STATE OF MICHIGAN

COURT OF APPEALS

In re DAVIS, Minor.

UNPUBLISHED
September 15, 2016

Nos. 330297 & 330630
Wayne Circuit Court
Family Division
LC No. 13-514918-NA

Before: CAVANAGH, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, respondent-father E. Robinson (the "father") appeals in Docket No. 330297, and respondent-mother C. Davis (the "mother") appeals in Docket No. 330630. Each challenge the circuit court's order that terminated their parental rights to the minor child pursuant to MCL 712A.19b(3)(a)(*ii*), (g), and (j). For the reasons provided below, we affirm.

I. TRIBAL NOTICE

The father argues that reversal is required because the circuit court failed to adhere strictly to statutory, tribal notice requirements regarding Native-American Indian children. We review de novo legal questions inherent in statutory construction and application. *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). We review for clear error a circuit court's "factual finding underlying the application of legal issues." *Id*. However, because the father never objected or otherwise challenged the adequacy of petitioner's tribal notices in this proceeding, his appellate challenges are unpreserved. We review unpreserved issues to determine whether any plain error affected the appellant's substantial rights. *In re Williams*, 286 Mich App 253, 278; 779 NW2d 286 (2009).

We hold that the circuit court correctly ruled that petitioner had documented the Native-American tribes' receipt of notices regarding, and the content of, the petition in LC No. 13-514918-NA. The father initially avers that "although DHHS [the Department of Health and Human Services] sent the notices to the tribes by registered mail on . . . 12/05/13, DHHS did not request or obtain return receipts for those registered mailings." We disagree.

25 USC 1912(a) provides:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster

> care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

In *In re Morris*, 491 Mich at 89, our Supreme Court held as follows concerning the adequacy of tribal notice pursuant to 25 USC 1912(a):

> We hold . . . that the trial court must maintain a documentary record including, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a),[1] and (2) the

[1] The father does not contest the adequacy of the notices in the record that petitioner sent to the three Cherokee tribes and the Bureau of Indian Affairs (BIA).

The Indian Child Welfare Act, 25 USC 1901 *et seq.*, contains notice provisions similar to those in Michigan statutes. In MCL 712B.9, the Michigan Legislature provided:

> (1) In a child custody proceeding, if the court knows or has reason to know that an Indian child is involved, the petitioner shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending child custody proceeding and of the right to intervene. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary in the same manner described in this subsection. The secretary has 15 days after receipt of notice to provide the requisite notice to the parent or Indian custodian and the tribe.
>
> (2) No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or the secretary. The parent or Indian custodian or the tribe shall, upon request, be granted up to 20 additional days to prepare for the proceeding. If the petitioner or court later discovers that the child may be an Indian child, all further proceedings shall be suspended until notice is received by the tribe or the secretary as set forth in this subsection. If the court determines after a hearing that the parent or tribe was prejudiced by lack of notice, the prior decisions made by the court shall be vacated and the case shall proceed from the first hearing. The petitioner has the burden of proving lack of prejudice.

> original or a legible copy of the return receipt *or other proof of service showing delivery of the notice*. [Emphasis added.]

We reject as unsupported in the record the father's challenge to the adequacy of petitioner's tribal notices. The record documents that, concerning the father, (1) petitioner sent by registered mail copies of three tribal notifications and one BIA notification, and (2) legible copies of "other proof[s] of service showing delivery of the notice[s]." *In re Morris*, 491 Mich at 89. The notifications in this case included copies of United States Post Office tracking information for the three notices to Cherokee tribes and the BIA's notice, all of which reflect delivery by December 12, 2013. We conclude that the notices comport with the notice documentation analysis in *In re Morris*. Because the tribes and the BIA received their notices by December 12, 2013, and none of these entities requested additional time to investigate or respond, the circuit court properly held the preliminary hearing on December 23, 2013. Because the record adequately documents the receipt of tribal notices in this case, no basis exists for a conditional reversal to the circuit court or necessity of a remand to resolve a 25 USC 1912(a) notice issue. *Id.* at 121.

We also reject the father's challenges to the notices' failures to include a copy of the petition in LC No. 13-514918-NA. The father cites only 80 CFR 37, 10146, 1153-1154 (2015). This regulation contains the requirements for Native-American tribal notifications under 25 USC 1912(a). In relevant part, the regulation demands that a notice of a pending child custody proceeding contain "clear and understandable language and include" identifying information concerning the child, the tribes "in which the child . . . may be eligible for membership," and "[a] copy of the petition, complaint or other document by which the proceeding was initiated." 80 CFR 37(B)(6)(a)(1)-(3). But the father fails to identify any authority in support of the proposition that the failure to strictly adhere to the requirement that a tribal notice contain a petition copy demands conditional reversal.

