

STATE OF MICHIGAN
COURT OF APPEALS

In re KRCMA, Minor.

UNPUBLISHED
August 20, 2020

No. 351530
Van Buren Circuit Court
Family Division
LC No. 13-017830-NA

Before: SHAPIRO, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to the minor child, EK, under MCL 712A.19b(3)(h) (incarcerated parent) and (j) (reasonable likelihood that child will be harmed if returned to the parent). We reverse and remand for proceedings consistent with this opinion.

I. BACKGROUND

The Department of Health and Human Services (DHHS) filed a petition for the removal of minor child EK from the home because respondent was abusing alcohol and engaging in violent and criminal activities in front of EK. For example, respondent frequently drove drunk or engaged in fights while EK was present. Respondent had raised EK alone since EK was born and they had a close bond. At the start of the legal proceedings, EK remained in respondent's care and the trial court ordered respondent to participate in services and to refrain from drinking.

However, respondent continued drinking and placing EK in inappropriate situations. After respondent, who was intoxicated, ran over his girlfriend with a vehicle in EK's presence, EK was removed from his home and placed into relative care. Thereafter, EK alleged that she was sexually abused and was moved into a nonrelative foster-care home.

For the convictions arising from injuring his girlfriend, respondent was incarcerated and sentenced to 47 to 90 months' imprisonment. In prison, respondent participated in the services that were available to him, worked, and attended religious activities. He also kept to himself, refrained from drinking, and had no disciplinary issues. Respondent also continued contact with EK. He mailed EK letters, cards, and gifts. However, EK's therapist filtered respondent's contact with EK because the therapist deemed some of respondent's statements to EK inappropriate.

Additionally, EK reported that respondent created a highly sexualized environment at home before he was incarcerated. By the end of the proceedings, respondent's most recent contact with EK was appropriate, and he was permitted to have phone conversations with EK.

EK, who was almost 15 years old, wished to be adopted and requested that respondent's parental rights be terminated. A relative and a nonrelative expressed interest in adopting EK. EK desired a stable and permanent home and did not wish to wait approximately twenty months for respondent to be released. Following a hearing, the trial court terminated respondent's parental rights.

This appeal followed.

II. STATUTORY GROUNDS

Respondent argues that the trial court erred by terminating his parental rights pursuant to MCL 712A.19b(3)(h) and (j). We agree.

“In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met.” *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). A trial court's factual findings following a termination hearing are reviewed for clear error. *In re Gonzales/Martinez*, 310 Mich App 426, 430; 871 NW2d 868 (2015). “A finding is clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *Id.* at 430-431 (quotation marks omitted). We review de novo whether the trial court properly selected, interpreted, and applied a statute. *Id.* at 431.

Termination of parental rights under MCL 712A.19b(3)(h) is proper when “[t]he parent is imprisoned for such a period that [1] the child will be deprived of a normal home for a period exceeding 2 years, *and* [2] the parent has not provided for the child's proper care and custody, *and* [3] 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.” *In re Mason*, 486 Mich 142, 160-161; 782 NW2d 747 (2010). The two-year period is calculated from the date petitioner seeks termination. *Id.* at 162. In regard to the first two requirements, a parent may “provide for a child's care and custody *although the parent is in prison*; he need not *personally* care for the child.” *Id.* at 161. For example, a parent may achieve proper care and custody by placing the child with a relative. See *In re Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982). The third requirement “is forward-looking; it asks whether a parent ‘will be able to’ provide proper care and custody within a reasonable time.” *Mason*, 486 Mich at 161. “Thus, a parent's past failure to provide care because of his incarceration also is not decisive.” *Id.*

In this case, the trial court made the following findings when it terminated respondent's parental rights pursuant to MCL 712A.19b(3)(h):

So that moves us to whether or not statutory ground MCL [712A.19b(3)(h)] has been proven. While the court does not necessarily need to find that because we've already found statutory grounds in the other matters, we'll note that this child has already been deprived of a normal home for a period of exceeding 2 years, and

in fact it will be close to 4 years that this child will have been deprived of a normal home by the time [respondent] will be released from prison.

He has been unable to provide proper care and custody and certainly in light of the fact that [EK] is 14 at this point, almost 15 years old, and has been in care for several years at this time, it is clear that there's no reasonable expectation that he would be able to provide proper care and custody within a reasonable time considering her age, and therefore the Court does find under MCL [712A.19b(3)(h)] that that statutory ground has been proven by clear and convincing evidence.

In this case, there was not clear and convincing evidence to support termination under MCL 712A.19b(3)(h). See *In re VanDalen*, 293 Mich App at 139. The first requirement needed to support termination pursuant to MCL 712A.19b(3)(h) was not met because the trial court terminated respondent's parental rights when he was less than two years away from his earliest parole eligibility date. See *In re Mason*, 486 Mich at 160, 162. As stated earlier, the two-year period is determined from the date petitioner seeks termination. See *In re Mason*, 486 Mich at 162.

The record indicates that respondent was sentenced to 47 months to 90 months' imprisonment, or 3 years and 11 months to 7 years and 6 months' imprisonment. Respondent's earliest release date was August 3, 2021, and his maximum discharge date was February 3, 2025. Petitioner sought termination of respondent's parental rights on October 10, 2019, and the termination hearing was held a month later. Therefore, when the trial court terminated respondent's parental rights, respondent had at least 20 months or, at most, 62 months remaining on his sentence. However, during his incarceration, respondent kept to himself, did not have any disciplinary issues, attended weekly religious services, and was employed. Thus, there was no evidence in the record indicating that respondent would not be released on his earliest release date. Indeed, the trial court recognized that there was no reason to believe that respondent would not be paroled on his earliest release date.

In an effort to satisfy the two-year timeframe, EK's lawyer-guardian ad litem argued that respondent would have to engage in reunification efforts after he was released, which would take at least six months. But respondent engaged in services while in prison "that amounted to compliance with elements of the service plan." *In re Mason*, 486 Mich at 162-163. The record reflects that respondent participated in programs while incarcerated, including a parenting class. The record also reflects that respondent was on the waiting list for several other programs throughout this case. In fact, the trial court and the caseworkers consistently recognized that respondent was doing the most that he could to engage in services while incarcerated. See *id.* at 163. And although there were concerns about respondent's relationship with EK, specifically the boundaries between EK and respondent, respondent's most recent contact with EK before the termination hearing was deemed appropriate.

Respondent also testified that he had abstained from alcohol while in prison, even avoiding available "spud juice," and there was no record evidence to the contrary. Additionally, respondent remained in contact with EK throughout the proceedings via supervised letters, gifts, and phone calls. Furthermore, respondent had consistent contact with his caseworker and, with one

exception, he attended every hearing. Respondent also testified that he had arranged for housing upon his release and that it would only take him one to two weeks to find employment given his work history. Respondent worked throughout his time in prison and believed he would be able to secure work with his previous employer.¹

For these reasons, the first requirement needed to terminate parental rights pursuant to MCL 712A.19b(3)(h) was not demonstrated by clear and convincing evidence. See *In re Mason*, 486 Mich at 160. Accordingly, the trial court clearly erred in terminating respondent's parental rights under MCL 712A.19b(3)(h).

The trial court also terminated respondent's parental rights under MCL 712A.19b(3)(j). With respect to MCL 712A.19b(3)(j), a trial court may terminate parental rights where "[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."

Our Supreme Court has cautioned against terminating a respondent's parental rights based on his or her incarceration. *In re Mason*, 486 Mich at 162-165. Our Supreme Court held that neither incarceration nor criminal history alone are grounds for termination of parental rights. *Id.* at 165. The court specifically addressed subsection (j) in *In re Mason*:

Termination on this ground was clearly erroneous because no evidence showed that the children would be harmed if they lived with [the] respondent upon his release. Significantly, just as incarceration alone does not constitute grounds for termination, a criminal history alone does not justify termination. Rather, termination solely because of a parent's past violence or crime is justified only under certain enumerated circumstances, including when the parent created an unreasonable risk of serious abuse or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. [*In re Mason*, 486 Mich at 165 (citations omitted).]

Without evidence of future harm, our Supreme Court reversed the trial court's termination of the respondent's parental rights under MCL 712A.19b(3)(j). *Id.*

We followed this reasoning in *In re Pops*, holding that the trial court improperly relied upon the respondent's current incarceration to determine the risk of harm to the child rather than "scrutiniz[ing] the likelihood of harm if the child w[as] returned to the parent's home after the parent's release from prison." *In re Pops*, 315 Mich App 590, 600; 890 NW2d 902 (2016). Looking to the respondent's current incarceration fails "to address the likelihood that [his child] would be harmed based on [the] respondent's 'conduct or capacity.'" *Id.*, quoting MCL 712A.19b(3)(j). Stated otherwise, the risk-of-harm analysis under MCL 712A.19b(3)(j) must

¹ And, even if the 2-year timeframe had been established, for these same reasons, petitioner failed to establish clear and convincing evidence that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering the child's age. *In re Mason*, 486 Mich 142, 160-161.

consider the respondent's "conduct and capacity" rather than his mere absence. *Id.* We further rejected the conclusion that the respondent's criminal record, including a resisting and obstructing and possession of a concealed weapon convictions, created an unreasonable risk of serious abuse or death to the respondent's child. *Id.* at 600-601. This remained true even though the facts underlying the resisting and obstructing offense were that the respondent had fled from the police for several blocks in a vehicle with his child as a passenger. *Id.* at 601.

In this case, the trial court stated:

[Respondent] at this time is unable to care for this child. Under MCL [712A.19b(3)(j)] it indicates would the child be harmed if returned to his home. At this point he has no home and he's been unable to provide any relative care or anybody else at this point that could care for the child and it is clear he will not be released. His earliest release from prison, there's no reason to think he would not be released at that time, but certainly it appears it would be earliest August 3rd of 2021. So, over a year and a half from now before his earliest release. It is clear that the child is unable to be returned to [respondent] at this time, would be harmed if returned to his care, as there is no alternative that he could provide at this point in time for his—her care.

So the Court does find that under MCL [712A.19b(3)(j)] that the statutory ground involving [respondent] has been proven by clear and convincing evidence.

Thus, the trial court relied upon (1) respondent's inability to care for his minor child because he was in prison and (2) his failure to identify a suitable relative placement during his incarceration. Critically, the trial court failed to "scrutinize the likelihood of harm if the child were returned to the parent's home after the parent's release from prison." *In re Pops*, 315 Mich App at 600. Rather than addressing how respondent's "conduct or capacity" would harm EK after respondent's release from prison as required by MCL 712A.19b(3)(j), the trial court improperly looked to respondent's passive absence due to his incarceration. This alone requires reversal under *Mason and Pops*.

Because termination under MCL 712A.19b(3)(j) was not supported by clear and convincing evidence, the trial court clearly erred in terminating respondent's parental rights on this ground. Because the trial court clearly erred by finding that termination was proper pursuant to MCL 712A.19b(3)(h) and (j), we reverse the trial court's order terminating respondent's parental rights on these statutory grounds. See *VanDalen*, 293 Mich App at 139.

Reversed and remanded for further proceedings.

We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Anica Letica