

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
March 15, 2011

In the Matter of A. D. DAVIS, Minor.

No. 300634
Wayne Circuit Court
Family Division
LC No. 09-491262

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Respondent D. Davis appeals as of right from a circuit court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(f). We reverse.

MCL 712A.2(b)(5) and MCL 712A.19b(3)(f) allow a court to exercise jurisdiction over a child and to terminate a parent's rights to the child where the child has a guardian and both of the following are shown:

(A) The parent, having the ability to support or assist in supporting the [child], has failed or neglected, without good cause, to provide regular and substantial support for the [child] for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition.

(B) The parent, having the ability to visit, contact, or communicate with the [child], has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition. [MCL 712A.2(b)(5); MCL 712A.19b(3)(f).]

The only significant difference between the statutes is that regarding the burden of proof. Jurisdiction must be established by a preponderance of the evidence, MCR 3.972(C)(1); MCR 3.977(E)(2), while the statutory ground for termination must be proven by clear and convincing evidence, MCR 3.977(E)(3). The petitioner bears the burden of proof and must prove both subsections of the statutes. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, 221 Mich App 683, 691; 562 NW2d 254 (1997).

A trial court's decision to exercise jurisdiction is reviewed for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). The court's finding that the statutory ground for termination has been proven by clear and convincing evidence is also reviewed for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "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 at 296-297.

Petitioner had the burden of proof (persuasion) for all elements necessary to establish her cause of action and this burden never shifts. See *Kar v Hogan*, 399 Mich 529, 539; 251 NW2d 77 (1976). Petitioner also had the burden of going forward with evidence (production), although that burden may shift during the course of the trial. *Id.* at 540.

In this case, the trial court clearly erred when it excused petitioner from presenting any evidence in support of her petition and instead required respondent "to present evidence to the court that the statutory factors have not been met." Because petitioner failed to present any evidence, she failed to prove that § 2(b)(5) was established by a preponderance of the evidence and that § 19b(3)(f) was established by clear and convincing evidence. Further, even if petitioner's testimony on cross-examination were treated as petitioner's proofs, the trial court clearly erred in finding that the testimony established § 2(b)(5)(B) by a preponderance of the evidence, and established § 19b(3)(f)(ii) by clear and convincing evidence.

The child had lived with petitioner continuously since April 2006. The probate court had entered orders awarding respondent unsupervised weekend visitation in January 2005 and July 2009. It was unclear how often respondent saw or spoke to the child, but petitioner admitted that respondent exercised visitation regularly and that the child "does see [respondent] on a regular basis." Thus, the trial court found that the evidence showed "that [the child] has had frequent contact and communication with [respondent] in the last two years" and that respondent "has had somewhat frequent contact with [the child]." The trial court erred in relying on *In re Redic*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2004 (Docket No. 251634), to find that respondent's contact with the child did not amount to regular and substantial contact because it "was not for the purpose of furthering their parent-child relationship." Apart from the fact that *In re Redic* is an unpublished decision and, as such, is not precedentially binding, MCR 7.215(C)(1), the evidence in that case showed that the respondent did not see the child for the experience of spending time with her and maintaining a parent-child relationship. Rather, their contact was "merely incidental to respondent visiting petitioner with her other children, or [the child] going to respondent's residence to spend time with her siblings." *In re Redic*, unpub op at 5-6. In this case, the evidence showed that respondent exercised visitation to spend time with the child; there was no evidence that the child's contact with respondent was incidental to events unrelated to maintaining the parent-child relationship. Therefore, the trial court clearly erred in finding that respondent's frequent contact with the child "was not for the purpose of furthering their parent-child relationship."

Because petitioner failed to meet her burden of proof and because the evidence presented by respondent did not establish both subsections of §§ 2(b)(5) and 19b(3)(f), the trial court clearly erred in terminating respondent's parental rights. In light of our decision, it is unnecessary to address respondent's remaining issues.

Reversed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto