

STATE OF MICHIGAN
COURT OF APPEALS

In re R. J. WHISMAN, Minor.

UNPUBLISHED
February 18, 2020

No. 349933
St. Joseph Circuit Court
Family Division
LC No. 2013-001005-NA

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Respondent-father appeals by right the court’s order terminating his parental rights to his daughter, RW, pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (j) (reasonable likelihood that child will be harmed if returned to parent). We affirm.

In August 2017, the Department of Health and Human Services (DHHS) submitted a petition to the court. The DHHS alleged that RW’s mother used methamphetamine while pregnant with the child, that respondent released his parental rights to two other children in July 2015, and that respondent was currently incarcerated for operating a methamphetamine lab, with an earliest release date of October 2019.¹ Respondent remained incarcerated throughout the court proceedings, had never met RW, and had only spoken to her on the phone four times. Respondent took classes and attended meetings while imprisoned to address his substance abuse and parenting issues. At the request and direction of the DHHS, RW was placed with the paternal grandmother one month after she was removed from care, and RW remained in that placement throughout the proceedings. RW did well in the care of her grandmother, who wished to adopt RW. The court found that MCL 712A.19b(3)(c), (g), and (j) were proven by clear and convincing evidence and that termination was in the child’s best interests. This appeal followed.

On appeal, respondent argues that the court clearly erred by terminating his parental rights under MCL 712A.19b(3)(g) without complying with the requirements of *In re Mason*, 486 Mich 142; 782 NW2d 474 (2010), regarding imprisoned parents. Respondent also contends that the court clearly erred by terminating his parental rights under MCL 712A.19b(3)(j) because the

¹ We note that respondent was paroled in October 2019.

record is devoid of evidence that RW would suffer emotional harm if returned to respondent's care.

If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "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 children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K).² "A finding . . . is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed[.]" *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). In applying the clear error standard in parental termination cases, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); see also MCR 2.613(C).

MCL 712A.19b(3)(g) provides for termination of parental rights when "[t]he parent, although, in the court's discretion, financially able to do so, 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." "The 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. An imprisoned parent may provide for a child's care and custody through others during the incarceration; "he need not personally care for the child." *Id.* at 161. "Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative." *Id.* at 161 n 11. "[A] parent's past failure to provide care because of his incarceration also is not decisive." *Id.* at 161.

Respondent maintains that he executed a power of attorney for his mother to care for RW, thereby providing proper care and custody for his daughter, that he participated in every service available to him in prison and that he had a plan to obtain a job and housing upon his release. The court correctly determined that the child's placement with her grandmother did not occur because respondent delegated his parental authority rather. Instead, RW was placed with respondent's mother "simply because the [DHHS] investigated the paternal grandmother and determined her to be an appropriate placement for [RW]." The court gave credit to respondent for not obstructing that placement, but it refused to credit him for RW's placement and care, an important distinction. Additionally, the court correctly acknowledged that incarceration alone could not support termination, but the court noted that respondent had an "incredibly" extensive criminal history.

² Respondent does not challenge the court's ruling that termination of respondent's parental rights was in RW's best interests. Accordingly, that finding stands. We would also note that there was abundant evidence indicating that termination was in RW's best interests, including respondent's history of drug abuse, criminality, prior terminations, the lack of any bond between RW and respondent, and the fact that the child was thriving in the care of her grandmother.

Respondent testified that he had 23 adult criminal convictions. Respondent also testified that before his incarceration he was using methamphetamine every day.

Furthermore, although respondent had taken many classes in prison during the time affecting this matter, he had also taken classes and completed extensive treatment before the current proceedings. Yet, he once again fell into his old problematic patterns and did not demonstrate any effective, positive changes in his behaviors in respect to parenting. The court also noted that respondent's feedback from his class instructors was that he would require 6 to 12 months of outpatient treatment for substance abuse after his release from prison. The court found that this was "evidence that you don't get out of prison with this kind of criminal history, with this kind of incarceration being related to substance abuse," and then immediately take on the care and custody of a child that respondent had never met. The court observed that the length of time that it would take respondent to be in a position to adequately parent RW was unreasonably long considering RW's age even if respondent were released from prison at the earliest possible date. The court found, therefore, that respondent failed to provide proper care and custody for RW and that there was no reasonable expectation that he would be able to do so within a reasonable time given her age. MCL 712A.19b(3)(g).

Finally, MCL 712A.19b(3)(j) provides for termination of parental rights when "[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." The harm contemplated by MCL 712A.19b(3)(j) includes both emotional and physical harm. See *In re Hudson*, 294 Mich App at 268. Considering respondent's very extensive criminal record, his substantial history of drug abuse, his involvement in operating a meth lab, his minimal communications with RW, and his prior terminations and associated parenting failures, we conclude that the court did not clearly err by finding that MCL 712A.19b(3)(j) was proven by clear and convincing evidence.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens