STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MARVIN EILENDER, CHARLES HENRY NOAH EILENDER, HANNAH EILEEN ROSE EILENDER, LEWIS ABRAHAM JOSEPH EILENDER, and SARAH LILLIAN EILENDER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DR. DAVID EILENDER,

Respondent-Appellant,

and

BETTY COLLEEN EILENDER,

Respondent.

UNPUBLISHED
June 30, 2009

No. 287939
Oakland Circuit Court
Family Division
LC No. 05-707874-NA

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

BETTY COLLEEN EILENDER,

Respondent-Appellant,

and

DR. DAVID EILENDER,

Respondent.

No. 288110
Oakland Circuit Court
Family Division
LC No. 05-707874-NA

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Respondents appeal as of right from the September 15, 2008, trial court order terminating their parental rights to the minor children (Marvin, DOB: 6-19-94; Charlie, DOB: 12-29-95; Hannah, DOB: 6-13-97; Lewis, DOB: 12-17-99; and Lillian, DOB: 11-16-2002) under MCL 712A.19b(3)(c)(i), (g) and (j). We affirm.

Docket No. 287939

Respondent father does not argue that the statutory grounds for termination were not established by clear and convincing evidence, nor does he argue that it was not clearly in the children's best interest to terminate parental rights. Father argues that the trial court erred by terminating his parental rights without first providing him with services to treat obsessive-compulsive personality disorder (OCPD). He contends that this disorder affected his parenting ability. Father concedes, however, that he took the position during the proceedings below that he does not suffer from OCPD. In fact, father presented the testimony of Dr. Miller that father does not have a mental illness and does not suffer from a personality disorder. Father's denial is consistent with his broad denial of any responsibility for any of the problems that this family suffered and for any physical or domestic abuse of his wife or his children. The record is replete with testimony that an individual who refuses to accept responsibility for his actions will never be able to change his actions.

Further, the psychological evaluation with regard to father recommended that father "find a specialist, either psychiatric or psychological, who addresses Obsessive/Compulsive Personality Disorder and resulting behavior patterns that make it difficult for an individual to function on a daily basis and that are obviously interfering with the family's ability to function as a group." Father treated with Dr. Gonzales beginning in June 2005, upon a referral from father's attorney indicating that father might have OCPD, but father discontinued treatment after seven sessions. Father indicated to Dr. Gonzalez that he was going to treat with another psychiatrist, but failed to do so. Father never provided any information regarding Dr. Gonzalez' diagnosis or prognosis, nor did he provide information regarding his treatment. Although father claims that he was not aware of the recommendation that he treat with a specialist in OCPD, the record suggests otherwise. A discussion was held on the record in October 2005 regarding the fact that DHS does not pay for psychiatric treatment and that father's private insurance might pay for such treatment. Father made no attempt after ending his treatment with Dr. Gonzalez to secure treatment for the psychiatric condition that he denied, despite the recommendation in the psychological evaluation.

Further, contrary to father's suggestions, DHS did provide referrals for father for individual therapy. Father first had individual therapy with Marianne Winter-Long, a social worker with Oakland Family Services, and later with Ian Lloyd, a mental health therapist at Alpha Family Counseling. DHS authorized individual therapy with Lloyd from 1/19/06 to 4/21/08. That referral did not contain any mention of OCPD. A second authorization for the period of 4/20/06 to 7/20/06 listed OCPD as a reason for the extension of the authorization.

Lloyd did not find father to possess OCPD tendencies. At the end of father's second treatment period with Lloyd, Lloyd indicated in a report generated on August 1, 2006, that father had reached maximum benefit and recommended termination of therapy. The *following* day, a request for an extension of services was made. Lloyd testified that he indicated that father had reached maximum benefit because no additional authorizations for treatment would be granted. Lloyd then stated that he meant that father "reached maximum benefit from the therapy that was authorized," but acknowledged that that is not what he stated in his report. Father's statement in his brief that "DHS pressured him [Lloyd] into documenting that no further services were needed" is incorrect and misleading.[1] Similarly, father's statement that "most [of father's problems] related or arose from OCPD" is misleading. Indeed, father denied having OCPD, and at least 2 witnesses, including father's own expert, testified that father did not have OCPD.

The record reveals that DHS provided many services to father throughout this case and that father failed to benefit from any of those services because he was in denial and refused to accept responsibility for his behavior and for the problems existing in the family. The failure of petitioner to ensure father's compliance with treatment to address his OCPD is not enough to render insufficient the evidence for the termination of parental rights.

Father also argues that his interests conflicted with those of mother and, therefore, the trial court erred by denying his request for separate trials. However, the court specifically indicated that it was capable of adjudicating the rights of each parent separately, and properly could terminate the parental rights of one parent without terminating the rights of the other, if appropriate. *In re Marin*, 198 Mich App 560, 568; 499 NW2d 400 (1993). A separate hearing was not required to avoid prejudice to father's case. See *Detloff v Taubman Co, Inc*, 112 Mich App 308, 310-311; 315 NW2d 582 (1982). Indeed, father concedes that there is no authority for the proposition that a separate hearing is required under the circumstances presented in this case.

Next, father argues that the trial court refused to let father's counsel cross-examine the family therapist, Dr. Stulberg, "regarding her anger and resentment toward him" after he filed a HIPPA complaint against her,[2] and then sanctioned him for attempting to obtain a basis for the court's ruling, thereby violating his right to confront his accusers. However, respondent's right to confrontation was not violated because he had no right to confrontation in a child protection proceeding. *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993).

Father also argues that his right to due process was violated because the trial court refused to allow him the opportunity to cross-examine Dr. Stulberg on the issue of bias. The parental right to custody of one's child constitutes a liberty interest entitled to constitutional due process protection. *In re Render*, 145 Mich App 344, 348; 377 NW2d 421 (1985). On review de novo of the proceedings below, there is no basis to conclude that father was denied such

[1] Documentation in the record reveals that no further referrals would be authorized for father for individual therapy because he was participating in family therapy.

[2] The HIPPA complaint resulted from the initial family therapy session that was also attended by the court-appointed special advocate.

protection when the trial court cut-off further cross-examination of Dr. Stulberg regarding alleged bias. Father presents a distortion of what transpired. Earlier in the hearing, the court had sustained an objection and father's counsel continued to argue with the court over its ruling. The court ultimately informed father's counsel that, "That's one sanction. Move on." When father's counsel continued to argue with the court with regard to the colloquy at issue above, the court informed him of "Sanction two." Thus, the record does not support father's argument that he did not know what the court was referring to.[3] Nonetheless, father was not denied his due process rights by the court's limitation of cross-examination of Dr. Stulberg with regard to the HIPPA complaint. Father has not shown how he could further attack Dr. Stulberg's credibility with information that the trial court already knew – i.e., that father had filed a HIPPA complaint against Dr. Stulberg. In addition, father had listed Dr. Stulberg as a witness and had the opportunity to call Dr. Stulberg, but declined. Father has not demonstrated that he was denied due process of law.

Lastly, father asserts that he was not able to obtain a copy of the plea proceeding to allow him to raise a challenge to the voluntariness of his plea to the original petition on July 29, 2005.[4] However, the transcript of the plea proceeding was filed on November 17, 2008, two months before father filed his appellate brief. Consequently, father's argument is misplaced.[5]

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[3] The record does not reveal that any sanctions were imposed against father's counsel.

[4] Father concedes that, "This is not a proper appellate issue at all. It is, rather, one of necessity." Father's counsel also concedes that the appellant has "the duty to obtain the record and, quite frankly, this Court may discard this question entirely with a single citation thereto."

[5] Nonetheless, father's assertion regarding the voluntariness of his plea is without merit. The court asked both mother and father if they understood that by pleading no contest to the contents of the petition they were giving up their right to a trial, to which both responded affirmatively. The court informed mother and father that:

> When you give up your right to a trial by the preponderance of the evidence, which is what the prosecutor must prove, you are giving up all those rights that go along with the right to a trial, including the right to have the prosecutor prove your responsibility and that the children fall within the neglect statute by the preponderance of the evidence.
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> You're giving up your right to have your attorneys represent you during the trial process, to have witnesses appearing against you and to question those witnesses or have your attorney question those witnesses, to have the Court order witnesses to appear on your behalf, also to testify on your own behalf, if you wish to testify. You are waiving all of these rights by pleading no contest to the contents of the petition. Do you understand that Ms. Eilender and Mr. Eilender?
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> MS. EILENDER: Yes.
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> MR. EILENDER: Yes.

(continued…)

Respondent mother's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(i), (3)(g), and (3)(j), which state as follows:

Pursuant to MCL 712.A.19b(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:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *

(…continued)

> THE COURT: By pleading no contest, you're indicating that you are not contesting the allegations present in the petition. You're not pleading responsible to any specific allegations, but do you understand for purposes of this case, the Court is going to treat your no contest plea as if you had pleaded responsibility. Do you understand that, Ms. Eilender and Mr. Eilender?
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> MS. EILENDER: Yes.
>
> MR. EILENDER: Yes.
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> THE COURT: And further, please understand the following. As a result of your plea of no contest today, the Court will take jurisdiction over these children and the Court will order you after disposition is made in this case to a number of cases aimed at the reunification of your family. Should you fail to follow the Court's orders, a petition could be filed to terminate your rights. If that occurs, your no contest plea to the contents of this petition could be used against you at that time.

Both mother and father indicated that they understood what the court stated. The court then continued its questioning to determine the voluntariness of the plea. The factual basis of the plea was a two-page copy of the complaint dated May 20, 2005. The court accepted both mother's and father's pleas of no contest, and informed mother and father that:

> . . . when the court takes jurisdiction in a temporary custody petition, it is the intent of this Court to work towards reunification of the family. And it will take jurisdiction over the family based upon the pleas of no contest by both parents.

(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.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the children's parents that the child will be harmed if he or she is returned to the home of the parent.

The petitioner has the burden of proving a statutory ground for termination by clear and convincing evidence. *In re Trejo,* 462 Mich 341, 350; 612 NW2d 407 (2000). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989). Deference is accorded to the trial court's assessment of the credibility of the witnesses who appeared before it. *Id.;* MCR 2.613(C). An order terminating parental rights need only be supported by a single statutory ground. *In re Trejo, supra;* MCL 712A.19b(3).

MCL 712A.19b(3)(c)(i)

Mother concedes that she was not [at the time of the termination trial] and is not yet prepared to be a model parent. She asserts that she "deserved more time to address her many concerns" and that the trial court should not have changed the permanency plan from reunification to termination simply because "the magic 182" days had elapsed in this case.

Mother's argument ignores the fact that the children first came under the jurisdiction of the court in May 2005, and that the initial disposition order was entered on October 18, 2005. Clearly, more than 182 days had elapsed since the issuance of the initial disposition order. Mother's argument also acknowledges, but fails to give due weight to, the fact that a multitude of services were provided to this family throughout the duration of this case. Mother's argument also acknowledges that mother showed some progress with regard to the parent-agency agreement, but that she did not fully comply. Even assuming that mother had fully complied, a party's compliance with the parent-agency agreement is merely *evidence* of the party's ability to provide proper care and custody of the children. *In re Trejo supra* at 356-357. Compliance is not unquestionably decisive of the issue. Moreover, benefiting from the services is "an inherent and necessary part of compliance with the case service plan." *Id.* The record demonstrates, and mother concedes, that she had not yet benefited from the services she received.

Contrary to mother's suggestion, the trial court was fully aware of the unusual circumstances of this case. The court scheduled review hearings nearly every month in an effort to keep the family on track and deal with the many issues presented in this case. The court also consistently noted the goal of reunification for this family (with mother and father planning separately in light of their divorce). It was not until it became very apparent that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the ages of the children that the trial court authorized the filing of a supplemental petition to terminate parental rights.

Although it is clear that mother loves her children, she is thinking about only herself in suggesting that she be provided more services and more time to rectify the conditions that led to the adjudication. These children had been in and out of foster care for three years, and had been solely in foster care for nearly 2 years at the time of the trial.

MCL 712A.19b(3)(g)

Mother concedes that "she received a multiplicity of services from professionals and friends and neighbors," but argues that she "required exceptional services for a prolonged period of time" and that "more and repeated services should have been provided." Mother essentially argues that DHS rushed to terminate her rights. In making this argument, mother likens her situation to that of the respondents in *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991). Mother's argument fails since *Newman* is factually distinguishable from this case. In *Newman*, the service provider assigned to instruct the respondents on maintaining their home stopped providing the instruction. *Id.* at 65-68. Evidence was presented that progress was being made while the provider's services were being offered. Thus, this Court concluded that the trial court erred in finding the "the conditions in the home to be a basis for terminating respondents' parental rights because respondents were not given a full and fair opportunity to maintain the home. They need help. It was not shown that after being given consistent assistance they still did not rectify the conditions." *Id.* at 67-68. In the present case, however, mother was given a full and fair opportunity to provide proper care and custody within a reasonable time considering the children's ages. She had "expected relapses" throughout the course of this case, and there is nothing in the record to support a finding that such relapses would not continue to occur. Further, the policy preference for timely decisions regarding a child's permanency plan is driven by a concern for the child's needs. See *In re Hatcher*, 443 Mich 426, 431 n 5; 505 NW2d 834 (1993). By the time the court terminated mother's rights, the protective proceedings had lasted almost 3 years, during which time mother had been provided ample opportunity to improve her parenting capabilities.

MCL 712A.19b(3)(j)

Mother's sole argument with regard to this statutory ground for termination is:

> There was no evidence presented that indicated that these children were directly harmed by their Mother when they were in her care. It is only when father was in the home did the neighbor or DHS note that the children were harmed. With father out of the home, the likelihood of harm to the children was nil.
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> Unfortunately, the children did not voice a desire to the Court Clinic evaluator to live with Mother due to negative memories of their life with both parents. Even Ms. Eilender said she was not ready yet to parent. Time could have healed these wounds. The professionals could have and should have presented an alternative to termination because Ms. Eilender was highly motivated to be healthy and to be a good parent now that she had monetary means to provide for her family.

This argument need not be addressed because (1) mother has failed to properly present it,

and (2) other statutory grounds for termination are supported by clear and convincing evidence.

Nonetheless, the record supports a finding that there was a reasonable likelihood that the children would be harmed if returned to mother's home. With regard to this factor, the trial court found:

> This is juxtaposed against mother's capacity to effectuate change and her real desire to do so, but an underlying inability to make such change lasting in duration due to her inability to obtain and effectuate a lasting and stable mental health status. Parenting children brings with it normal trials and tribulations, which in and of themselves create various levels of stress. Mother's inability to remain stable in the face of stress, due to her fragile and extremely sensitive emotional state, make the likelihood of long lasting functionality questionable at best.
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> Many significant services were provided in this case, with regular (shorter time period) reporting to the Court due to the fluidity of mother's emotional mental health status. Mother was often unable to cope with generally accepted behavioral constraints associated with appearing in a courtroom setting. Her irrational and illogical thought processes, and elevated level of neediness often placed others in a caretaking position, as opposed to demonstrating a prolonged ability for her to provide the necessary guidance and care required to parent these five children.
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> Many opportunities were provided for mother to seek other family members to resume a supportive role in her parenting of the children without success. In additional [sic] an extremely high level of services was required while the children were either in her care or even during limited visitation periods, just to permit her to function at the most basic of levels.
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> Without emotional and mental health stability, mother has remained vulnerable to her deficits and unable and incapable of supporting the children financially or emotionally, and it is apparent to the Court that the children stand in considerable risk of harm if returned to her care, despite her best intentions and love for them.

The record clearly supports the trial court's finding that the children were at risk of harm if returned to mother due to her emotional and mental health stability. Indeed, mother recognized that she was not able to properly care for the children at the time of the termination hearing. She had been afforded a multitude of services, including psychological care, as well as psychiatric care, and still she continued to engage in self-destructive behavior and was not able to handle the stress of parenting. Given mother's failure to fully comply with her treatment plan and her history of long-term serious mental health problems, there remains a reasonable likelihood that the children would be harmed if returned to her care. MCL 712A.19b(3)(j). Contrary to mother's position, it is not necessary that there be evidence of physical harm or neglect to support termination under § 19b(3)(j). See *In re Trejo, supra* at 360-361 n 16.

The family court's determination regarding the children's best interests is also reviewed under the clearly erroneous standard. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Once a ground for termination is established, the family court must order termination of parental rights unless the court concludes that termination is clearly not in the children's best interests. *Id.*

Mother argues that it was not in the best interest of the children to terminate her parental rights because she was making an effort to comply with the parent-agency agreement and was making some progress. Her sole argument with regard to this issue is that she loves and misses the children and would never intentionally hurt them, and that she took full responsibility for her addictions and the trouble that her children have encountered. She argues that "termination was premature," but acknowledges that her position at trial was that she "was willing to accept whatever decision the court rendered." She notes that "it cannot be ignored that Ms. Eilender has stated that she is not ready to be a good parent right now. . . Time is needed and requested."

After summarizing all of the testimony presented at the best interests hearing and noting the total record, the trial court found with regard to mother:

> The Court finds by clear and convincing evidence from the total record as set forth above that each of the individual children's right to and need for security and permanency is best served by allowing each an opportunity to live in a stable, safe, clean, nurturing environment which the entire record in this case establishes cannot be provided by either of the parents. These children have been in foster care for three years. They have not spoken to either parent in over six months.
>
> Both parents have been offered numerous services over the past three years. Inspite [sic] of these services, both parents continue to behave inappropriately when allowed contact with their children. This Court concludes the clear and convincing evidence above establishes it is unlikely that additional services will be beneficial. The Court further finds from the entire record that each of the children would likely suffer harm of the nature previously visited upon each while in respondent parents' care if reunited with respondent parents.

While the record reflects that respondent expressed love for her children and a desire to care for them in the future, there was no clear error in the trial court's refusal to further delay the children's permanency and stability. The children had been outside of mother's care for a substantial amount of time. Mother was given ample services and time to demonstrate that she could properly parent her children. Testimony by service providers indicated that the children needed permanency and a caregiver who could meet their needs and provide a safe, structured, and stable environment, which mother clearly could not do as evidenced by testimony regarding her serious and ongoing parenting deficiencies.

The order terminating parental rights is affirmed in both docket number 287939 and docket number 288110.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro