STATE OF MICHIGAN

COURT OF APPEALS

In re I. MCCARRICK, Minor.

UNPUBLISHED
September 25, 2014

Nos. 320153; 320154
Ingham Circuit Court
Family Division
LC No. 13-001996-NA

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

PER CURIAM.

In this consolidated appeal, respondent-mother (Docket No. 320153) and respondent-father (Docket No. 320154) appeal by right an order terminating their parental rights to their newborn, IM. We affirm.

I. FACTS AND PROCEEDINGS

Three days after respondent-mother gave birth to IM, the Department of Human Services (DHS) filed a petition asking the court to take jurisdiction over the newborn pursuant to MCL 712A.2(b)(1) (parent neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for the child's well-being) and MCL 712A.2(b)(2) (unfit home or environment), and to terminate respondents' parental rights pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody), MCL 712A.19b(3)(j) (unfit home or environment), and MCL 712A.19b(3)(*l*) (rights to another child previously terminated). The petition alleged that respondents did not have adequate housing or supplies for their newborn. Respondents proposed to live with IM's paternal grandfather, but Child Protective Services (CPS) assessed his one bedroom house and found it inadequate for the baby's needs. In addition, the paternal grandfather told CPS that respondents could not stay with him long-term. The petition also detailed respondents' involvement with CPS, and the previous termination of their parental rights to children in 2008, 2009, and 2011.[1]

[1] In addition to termination of their rights to the three children they had, respondent-father's parental rights to a child he had with another woman had also been terminated, and respondent-mother had voluntarily relinquished her rights to a daughter she had given birth to before she met respondent-father. She shares joint legal custody of two other children.

The preliminary hearing was held the same day the petition was filed. The hearing referee found that it would be contrary to IM's welfare to remain with respondents for the reasons stated in the petition and recommended that the court grant the petition and take jurisdiction over IM. The court accepted the recommendations, took jurisdiction over IM, removed her from respondents' care, placed her with DHS for care and supervision, and granted respondents parenting time.

After IM was removed, respondents underwent psychological evaluations. Tests revealed that respondent-father functioned at a second-grade level with regard to word recognition and a third-grade level when it came to math. An evaluation of his executive functions[2] resulted in an overall classification of "moderately impaired." Tests revealed that respondent-mother functioned at a fifth-grade level with regard to word recognition and a third-grade level in math. Her executive function classification was "moderately-to-severely impaired." Both admitted to suffering from depression, and bipolar and sleep disorders. Although respondent-mother had taken medication for her bipolar disorder while she was pregnant, she stopped taking the medication after IM was born. Respondent-mother was estranged from her parents and her two siblings, and respondent-father described himself as an "outcast"; neither acknowledged having a support system.

The evaluators noted that respondents had little insight into their own behavior and difficulties. If the court ordered reunification, the evaluators recommended that it would first be necessary for respondents "to achieve normative developmental tasks, including obtaining housing, income, and a consistent and responsible lifestyle." Respondent-father would need counseling "to help improve his capacity to regulate his emotions, eliminate self-defeating behavior, and develop interpersonal skills to deal with conflicts and demands imposed on him." Respondent-mother would require therapies focused on abuse and neglect. Intensive parent training was recommended for both, as was developing a list of tasks and activities that they would perform regularly every day. The evaluators considered respondents' overall prognosis for developing the needed skills to handle a child within the next year to be very poor. The evaluators said that respondent-mother accepted little responsibility for her current situation and is not self-reflective, and that these would be significant barriers to her progress.

The initial disposition hearing combined the adjudicative and dispositional phases of the termination proceeding. A foster-care worker testified that respondents had attended parenting time, acted appropriately, and appeared to bond with IM. However, they were never allowed unsupervised parenting time because there had been no improvement with regard to the issues that had brought IM into foster care and had resulted in prior terminations of respondents' parental rights. Historically, respondents had struggled with housing, emotional stability, parenting skills, domestic relations, and intellectual capacity. The foster-care worker testified

[2] The psychological evaluation explained executive functions as "those behaviors and skills that allow one to successfully carry out instrumental and social activities, such as planning, engaging with others effectively, problem-solving, and successfully interacting with the environment to get one's needs met."

that, although there have been no domestic violence concerns since 2008, the other issues continue to present barriers to reunification with IM. The foster-care worker said that respondents had attended parenting classes, received psychological evaluations, individual and couples counseling, parent nurturing programs, housing referrals, and parenting time, but without apparent benefit. She noted that respondents are without permanency in their own lives, and have none to give their child.

Respondent-mother testified that she had been out of work since 2008, and that her only source of income was food stamps. She answered in the affirmative when asked if she thought she could budget and maintain a consistent lifestyle. When informed of the results of the psychological evaluation that indicated third-grade math skills and fifth-grade word-recognition skills, respondent-mother said she did not think either would interfere with her ability to parent IM. She said she did not think her behavior was the reason for previous terminations, nor the reason why she was again involved in termination proceedings. She insisted that this time would be different because she was in a stable relationship with respondent-father, and she had supplies for IM.

Respondent-father testified that he was working under the table for his landlord, cleaning and repairing vacated apartments in order to work off a $200 debt, and that he hoped to continue to work for him after the debt was paid, and possibly rent housing from him. Respondent-father testified that he attended therapy so he could get medication for his sleep and bipolar disorders, but that he did not think the therapy helped. Nevertheless, he said he would be willing to do whatever DHS required in order to keep IM. When asked if his second-grade word recognition skills and third-grade math skills would negatively impact his ability to be an effective parent, respondent-father said he did not think so, at least not until IM began to need help with her homework. Although respondent-father did not think his behavior was the reason for previous terminations nor for the current termination proceedings, he did acknowledge that he needed services before IM was returned.

The court found by clear and convincing evidence that it could terminate respondents' parental rights pursuant to MCL 712A.19b(3)(*l*) because their rights had previously been terminated as a result of proceedings under MCL 712A.2(b). The court also found that grounds to terminate under § 19b(3)(g) existed because, despite their best intentions, respondents have failed to provide proper care for IM and there is no expectation that they will be able to do so in the near future. The court found that respondents did not have adequate housing or a source of income, and they needed significant assistance to take care of themselves on a day-to-day basis. The court also found grounds to terminate pursuant to § 19b(3)(j), stating that it did not believe respondents would intentionally harm IM, but because of their capacity, they might subject her to environmental risks that would undermine her ability to grow up happy and healthy.

Having found statutory grounds for termination, the court next turned to whether termination was in IM's best interests, and found that it was. The court said that it knew respondents had bonded with IM but, for all the reasons mentioned above, did not think they had the ability to care for her.

II. ANALYSIS

Respondent-mother first argues that the court erred in terminating respondent's parental rights without making findings relative to jurisdiction. Whether the trial court had subject-matter jurisdiction over a claim is a question of law this Court reviews de novo. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004). " 'Jurisdiction is the power of a court to act and the authority of a court to hear and determine a case.' " *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001), quoting *Grubb Creek Action Comm v Shiawassee Co Drain Comm'r*, 216 Mich App 665, 668; 554 NW2d 612 (1996). A family court's subject-matter jurisdiction "is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *In re AMB*, 248 Mich App at 167-168, quoting *In re Hatcher*, 443 Mich 426, 437; 505 NW2d 834 (1993). For this reason, "a family court has subject-matter jurisdiction when the allegations in the petition provide probable cause to believe that it has statutory authority to act because the child's parent or guardian neglected the child, failed to provide a fit home, or committed any of the other conduct described in the statute." *In re AMB*, 248 Mich App at 168.

Here, petitioner's initial petition alleged that MCL 712A.2(b)(1) (parent neglects or refuses to provide proper or necessary support, education, medical, surgical or other care necessary for child's well-being) and MCL 712A.2(b)(2) (unfit home or environment) applied because respondents did not have suitable or stable housing, and had only one can of formula and a few clothes for their newborn. In its order of adjudication, the trial court found by a preponderance of the evidence that statutory grounds existed to exercise continued jurisdiction over IM pursuant to MCL 712A.2(b)(2) (unfit home or environment). The findings on the record that support the court's exercise of continued jurisdiction pursuant to MCL 712A.2(b)(2) are the same as those the court made to support termination on the basis of MCL 712A.19b(3)(j) (unfit home or environment). The record shows that a preponderance of the evidence clearly indicated that the environment created by respondent-mother would be unfit for IM to live in, MCL 712A.2(b)(2), and that this case was within the subject-matter jurisdiction of the trial court.

Respondent-mother also contends that the doctrine of anticipatory negligent is inapplicable to her case. The doctrine of anticipatory neglect holds that evidence of how parents treat one child may be probative of how they will treat another. *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973). Respondent-mother asserts, however, that because she received prenatal care while pregnant with IM, was not homeless, had obtained supplies for IM, and had attended all parenting time periods and bonded with IM, she has demonstrated that her treatment of IM differs from her treatment of her other children. Whether respondent-mother's treatment of IM thus far has differed from how she treated her other children cannot be ascertained from the record, and respondent-mother offers no evidence other than her appropriate behavior under supervised conditions that she has changed or amended her parenting abilities. What is clear from the record is that respondent-mother continues to struggle with the same issues that resulted in previous terminations of her parental rights: housing, emotional stability, parenting skills, and intellectual capacity. For these reasons, the doctrine of anticipatory neglect does apply and the trial court's termination decision under MCL 712A.19b(3)(*l*) was supported by the evidence and the law.

But even if termination under § 19(b)(3)(*l*) was not appropriate, the trial court also found that grounds for termination existed under § 19b(3)(g) (failure to provide proper care and custody) and § 19b(3)(j) (unfit home or environment). "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). Because respondent-mother has not challenged the trial court's specific rulings under subsections (j) or (g), we can affirm the statutory findings on that basis alone. *In re Trejo*, 462 Mich 341, 360; 612 NW2d 407 (2000). In any event, the record squarely supports the trial court's findings under these two additional subsections.

Respondent-mother next argues that the court erred in determining that termination of her parental rights was in the best interests of IM because it failed to consider respondent-mother's progress toward removing barriers to reunification. We review the trial court's findings regarding a child's best interests under the clearly erroneous standard. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91 (opinion by CORRIGAN, J.), 126 n 1 (YOUNG, J., concurring in part); 763 NW2d 587 (2009). 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 was made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). When determining whether termination of parental rights is in a child's best interests,

> the court should consider a wide variety of factors that may include the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014) (citation and quotation marks omitted).]

Respondent-mother argues that termination of her parental rights was not in IM's best interests because she had made progress on the issues that lead to past terminations. For example, she argues that whereas domestic violence had been a part of her previous relationships, she was now in a stable relationship with IM's father. Furthermore, she had acted appropriately during parenting time, had bonded with IM, was open to parenting suggestions, and was willing to participate in the services necessary to implement the recommendations of the psychological evaluation.

Nevertheless, the trial court found that, although she is in a stable relationship where domestic violence is not an obvious factor and has bonded with IM, respondent-mother remains chronically unemployed with no source of income except food stamps and no apparent job prospects. The trial court found that respondent-mother has a history of homelessness and, at the

time of the dispositional review hearing, she lacked adequate and stable housing. And she is reluctant to get therapy for her untreated bipolar disorder. The trial court recognized that respondent-mother participated in services in the past without apparent benefit, and there are no new services to offer her. The court found that her unwillingness to take responsibility for her situation prevents her from making any progress toward rectifying it, and was firmly convinced that respondent could not provide IM with the permanency, stability, and finality that she needed, and which would be provided in a foster home.

In light of the record and the wide variety of factors that the trial court considered prior to making its termination decision, and giving due regard to the trial court's special opportunity to judge the credibility of the witnesses, *In re Miller*, 433 Mich at 337, we conclude that the trial court did not clearly err in determining that termination was in IM's best interests.

Respondent-father also argues that the trial court erred in terminating his parental rights when it used his past conduct to determine that he could not care for his daughter in the future, and that termination was not in IM's best interests. We review the trial court's findings that a ground for termination has been established and regarding the child's best interests for clear error. MCR 3.977(K); *In re Rood*, 483 Mich at 90-91. We find clear error when we are left with a firm conviction that a mistake has been made. *In re Mason*, 486 Mich at 152.

It is true, as respondent-father argues, that the doctrine of anticipatory neglect risks punishing a parent for what he might do in the future based on what he has done in the past. However, respondent-father's parental rights were terminated because his current patterns of behavior were unchanged from past patterns of behavior that, despite respondent-father's participation in services, had resulted in previous terminations. The record before the trial court established that respondent-father's living arrangement was a short-term, impromptu arrangement that was inadequate for IM's needs. Additionally, although respondent-father was working to pay off a debt rather than to receive income, he had no guarantee that he would be employed for a wage after the debt was paid. And although he expressed to the trial court a willingness to do whatever it takes to maintain his parental rights, he participated in services in the past without benefit, and stated on the record that, while he attends therapy in order to get his medications, he does not think it works. The record also showed that respondent-father disbelieved that his behavior is the reason that he lost his parental rights in the past, or the reason why he is facing termination in the instant case. Despite his claim to having made changes in his life, respondent-father did not provide the trial court with any evidence of any substantial change in the issues that lead to previous terminations. In light of this, we conclude that the trial court did not err in terminating his rights pursuant to MCL 712A.19(b)(3)(*l*).

Moreover, the trial court did not err in determining that even though respondent-father had attended and behaved appropriately during supervised parenting time and had bonded with IM, is not sufficient—when weighed against respondent-father's continued struggles with his historic barriers to reunification—to overcome the evidence that termination of his parental rights is in the best interests of IM. As noted by the trial court, respondent-father's children were brought into foster care because of lack of housing, emotional instability, the inability to manage resources, deficient intellectual capacity, and domestic violence. These barriers to reunification still existed at the time of termination, and are the reasons why respondents were never allowed unsupervised parenting time with IM. Respondent-father had not benefitted from services in the

past and, despite his stated willingness to participate in further services, there is no indication that he would benefit from them now. In light of this, we conclude that the trial court did not clearly err in determining that termination of respondent-father's parental rights was in IM's best interests.

Affirmed.

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