STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
October 25, 2012

In the Matter of W. G. WARSINSKI, Minor.

No. 309307
St. Clair Circuit Court
Family Division
LC No. 11-000401-NA

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to her minor child pursuant to MCL 712A.19b(3)(g), (i), (j), and (m). Although we find that the trial court's decision to terminate respondent's parental rights was supported by clear and convincing evidence, the trial court failed to specifically find that termination of respondent's parental rights was in the child's best interests. As such, we affirm in part but remand to the trial court for a best-interests determination as required by MCL 712A.19b(5).

I. BASIC FACTS

Respondent has four children. Her two oldest children are in a guardianship. Respondent voluntarily relinquished her parental rights to her third child after a termination petition was filed. The child at issue in this case was removed from respondent's care immediately after birth once a social worker discovered respondent had a prior termination and alerted Children's Protective Services. Though the initial petition filed by Department of Human Services (DHS) did not seek termination of respondent's parental rights, a termination petition was filed approximately one month later.

A court referee conducted the evidentiary hearing. The evidence revealed that respondent suffered a history of mental and physical illnesses (including Attention Deficit Hyperactivity Disorder (ADHD), Post-Traumatic Stress Disorder (PTSD), anxiety disorder, and epilepsy). Respondent also had on-going problems with unemployment and homelessness. In the neglect case involving respondent's third child, respondent was offered a number of services, including two parenting courses, but both courses resulted in recommendations that respondent's children not be returned to her. Respondent was also provided a parent mentor, but she was unable to get her living space into a condition that was safe for a child. Several DHS employees who had handled respondent's cases testified that respondent was unfit to care for the minor child primarily because of her lack of parenting skills and mental health issues.

Respondent testified that she was now married and had a stable living situation with her husband at his parents' home. She testified that neither she nor her husband was employed, but that with proper public assistance she was more than capable of caring for the child.

The referee found that grounds for termination had been established by clear and convincing evidence under MCL 712A.19b(3)(g), (i), and (j), but that clear and convincing evidence had not been presented to establish grounds for termination under MCL 712A.19b(3)(m). The referee concluded that the termination of respondent's parental rights was in the best interests of the child.

In an amended order, the trial court found that that grounds for termination had been established by clear and convincing evidence under MCL 712A.19b(3)(g), (i), (j), and (m).

Respondent now appeals as of right.

II. ANALYSIS

A. STATUTORY GROUNDS FOR TERMINATING RESPONDENT'S PARENTAL RIGHTS

On appeal, respondent argues that the statutory grounds for termination were not established by clear and convincing evidence. She notes that a termination petition was filed only 32 after the child was born and that there was no proven instability of housing, employment, or mental health during that time. Additionally, respondent argues that petitioner failed to provide any specific evidence that the child would be harmed if he was returned to respondent. Finally, respondent maintains that her voluntary release of parental rights to her third child could not form the basis for termination under MCL 712A.19b(3)(i) or (m).

This Court reviews for clear error a trial court's determination to terminate parental rights. *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).

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(g), (i), (j), and (m), which provides:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> (g) The parent, without regard to intent, 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.
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> ***

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(j) There 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.

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(m) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state and the proceeding involved abuse that included 1 or more of the following:

(*i*) Abandonment of a young child.

(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life-threatening injury.

(*vi*) Murder or attempted murder.

(*vii*) Voluntary manslaughter.

(*viii*) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

(*ix*) Sexual abuse as that term is defined in section 2 of the child protection law, 1975 PA 238, MCL 722.622.

The evidence established that respondent released her parental rights to her third child after termination proceedings were initiated against her due to respondent's failure to attend to and provide a safe home for that child. In that case, respondent was provided with a pair of parenting courses and a parent mentor, none of whom recommended that the child be returned to respondent.

In the present case, when the child was removed, respondent lacked stable housing or employment. She continued to struggle with mental health issues. All of these same issues existed with respondent's three older children. Multiple parenting classes, psychiatric services, and the placement of a parent mentor had all failed to alleviate the problems. While respondent asserts that she has recently rectified those issues, the evidence shows that respondent still lacks employment, stable housing, and still has not resolved her mental and physical health issues.

Moreover, respondent's own testimony showed an unwillingness to accept responsibility for her situation. She presented a letter from her psychiatrist stating that she was not a danger to herself or others; however, the psychiatrist specifically disavowed having provided any treatment to respondent concerning her abilities and responsibilities as a parent.

In light of the foregoing evidence, the trial court did not err in finding clear and convincing evidence that respondent failed to provide proper care or custody for the child and there was no reasonable expectation that she would have been able to do so within a reasonable time considering the child's age. Nor did the trial court err in finding clear and convincing evidence that there was a reasonable likelihood, based respondent's conduct or capacity, that the child would have been harmed if returned to respondent's home.

We agree that the trial court erred in terminating respondent's parental rights pursuant to MCL 712A.19b(3)(i)(m), where there was no evidence presented that established any of the aggravating circumstances enumerated in that subsection. Indeed, the referee specifically found that MCL 712A.19b(3)(m) had not been established by clear and convincing evidence. Given the lack of evidence presented by petitioner, the trial court's finding that MCL 712.19b(3)(m) had been proven by clear and convincing evidence was clearly erroneous. Our finding does not change the result of this case, however, because an erroneous termination of parental rights under one statutory basis is harmless error if the court properly terminated rights under another statutory ground. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). For that same reason, we decline to address whether respondent's voluntary release of parental rights formed a basis for termination pursuant to MCL 712A.19b(3)(i).

B. BEST INTERESTS OF THE CHILD

Respondent next argues that the trial court erred by failing to find that clear and convincing evidence showed that termination of her parental rights was in the child's best interest. We agree.

MCL 712A.19b(5) reads as follows:

> 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.

Here, the trial court failed to make any determination whatsoever as to whether termination was in the child's best interests. As such, the trial court's termination order was defective, and we must remand to the trial court for the required a best-interests determination.

III. INDIAN CHILD WELFARE ACT

Finally, respondent argues that the trial court's termination order violated the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. We disagree.

Pursuant to MCR 3.965(B)(2), a trial court must inquire if the child or either parent is a member of an Indian tribe. If it is determined that a child is potentially an Indian child, the trial

court must give notice of the proceedings to the Indian child. In determining whether a trial court has "reason to know" that an Indian child is involved:

> we adopt the permissive standard articulated by the Colorado Supreme Court and hold that sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 U.S.C.A. § 1912(a). Once sufficient indicia of Indian heritage are presented to give the court a reason to believe the child is or may be an Indian child, resolution of the child's and parent's tribal status requires notice to the tribe or, when the appropriate tribe cannot be determined, to the Secretary of the Interior. If there must be error in determining whether tribal notice is required, let it be on the side of caution. [*In re Morris*, 491 Mich 81, 108; 815 NW2d 62 (2012) (footnote omitted).]

Here, the only evidence that the child had any tribal membership was the testimony of a DHS worker who stated that respondent once mentioned that she had recently discovered that she had Native American heritage. Respondent herself did not provide any testimony as to any Native American heritage on her part or on the part of the child. Indeed, the statement made to the DHS worker was entirely unsubstantiated. As such, it was not sufficiently reliable information of the child's Indian heritage to trigger the requirements of the ICWA.

IV. CONCLUSION

We affirm the trial court's order with respect to the determination that the statutory grounds for termination were established under MCL 712A.19b(3)(g) and (j), but remand to the trial court for a best-interests determination as required by MCL 712A.19b(5). We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto