

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
July 24, 2012

In the Matter of RUSSELL, Minors.

No. 303586
Wayne Circuit Court
Family Division
LC No. 07-473554

Before: DONOFRIO, P.J., and TALBOT and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's orders terminating her parental rights to the minor children, IR and SR. The court terminated respondent's parental rights to IR pursuant to MCL 712A.19b(3)(c)(i) (the conditions that led to the adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) reasonable likelihood of harm if child is returned to the parent's home). The court terminated respondent's parental rights to SR under §§ 19b(3)(g), (i) (parental rights to another child previously terminated), and (j). Because the appointment of new counsel before respondent's second termination trial did not violate her due process rights, the trial court did not abuse its discretion by admitting Marcus Barnes's testimony, clear and convincing evidence supported the termination of respondent's parental rights, and termination was in the children's best interests, we affirm.

Respondent first argues that the trial court violated her due process rights by removing her attorney and appointing new counsel before her second termination trial. Because respondent failed to raise this issue below, our review is limited to plain error affecting her substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

A respondent has a statutory and constitutional right to counsel during parental rights termination proceedings. *Id.* The constitutional right to counsel stems from notions of due process and equal protection. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000). In addition, "[b]oth MCL 712A.17c(4) and MCR 3.915(B)(1)(b) specifically extend the right of appointed counsel . . . to indigent respondents in child protective proceedings." *In re Williams*, 286 Mich App at 276 (quotation marks and brackets omitted). At its discretion, the trial court may substitute counsel "upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

On March 25, 2011, respondent's attorney, Jeremy Brand, failed to appear at a scheduled hearing regarding SR. The trial court noted that it had discussed the absence with Brand, and

Brand stated that he would not be able to appear at the hearing. Given his failure to appear, the trial court appointed emergency house counsel, Charlene Johnson, to represent respondent in the proceedings concerning SR. Following the appointment, the trial court adjourned the proceedings until April 8, 2011, giving Johnson two weeks to prepare for trial.

Because there is no evidence suggesting that Brand intended to appear at any further hearings concerning SR, the trial court had good cause to appoint new counsel. By doing so, the trial court preserved respondent's due process rights by ensuring that she was represented at all times. The adjournment gave Johnson an ample opportunity to discuss the case with respondent, review the lower court file, which included filings and exhibits concerning respondent's history of employment, housing, and allegations of prostitution, and to prepare for the April 8, 2011, termination trial. The fact that Johnson did not request a further adjournment suggests that she was afforded sufficient time to prepare. Accordingly, respondent has failed to establish plain error affecting her substantial rights. *In re Williams*, 286 Mich App at 274.

Respondent next argues that the trial court erred by admitting Marcus Barnes's testimony concerning allegations that respondent was engaged in prostitution. We review for an abuse of discretion a trial court's evidentiary rulings in a child protection proceeding. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). A trial court abuses its discretion if its decision falls outside of the range of principled outcomes. *Id.* "This Court, however, will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights. MCR 2.613(A); MRE 103(a)[.]" *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998).

"The relevancy and admissibility of evidence depends on the purpose for which it is offered." *In re Jones*, 286 Mich App at 130. "Relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403.

Respondent contends that Barnes's testimony was more prejudicial than probative. Barnes, the father of two of respondent's children not involved in this appeal, testified that he located respondent on a social media website by using her telephone number. On that website, respondent had created a profile and appeared to be offering sexual services in exchange for payment. Barnes identified and the trial court admitted printouts of the Internet profile. In order to confirm that the individual on the website was in fact respondent, Barnes communicated with the individual through the website and later confirmed that the person was indeed respondent. Barnes testified that when he confronted respondent about the profile, she partially acknowledged that she was involved in prostitution by stating that she was not soliciting clients for herself, but rather, for her friend. Such testimony was highly probative and relevant to respondent's fitness as a parent and whether she had a legal source of income. Considering the probative nature of the evidence, it was not unfairly prejudicial. Barnes's testimony related to his personal knowledge of respondent's activities and not his lay opinion regarding whether he believed that respondent was engaged in prostitution. Thus, the trial court did not abuse its discretion by admitting the testimony.

Respondent next argues that clear and convincing evidence did not support the termination of her parental rights. “In order to terminate parental rights, the [trial] court must find that at least one of the statutory grounds for termination . . . has been met by clear and convincing evidence.” *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). We review for clear error a trial court’s determination that a statutory basis has been proven by clear and convincing evidence. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). “A finding is clearly erroneous where the reviewing court has a definite and firm conviction that a mistake has been made.” *In re Jackson*, 199 Mich App at 25. When reviewing the trial court’s findings of fact, we give due regard to that court’s special opportunity to judge witness credibility. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

The trial court terminated respondent’s parental rights to IR pursuant to MCL 712A.19b(3)(c)(i), (g), and (j), and terminated her parental rights to SR under MCL 712A.19b(3)(g), (i), and (j). Although respondent does not challenge the trial court’s decision based on MCL 712A.19b(3)(i) with respect to SR, petitioner concedes that the trial court clearly erred by finding that that statutory ground was satisfied. In any event, because clear and convincing evidence supported the termination of respondent’s parental rights based on the other statutory grounds, any error with respect to MCL 712A.19(3)(i) is harmless. See *In re Powers*, 244 Mich App at 118 (“clear and convincing evidence of only one statutory ground [is necessary] to support [a] termination order.”)

MCL 712A.19b(3)(c)(i), (g), and (j) provide:

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.

* * *

(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 child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The trial court did not clearly err by determining that the requisites for termination under MCL 712A.19(b)(3)(g) were established by clear and convincing evidence with respect to both IR and SR. Respondent was required to obtain suitable housing and address mental health issues by attending individual and domestic violence therapy. Although she had received services since 2008, she failed to comply with the terms of her parent-agency agreement, particularly regarding housing. "[A] parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child." *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). While respondent and her boyfriend, Reggie Anner, testified that respondent lived at Anner's residence, respondent failed to establish her actual housing situation. The record shows that respondent provided conflicting testimony regarding her housing history and her current living situation, including housing information that was later determined to be false. Respondent admitted occasionally spending time at a motel where she had been connected to prostitution and solicitation activities, which raises concerns regarding her ability to provide proper care for the children.

In addition, although respondent maintained sporadic employment, she failed to provide proof of her income. She claimed that she prepares tax returns and earns more than \$1,000 a week for such services, but she failed to provide evidence verifying her claim. To the extent that respondent challenges the trial court's credibility decisions, it is well established that this Court defers to the trial court regarding credibility. *In re Fried*, 266 Mich App at 541. Because respondent failed to establish stable housing or income since 2008 and there was no reasonable expectation that she will be able to do so within a reasonable time, the trial court did not clearly err by terminating her parental rights under MCL 712A.19b(3)(g).

Regarding MCL 712A.19b(3)(c)(i), more than 182 days had elapsed since the initial dispositional order concerning IR. When IR was removed from respondent's custody, the primary issues concerned housing and respondent's mental health. As discussed above, respondent failed to establish and maintain suitable housing. Moreover, although she attended individual therapy and domestic violence counseling on a somewhat consistent basis, her actions demonstrate that she has not benefitted from such services. On one occasion, respondent threatened to kill IR's foster parent and her children, and testimony showed that respondent had threatened others as well. While respondent relies on Trina Mason's testimony that respondent had made progress in her therapy sessions with Mason, it was shown that respondent was not forthcoming with Mason about issues in her life. Therefore, Mason's conclusions regarding respondent were not based on accurate information. Accordingly, the trial court did not clearly err by determining that the conditions that led to the adjudication continued to exist and there was no reasonable likelihood that they would be rectified within a reasonable time considering IR's age. MCL 712A.19b(3)(c)(i).

For the same reasons, the trial court did not clearly err by determining that there existed a reasonable likelihood of harm if the children were returned to respondent's care. Although respondent demonstrated sufficient parenting ability during her supervised visits, her actions and decision-making outside of her visits caused concern. Her failure to substantially comply with

the parent-agency agreement shows that there is a likelihood that the children would be harmed if returned to respondent's care. MCL 712A.19a(5).¹ Accordingly, the trial court did not clearly err by finding that the grounds for termination under MCL 712.19b(3)(j) were established by clear and convincing evidence.

Respondent next argues that petitioner failed to make reasonable efforts to assist her in rectifying the conditions that led to the children's removal from her care. "In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights." *In re LE*, 278 Mich App at 18. "Before the trial court enters an order of disposition, it is required to state whether reasonable efforts have been made to prevent the child's removal from the home or to rectify the conditions that caused the child to be removed from the home." *In re Plumb*, 294 Mich App 270, 272; ___ NW2d ___ (2011). Here, the trial court found that reasonable efforts had been made to rectify the conditions that led to the children's removal, but that such efforts were unsuccessful.² The record supports the trial court's findings.

Since 2008, petitioner had provided services for respondent, including parenting classes, supervised visitation, individual therapy, and domestic violence counseling. Stephanie Logan, the foster care worker, along with health care professionals, discussed housing with respondent on various occasions and repeatedly engaged her on the topic of employment. Logan even assisted in preparing a lease so that respondent could establish her residence. Petitioner's actions constituted reasonable efforts, and petitioner fulfilled its duty to make reasonable efforts to rectify the conditions that led to the children's removal from respondent's custody.

Finally, respondent argues that the trial court clearly erred by finding that termination was in the children's best interests. "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). Whether termination is in a child's best interests is "made on the basis of the evidence on the whole record and is reviewed for clear error." *In re LE*, 278 Mich App at 25. In making this determination, "the court may consider 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." *In re*

¹ MCL 712A.19a(5) provides in part:

In determining whether the return of the child would cause a substantial risk of harm to the child, the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.

² Because termination, not reunification, was petitioner's goal with respect to SR, we note that petitioner was not required to provide reunification services regarding SR. *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009).

Olive/Metts, ___ Mich App ___; ___ NW2d ___ (Docket No. 306279, issued June 5, 2012) (slip op at 3) (internal citations and quotations omitted).

Here, despite receiving services since 2008, respondent failed to demonstrate that she can provide a stable and permanent environment for the children. She failed to establish suitable housing or legal income despite her indications that she can offer both, and her inability to handle her mental health issues and her aggressive behavior also presented a risk to the children. Both IR and SR had been separated from respondent for much of their lives and it does not appear that a bond had developed between respondent and the children, particularly in light of the fact that respondent's visitation did not progress beyond supervised hourly visits each week. Because respondent failed to establish that she can provide a stable and permanent environment for her children, the trial court did not clearly err by finding that termination of her parental rights was in the children's best interests.

Affirmed.

/s/ Pat M. Donofrio
/s/ Michael J. Talbot
/s/ Mark T. Boonstra