STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 12, 2013

In the Matter of K J GREEN, Minor.

No. 312712
Muskegon Circuit Court
Family Division
LC No. 09-039004-NA

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to the minor child under MCL 712A.19b(3)(a)(*ii*) (desertion for 91 or more days). We affirm.[1]

I. FACTUAL BACKGROUND

The minor child was in the care of his mother when he was removed due to inadequate housing. Because respondent was the putative father, not yet the legal father, the initial focus was on the mother. At a dispositional review hearing on February 11, 2011, however, the trial court determined that respondent had filed an affidavit of parentage and was now the legal father. Respondent requested a court-appointed attorney at that hearing, and the trial court instructed him to fill out the appropriate paperwork.

While respondent was granted parenting time and interacted positively with the minor child, he was not attending all of the permitted parenting time. Respondent's interactions with the minor child decreased even more dramatically and at a dispositional review hearing on July 27, 2011, petitioner informed the court that respondent was not involved at all with the minor child and had not seen the minor child in quite some time. The trial court subsequently

[1] Petitioner challenges this Court's jurisdiction because respondent filed his request for the appointment of appellate counsel 16 days after the order of termination was entered. However, the mailing of the advice of rights and the order terminating parental rights did not occur until September 7, 2012. Thus, pursuant to MCR 3.977(J)(1)(c) and (2)(b), this claim of appeal is timely because it was filed within 14 days of the mailing of the order terminating parental rights and the advice of his appellate rights.

suspended respondent's parenting time and ordered that respondent continue to comply with and benefit from the case service plan.

During subsequent dispositional review hearings, the recurrent theme was that respondent was failing to see the minor child and failing to appear at the hearings. At the dispositional review hearing on April 4, 2012, petitioner noted that respondent had not seen the minor child for almost a year and the trial court recognized that it had been almost two years since the initiation of these proceedings. The foster care worker testified that respondent had not followed through with the parent agency agreement and that while she repeatedly attempted to contact him and inform him of the importance of maintaining contact, he was very difficult to reach. The trial court ordered petitioner to file a petition for termination.

After the petition had been filed, the mother voluntarily terminated her parental rights, and a termination hearing was scheduled for respondent. At the termination hearing on August 24, 2012, the trial court inquired into respondent's lack of counsel, and respondent indicated that he had been denied court-appointed counsel and was now earning more money. The trial court proceeded with the hearing. The foster care worker testified that the last time respondent had seen the minor child was on June 3, 2011, and that respondent had not sought custody of the child during the last 91 days since seeing the child. She stated that there was no bond between respondent and the minor child. She testified that respondent had informed her that he was not participating in reunification because he had relocated to Grand Rapids and was living with his mother. She testified, however, that she would not have had a problem providing reunification services, including parenting time, for an individual living in Kent County.

The foster care worker believed that termination was in the minor child's best interests because he had been in a stable foster home for almost two years, the child had bonded to the foster family, removing the child would be harmful, and respondent had failed to provide proper care and custody of the child and was unlikely to do so. The trial court found there was clear and convincing evidence that respondent had deserted the minor child and that termination was in the child's best interests. Respondent now appeals.

II. RIGHT TO COUNSEL

Respondent contends that the trial court violated his right to counsel by proceeding to termination even though he did not have court-appointed counsel. While "the constitutional provisions explicitly guaranteeing the right to counsel apply only in criminal proceedings, the right to due process also indirectly guarantees assistance of counsel in child protective proceedings." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002) (block quote and citation omitted). However, a respondent must take affirmative action in order to have counsel appointed. *Matter of Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991).

Our court rules specifically address the right to counsel in the context of child protective proceedings. MCR 3.915(B)(1)(a)(i) states that the court shall advise a respondent that he "has the right to a court appointed attorney at any hearing conducted pursuant to these rules, including the preliminary hearing, if the respondent is financially unable to retain an attorney . . . ." Further, MCR 3.915(B)(1)(b) states that "[t]he court *shall* appoint an attorney to represent the respondent at any hearing" if the respondent requested an appointed attorney and "it appears to

the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney." (Emphasis added); see also MCL 712A.17c(5) ("[i]f it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.").

In the instant case, at the February 11, 2011, dispositional review hearing—the first hearing respondent attended after signing an affidavit of parentage—the trial court asked respondent if he would like to have a court-appointed attorney. Respondent answered in the affirmative and the trial court instructed him to fill out the application form and directed the attorney-guardian ad litem to assist him. Respondent attended the subsequent May 6, 2011, review hearing without counsel, but did not raise any issue relating to the appointment of counsel. Respondent did not attend any subsequent hearing until he appeared in propria persona at the August 24, 2012, termination hearing. The trial court inquired into respondent's efforts to obtain court-appointed counsel, and respondent indicated that he had been denied appointed counsel. The trial court asked respondent if his circumstances had changed since he was denied the appointment of counsel, and respondent indicated that he now had a different job with a higher pay rate. The trial court proceeded with the hearing and asked respondent if he intended to represent himself. He replied "it looks that way."

Upon a review of the record, we find that respondent has failed to demonstrate that his right to a court-appointed attorney was infringed upon. At the first hearing respondent attended after signing the affidavit of parentage, the trial court inquired into his desire to seek a court-appointed attorney and guided him toward the proper procedure to do so, consistent with MCR 3.915(B)(1)(a)(i). Also, other than respondent's initial application for appointment of counsel, there is no evidence that he took any affirmative action to try and secure the appointment of counsel or that he informed the court that he still desired appointed counsel.

Furthermore, the trial court was not obligated to appoint an attorney for respondent at the termination hearing pursuant to MCR 3.915(B)(1)(b). Respondent testified that he was previously denied court-appointed counsel and that he was currently earning more money than he was at the time he applied for the appointment of counsel. He also testified that he was currently working a lot of hours. He never indicated a belief that his application for the appointment of counsel was wrongfully denied or that he was entitled to counsel. Thus, the mandate in MCR 3.915(B)(1)(b) to appoint appellate counsel was not triggered, as "an examination of the record" does not reveal that "respondent is financially unable to retain an attorney." Therefore, respondent has failed to demonstrate any error requiring reversal.

III. STATUTORY GROUNDS FOR TERMINATION

A. Standard of Review

We review a trial court's finding that there were statutory grounds for termination for clear error. *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

B. Analysis

Petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds for termination exists. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). The trial court in the instant case found the statutory grounds for termination were desertion. MCL 712A.19b(3)(a)(*ii*) states that a court may terminate parental rights if it finds by clear and convincing evidence that "[t]he child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period." In the instant case, respondent had not seen the minor child in over a year and had not sought custody of the child during that time. Although the trial court repeatedly ordered respondent to comply with and benefit from the case service plan, the foster care worker testified that respondent had failed to comply with the parent agency agreement and he was extremely difficult to contact. He failed to attend any of the hearings that were scheduled during the 15 months preceding the termination hearing. Accordingly, the trial court did not clearly err in finding that petitioner presented clear and convincing evidence that pursuant to MCL 712A.19b(3)(a)(*ii*), respondent had deserted the minor child.

Respondent, however, posits that because the Department of Human Services (DHS) failed to provide him with adequate services to facilitate reunification, the trial court clearly erred in terminating his parental rights. "Generally, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re HRC*, 286 Mich App at 462. In the instant case, respondent claims that the services were insufficient because they were offered in Muskegon, rather than Grand Rapids, where he had relocated during the pendency of the case.

Yet, according to the foster care worker, respondent was not provided with services or parenting time in Grand Rapids because he informed her that he was not participating in reunification due to his relocation to Grand Rapids. She testified that she would have been able to provide services such as parenting time in Grand Rapids. She also testified that despite her attempts to contact respondent and her instruction that he maintain contact with her, respondent was unavailable. Moreover, the record supports a finding that respondent failed to attend multiple parenting times and was noncompliant with the service plan even before relocating to Grand Rapids. As this Court has recognized, "[w]hile the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). Due to respondent's lack of participation in the services offered and failure to keep in contact with DHS, we find that the trial court did not clearly err in finding that reasonable reunification efforts were made and that the statutory grounds for termination were proven by clear and convincing evidence.

IV. BEST INTERESTS

A. Standard of Review

We review for clear error the trial court's determination that termination was in the best interests of the child. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). Clear error occurs when we are left with the definite and firm conviction that an error has been made. *In re HRC*, 286 Mich App at 459.

B. Analysis

The trial court did not clearly err in finding that termination of respondent's parental rights was in the minor child's best interests. At the time of the termination hearing, the child had lived with the same foster parents for almost two years and was doing well in their care. The foster care worker testified that the child was bonded with the foster parents and was living in a stable environment. Respondent had not seen the child in over a year, and there was no evidence of a bond between the child and respondent. The foster care worker also testified that the child needed permanence and stability, which respondent was unable to provide, and that disrupting the child's relationship with his foster parents would be harmful to the child. Thus, the evidence clearly established that termination was in the child's best interest, as he was living in a stable and loving environment with foster parents who had a strong bond with him. See *In re VanDalen*, 293 Mich App at 141 (holding that "[t]he evidence clearly supported the trial court's finding that termination was in the children's best interest" because "[t]he children had been placed in a stable home where they were thriving and progressing" in the care of foster parents). Respondent has failed to establish any error requiring reversal.

V. CONCLUSION

Respondent has failed to demonstrate any error requiring reversal regarding his lack of appointed counsel, the trial court's finding that there was clear and convincing evidence that he had deserted the minor child, and the trial court's finding that termination was in the best interests of the minor child. We affirm.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan