STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 15, 2012

In the Matter of DUNCAN, Minors.

No. 306821
Ingham Circuit Court
Family Division
LC Nos. 10-001069-NA
10-001070-NA
10-001071-NA
11-000430-NA

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

Respondent O. Duncan appeals as of right from a circuit court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(g), (h), (j), and (n)(*ii*). We reverse and remand.

Respondent and his wife have four children. The two older children were previously in a guardianship with their maternal grandmother. The third child was born in December 2008 and was also placed in his grandmother's care. Respondent was arrested for homicide in July 2009 and has been continuously incarcerated since then. The three older children returned to their mother for a brief period, but she lost custody again in June 2010, due in part to her continued drug use. The court acquired jurisdiction over the three older children in July 2010, and the children were again placed with their maternal grandmother. The fourth child was born during the period of temporary wardship and was also placed with the maternal grandmother. Petitioner later sought termination of parental rights because the mother was not able to overcome her drug problem, and respondent, who had been convicted of manslaughter, was serving a prison sentence of 5 to 22-1/2 years. The mother voluntarily released her parental rights, and the trial court terminated respondent's parental rights after a hearing.

Respondent argues that the trial court erred in finding that each of the statutory grounds for termination was established by clear and convincing evidence. To order termination pursuant to a supplemental petition, the trial court must find by clear and convincing evidence that one or more facts alleged in the petition are true and establish a statutory basis for termination under § 19b(3). *In re Trejo*, 462 Mich 341, 350, 360; 612 NW2d 407 (2000); MCR 3.977(H)(3)(a). We review the trial court's findings for clear error. *In re Trejo*, 462 Mich at 356-357; MCR 3.977(K). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm

conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court clearly erred in finding that § 19b(3)(g) was established by clear and convincing evidence. The trial court did not clearly err in finding that respondent failed to provide proper care or custody for his children. He was unable to care for his children due to his incarceration, and he left them with an unfit custodian without making arrangements to have another person care for the children. The trial court found that respondent would not be able to provide proper care and custody for the children within a reasonable time because of the length of time he will remain incarcerated. The trial court stated that although respondent had proposed alternative relative caretakers, "we're looking at the parent to be able to provide that care and custody, not whether or not there might be somebody else that can do that for him." However, in *In re Mason*, 486 Mich 142, 160, 163; 782 NW2d 747 (2010), our Supreme Court held that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination" of parental rights and that a respondent "could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration." Here, respondent was amenable to having the children remain with their grandmother and she agreed to continue caring for the children under a guardianship until respondent was released from prison. Although respondent had not actually taken steps to establish a limited guardianship with the grandmother, there was no evidence that he could not do so within a reasonable time. Therefore, the trial court clearly erred in finding that "there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time" considering the children's ages.

The trial court also clearly erred in finding that § 19b(3)(h) was established by clear and convincing evidence. That subsection contains the same elements as § 19b(3)(g), along with the added element that due to the parent's incarceration, "the child will be deprived of a normal home for a period exceeding" two years. *In re Mason*, 486 Mich at 161, 164-165. Given that the supplemental petition was filed in July 2011 and that respondent's early release date is in July 2014, the trial court could properly find that the children will be deprived of a normal home for a period exceeding two years due to respondent's incarceration. However, as with § 19b(3)(g), termination under § 19b(3)(h) also requires evidence that 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." Because respondent and the children's grandmother were both amenable to a guardianship during the remainder of respondent's incarceration and there was no evidence that a guardianship could not be established within a reasonable time, the evidence did not support a finding that respondent would not be able to provide proper care and custody within a reasonable time considering the children's ages. Thus, the trial court erred in finding that termination was warranted under § 19b(3)(h).

The trial court also clearly erred in finding that § 19b(3)(j) was established by clear and convincing evidence. The Supreme Court addressed this subsection in *In re Mason*, 486 Mich at 165, and held that "a criminal history alone does not justify termination." The Court stated that "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." *Id.* The Court concluded that termination under § 19b(3)(j) was clearly erroneous in that case "because no evidence showed that the children would be harmed if they lived with [the] respondent upon his release." *Id.*

There was no evidence here that respondent had hurt a child. His criminal record included convictions for illegal possession of drugs and a gun, and for fatally shooting another person, but there was no evidence regarding the circumstances surrounding the prior offenses such that the court could reasonably find that respondent had kept drugs or firearms in the home, let alone in a place accessible to the children, or that he engaged in criminal conduct in the presence of the children. Therefore, the evidence did not support a finding that the children were reasonably likely to be harmed if placed in respondent's custody upon his release.

Lastly, with respect to § 19b(3)(n)(*ii*), respondent does not dispute that manslaughter committed with a firearm involves an element of force or threat of force or that, due to his prior felony convictions, he was subject to sentencing as an habitual offender. But termination under § 19b(3)(n)(*ii*) also requires evidence that "termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child." The trial court found that maintenance of the parent-child relationship would be harmful to the children because respondent's poor decision-making created a risk of harm to the children. We agree that the nature of respondent's crimes makes him a poor role model for the children and that his recidivism indicates that the parent-child relationship may again be disrupted if respondent reoffends in the future. However, the trial court's finding that continuing the parent-child relationship would be harmful to the children cannot be reconciled with the fact that respondent was allowed to maintain a relationship with the children during the proceedings through letters and telephone calls. In fact, one goal of the parent/agency agreements was that respondent "develop a close parent child bond with his child" and they directed that he "send his children age appropriate letters or call if possible." This indicates that maintenance of the parent-child relationship was deemed appropriate for, and not harmful to, the children, and there was no evidence that anything had changed at the time the supplemental petition was filed such that maintenance of the parent-child relationship had become harmful to the children. Therefore, we conclude that the trial court clearly erred in finding that § 19b(3)(n)(*ii*) was established by clear and convincing evidence.

In sum, the trial court clearly erred in determining that each of the statutory grounds for termination was established by clear and convincing evidence. Accordingly, we reverse the trial court's order and remand for further proceedings. In light of our decision, it is unnecessary to determine whether the trial court properly evaluated the children's best interests under MCL 712A.19b(5).

Reversed and remanded for further proceedings not inconsistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher

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Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

MURRAY, J (*dissenting*).

With all due respect to my colleagues, I would affirm the circuit court's order terminating respondent's parental rights to the minor children pursuant to MCL 712A.19b(3)(g), (h) and (n)(*ii*).[1] In particular, the trial court did not clearly err in finding that clear and convincing evidence existed establishing at least one statutory basis for termination under § 19b(3). *In re Trejo Minors*, 462 Mich 341, 350, 360; 612 NW2d 407 (2000); MCR 3.977(H)(3)(a). The clearly erroneous standard of review is a deferential one. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence. As the majority recognizes, the trial court did not clearly err in finding that respondent failed to provide proper care or custody for his children. It was undisputed that respondent was unable to care for his children due to his incarceration (he had been in jail, and then prison, continuously since July 2008), and that he left them with an unfit custodian without making arrangements to have another person care for the children. Additionally, the evidence supported the trial court's finding that respondent would not be able to provide proper care and custody for the children within a reasonable time because of the length of time he will remain

[1] The majority correctly concludes that termination was not proper under MCL 712A.19b(3)(j).

incarcerated (another two and a half years from the termination decision)[2], and because respondent admitted he would need at least *another year* from his release to get his "ship in order" and be prepared to take responsibility for the children.

Although our Supreme Court in *In re Mason*, 486 Mich 142, 160, 163; 782 NW2d 747 (2010), held that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination" of parental rights and that a respondent "could fulfill his duty to provide proper care and custody in the future by voluntarily granting legal custody to his relatives during his remaining term of incarceration[,]" respondent had *not* taken steps to establish a limited guardianship with the grandmother, and even if she did remain the custodian for the duration of respondent's incarceration, he admitted he needed at least another year from then to be able to provide care and custody. And, unlike the respondent in *Mason*, here respondent does not have employment or housing available to him upon his release from prison. Finally, the trial court's finding that respondent's past criminal conduct (including his admission that he sold illegal drugs in part to provide income for the family) did not bode well for his future success at caring for the children provided further support for the trial court's conclusion. Therefore, the trial court did not clearly err in finding that "there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time" considering the children's ages. Although only one factor need be upheld to affirm the trial court's decision, *Trejo*, 462 Mich at 360, the trial court's findings under § 19b(3)(h) and 19b(3)(n)(ii) were also not clearly erroneous.

With respect to § 19b(3)(h), as the majority notes that subsection contains the same elements as § 19b(3)(g), but with the added element that because of the parent's incarceration "the child will be deprived of a normal home for a period exceeding" two years. *In re Mason*, 486 Mich 161, 164-165. Here, due to respondent's incarceration, the children will be deprived of a normal home for a period exceeding two years. And, for the same reasons stated while addressing § 19b(3)(g), the trial court did not clearly err in finding that 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 addressing § 19b(3)(n)(*ii*) respondent does not dispute that manslaughter committed with a firearm involves an element of force or threat of force or that, due to his prior felony convictions, he was subject to sentencing as an habitual offender.[3] Furthermore, the evidence supported the trial court's determination that "termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child." The trial

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[2] And, as the trial court noted, whether respondent is released on his earliest release date is questionable given his two misconduct charges for serious misconduct.

[3] The trial court did not terminate respondent's parental rights solely because of his incarceration. Instead, it focused on respondent's actions – both before and during his incarceration – to determine whether the statutory factors had been met. For that reason, as well as because respondent participated in all the trial court proceedings, this case is quite unlike *Mason*.

court found that maintenance of the parent-child relationship would be harmful to the children because respondent's poor decision-making created a risk of harm to the children. Aside from his convictions for carrying a concealed weapon, a drug offense, and the manslaughter sentence he is currently serving, respondent admitted to engaging in the sale of illegal narcotics to partially support the family. His poor judgment continued in prison, as reflected by his two misconduct tickets for serious misbehavior. These facts clearly support the trial court's finding, and certainly do not leave me with a definite and firm conviction that a mistake had been made. *Trejo*, 462 Mich at 350, 360. The majority's reversal is premised upon its disagreement with the factual assessments and findings of the trial court, which is not an appropriate basis upon which to reverse under this deferential standard of review. *BZ*, 264 Mich App at 296-297.

Finally, the trial court properly evaluated the children's best interests under MCL 712A.19b(5), and determined that the best interests of the children supported termination of respondent's parental rights. The evidence supported the trial court's finding that, except for the oldest child, there was no real parent-child relationship, and for all children, respondent had engaged in repeated poor choices that endangered the children and their ability to live in a safe environment. And, of course, the record squarely supports a finding that permanency was needed given respondent's admission that it would almost be four years until he could himself care for these children. *BZ*, 264 Mich App at 301; *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001); *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).

For these reasons, I would affirm.

/s/ Christopher M. Murray