Furthermore, the notice documentation regarding the father contains a brief introductory letter from petitioner to three Cherokee tribes and the BIA, which identifies petitioner's case number. The notice documentation also included three-page copies of petitioner's detailed "North American Indian Child Case Notification," which revealed details, including identifying information for the child and his parents, petitioner's case number, the date on which the circuit court had scheduled the next hearing—which might conclude in the removal of a Native-American child—and, beneath a CPS worker's signature, the identification of an enclosure as the "[p]etition with case related information." The CPS worker testified that she included copies of the petition in the tribal notices. Because the notice documentation record in this case contains abundant information identifying the parties and the child, and repeatedly advises the recipients of the specific, pending child protective proceeding, the father has failed to establish plain error that affected his substantial rights.

II. STATUTORY GROUNDS & BEST INTERESTS

Both respondents challenge the circuit court's findings that there were statutory grounds to support termination of their parental rights and that termination was in the best interests of the child. In a related argument, the mother insists that petitioner failed to make reasonable efforts toward assisting her in improving her parenting skills and transporting her to services.

A. STANDARDS OF REVIEW

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). We review for clear error a circuit court's decision to terminate parental rights. MCR 3.977(K). The clear error standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and . . . the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich at 356-357. A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). We "give deference to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

But with regard to the reasonable efforts issue raised by the mother, she never raised this issue at the circuit court. Thus, this particular unpreserved issue is reviewed for plain error affecting her substantial rights. *In re Utrera*, 281 Mich 1, 8; 761 NW2d 253 (2008).

B. MCL 712A.19b(3)(a)(*ii*)

We conclude that the circuit court clearly erred in finding clear and convincing evidence to support termination under MCL 712A.19b(3)(a)(*ii*).

In § 19b(3)(a)(*ii*), the Legislature authorized termination of parental rights when the record clearly and convincingly established that the parent has deserted the child "for 91 or more days and has not sought custody of the child during that period." Before the child protective proceeding began, the child lived with the mother, who regularly gave him maternal attention and otherwise provided for him. The father regularly interacted with the child and bought him food, supplies, and toys. Moreover, respondents appeared for almost all of the many hearings during this proceeding, intermittently attended parenting times until the circuit court suspended them, and otherwise achieved some compliance toward their treatment-plan goals.

This record does not clearly and convincingly establish abandonment by either respondent. Indeed, the supplemental petition did not request termination pursuant to § 19b(3)(a)(*ii*), and there is no indication in the record that respondents received notice that petitioner would seek, or that the circuit court would consider, the potential termination of their parental rights under § 19b(3)(a)(*ii*). At the termination hearing, petitioner failed to argue that the circuit court should invoke § 19b(3)(a)(*ii*), and the circuit court failed to explain the basis for its decision to apply § 19b(3)(a)(*ii*). However, the circuit court's erroneous reliance on § 19b(3)(a)(*ii*) as a basis for termination can be harmless as long as another statutory ground was proven by clear and convincing evidence. See *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009).

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

Pursuant to MCL 712A.19b(3)(g), a circuit court can terminate parental rights "if the court finds, by clear and convincing evidence," that "[t]he 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."

Here, the circuit court did not clearly err when it determined that both respondents failed to provide proper care or custody to the child when they failed to adequately care for the child's special medical needs. Likewise, the court did not clearly err when it determined that neither respondent would be able to rectify their parental shortcomings within a reasonable time in light of the child's age.

In January 2014, the circuit court ordered respondents to maintain legal income sources and suitable housing, complete a parenting class and a specialized parenting class geared toward caring for medically fragile children, attend the child's medical appointments, and participate in individual counseling. The circuit court also ordered the father to submit to a psychiatric evaluation and ordered the mother to maintain medication compliance and mental health services.

By the time of the termination hearing, which took place between July 2015 and October 2015, respondents had not made substantial progress toward improving their parenting skills. The parties did not dispute that the child had a diagnosis of prune-belly syndrome and had a resultant chronic kidney disease that required significant medical attention, including catheterization several times a day, use of a bathroom every two hours, and regular appointments with neurology and nephrology specialists. Two caseworkers testified that they repeatedly referred the mother for individual counseling to address responsible parenting, but by October 2015, she had not completed the individual counseling. Although the mother completed two parenting classes, the caseworkers agreed that she failed to exhibit any measurable improvement in her parenting skills during supervised parenting times. The mother failed to attend any of the child's nephrology and neurology appointments, and the father only sporadically attended. Although the child went to occupational therapy twice a week for six or seven months, the mother only attended once, and only once called to inquire about the child's progress. The mother received Social Security benefits but failed to substantiate her possession of appropriate housing. And the mother completed a psychological evaluation but neglected to demonstrate that she regularly pursued review of her medications.

The caseworkers testified that the mother attended 60 of 87 weekly supervised parenting times. In March 2015, the circuit court suspended her parenting time because she had failed to attend any parenting times between December 19, 2014 and mid-February 2015. The caseworkers agreed that the mother frequently had difficulty managing the child's behavioral issues, which included difficulty maintaining focus, throwing things, running out of the parenting-time room, and biting, kicking, and headbutting everything. Additionally, the caseworkers agreed that the parenting times the mother neglected to attend often caused the child to misbehave more than usual. The caseworkers testified that since March 2015, the child's misbehaviors in his foster home had markedly diminished.

With respect to the father, at an initial assessment for individual counseling in November 2014, the father reported homicidal and suicidal feelings. The caseworkers testified that after the father's inappropriate outburst, they could not refer him for many other services, including counseling and parenting classes, until he had completed psychological and psychiatric evaluations. The father's psychological evaluation diagnosed him with bipolar disorder and schizophrenia and recommended psychiatric treatment, but the father failed to document his participation in a psychiatric evaluation or regular psychiatric treatment. The father received Social Security benefits but failed to substantiate his possession of appropriate housing. The caseworkers agreed that the father never completed individual counseling to help address his parenting skills or a parenting-education course. The caseworkers regularly had difficulty contacting the father. The father attended only 33 of 87 supervised parenting times. In March 2015, the circuit court suspended the father's parenting times pending a psychological evaluation. The caseworkers testified that when the father inconsistently attended parenting times, the child exhibited increased misbehaviors. The caseworkers concluded that the father made only minimal improvement in his mental health or parenting skills.

In light of the foregoing evidence, we hold that the circuit court did not clearly err when it determined that respondents failed to provide proper care or custody for the child and that there was no reasonable expectation that the parents would be able to do so within a reasonable time. Accordingly, the court did not err when it terminated respondents' parental rights under § 19b(3)(g).

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

A circuit court can terminate parental rights if the record clearly and convincingly establishes that "[t]here 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." MCL 712A.19b(3)(j). The record clearly and convincingly establishes that respondents' neglect of the child's serious medical needs precipitated this child protective proceeding. The evidence demonstrated that for nearly two years before the termination hearing concluded, respondents failed to complete most of the services that petitioner offered to stabilize their mental health and improve their parenting skills. In light of respondents' minimal progress and the special medical needs that the child requires, there is a reasonable likelihood that the child would indeed suffer emotional or physical harm if returned to either respondent's home. As a result, the trial court did not clearly err when it terminated respondent's parental rights under § 19b(3)(j).

E. REASONABLE EFFORTS

The mother argues that the petitioner failed to pursue reasonable efforts to reunify her with the child. Primarily, the mother claims that petitioner neglected to ensure that she had transportation to services. As already noted, this unpreserved issue is reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8.

Although petitioner bears the "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 Laster*, 303 Mich App 485, 495; 845 NW2d 540 (2013) (quotation marks and citation omitted). The caseworkers testified that

they supplied the mother with bus tickets whenever she requested them. The mother claimed that transportation issues had interfered with her attendance at only approximately four parenting times. And the caseworkers repeatedly referred the mother for every service that petitioner offered. However, the evidence established that for nearly two years the mother failed to pursue most of the many services that petitioner offered. Accordingly, we find that she has not established any plain error that affected her substantial rights.

F. BEST INTERESTS

Both respondents argue that the circuit court erred in finding that termination of their parental rights was in the child's best interests. We disagree.

"Even if the trial court finds that the [petitioner] has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the child[]." *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). In *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014), this Court summarized:

> The trial court should weigh all the evidence available to determine the children's best interests. To determine 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. [Quotation marks and citations omitted.]

Although the child and respondents shared loving bonds, respondents' inability to meet the child's special medical needs led to the child's placement in foster care. Respondents failed to exhibit measurable improvement in their abilities to parent the child, and respondents demonstrated minimal progress in addressing their own significant mental health issues. Respondents failed to attend many parenting times with the child, which caused an increase in the child's misbehaviors. The child strongly needed permanency given his young age and the nearly two years he had spent in foster care. The caseworkers agreed that the child's mental and physical health had improved substantially in his foster care placement, which met the child's educational, emotional, medical, and physical needs. The foster parents and the child shared a strong bond, and the foster parents were contemplating adopting the child. Thus, the circuit court did not clearly err when it found that termination of respondents' parental rights was in the child's best interests.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Karen M. Fort Hood