcerated.

At a July 30, 2012, review hearing, the trial court was informed that respondent’s earliest possible release date was May 6, 2013. The court ordered respondent to “engage in any treatment programs available to him while incarcerated and that he follow any treatment recommendations upon release from incarceration.”

On October 16, 2012, the trial court ordered petitioner to file a petition to terminate respondent’s parental rights within 28 days after being informed that the child’s maternal grandparents, with whom the child had been placed, were interested in pursuing adoption if the parental rights of the child’s parents were terminated. On October 26, 2012, petitioner filed a petition seeking termination, which stated:

[Respondent] has been incarcerated for all but about a month and a half since the dispositional hearing. He is currently incarcerated with the Michigan

Department of Corrections in a SAI^[2] program. If he successfully completes that program, he could be eligible for parole on December 26, 2012. But if he fails, he will return to the regular prison population for a further period of incarceration. But even assuming [respondent] is paroled [at] the end of December, he still acknowledges needing 90 days of inpatient substance abuse treatment, as well as needing to find employment and independent housing thereafter.

The trial court held a termination hearing on December 7, 2012. Respondent testified that May 6, 2013, was his earliest possible release date.³ He maintained that, while incarcerated, he took several classes in an attempt to better himself as a parent: “I’ve taken a class called Pick a Partner, substance abuse, I am going to begin some vocation, I just started a computer class, I didn’t get to finish it but, self-awareness” He further indicated that he had been removed from his SAI program not for noncompliance, but because he had pending jail time to serve in a different county. At the conclusion of the hearing, the trial court terminated respondent’s parental rights.

A trial court may terminate a respondent’s parental rights if it finds that (1) at least one statutory ground for termination has been proven by clear and convincing evidence, and (2) termination is in the child’s best interests. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). “This Court reviews for clear error the trial court’s ruling that a statutory ground for termination has been established and its ruling that termination is in the [child’s] best interests.” *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.*

The trial court clearly erred by finding that the statutory grounds to terminate respondent’s parental rights had been proven by clear and convincing evidence. The conditions that led to the child coming within the court’s jurisdiction were respondent’s parenting skills, substance abuse, and housing. Admittedly, respondent was incarcerated for the majority of the proceedings, however, the DHS updated service plans repeatedly emphasized that he participated in parenting classes and substance abuse services to the extent possible while incarcerated.

The trial court and respondent both believed that respondent would benefit from inpatient substance abuse treatment. At the July 30, 2012, dispositional review hearing, the trial court was informed that respondent’s earliest possible release was May 6, 2013, and ordered respondent to participate in substance abuse services immediately upon his release. Thus, the court apparently concluded that respondent’s participation in those services at that time might give rise to a “reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age” as stated in MCL 712A.19b(3)(c)(i). Between the July 30, 2012, hearing and the

² “SAI” is an acronym for “special alternative incarceration,” commonly referenced as “boot camp.” See *People v Portillo*, 241 Mich App 540, 541-542; 616 NW2d 707 (2000).

³ A search of Michigan’s Offender Tracking Information System reveals that respondent was paroled on May 7, 2013.

October 16, 2012, hearing at which the court ordered the filing of the termination petition, there had arisen no new negative information regarding respondent. His positive drug test results were included in the DHS reports that predated the July 30, 2012, hearing and were apparently not sufficient for the trial court to order that a termination petition be filed at that time. Yet, the trial court switched gears and ordered petitioner to file a petition to terminate respondent's parental rights at the October 16, 2012, hearing, despite the lack of further evidence or change in circumstances. Although the child's maternal grandparents advised that they were interested in permanent adoption, that fact is and was of no import. In determining whether statutory grounds for termination exist, the court cannot consider "the relative advantages of the adoptive home compared to the [parent's] home." *In re JK*, 468 Mich 202, 214 n 21; 661 NW2d 216 (2003). "Indeed a child's placement with relatives weighs *against* termination under MCL 712A.19a(6)(a), which expressly establishes that, although grounds allowing the initiation of termination proceedings are present, initiation of termination proceedings is not required when the children are 'being cared for by relatives.'" *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010) (emphasis added). On this record, we can only conclude that the potential for adoption was part of the trial court's calculus in terminating respondent's parental rights.

The record indicates that respondent participated in services to the fullest extent possible while incarcerated. There was no indication that he would not pursue housing, substance abuse, and parenting services made available to him upon his release. Further, our Supreme Court has stated that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *In re Mason*, 486 Mich at 160.

Accordingly, we conclude that the trial court clearly erred by finding that the statutory grounds to terminate respondent's parental rights were proven by clear and convincing evidence. While there is inarguably some evidence to support termination, that is not the question before us on appeal. The trial court's ruling is clearly erroneous even if, "although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Hudson*, 294 Mich App at 264. Given our conclusion that the trial court clearly erred by finding that the statutory bases for termination had been established, we need not address the trial court's determination that termination was in the child's best interests.

Reversed and remanded for respondent to be provided additional services and given an opportunity to rectify the conditions that caused the child to come within the court's jurisdiction. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello