

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 16, 2012

In the Matter of K. N. AUBREY-CLAY, Minor.

No. 309915
Muskegon Circuit Court
Family Division
LC No. 10-039295-NA

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(a)(ii), (g), and (j). Because we conclude that there were no errors warranting relief, we affirm.

The trial court did not clearly err in finding that petitioner established a statutory ground for termination by clear and convincing evidence. MCR 3.977(K); *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). Respondent never had custody or provided care for the minor child. The trial court had earlier explained to respondent that he needed to establish his status as the child's father under the law, but respondent initially contested paternity. Because he did not believe he was the child's biological father, respondent chose not to participate in the lower court proceedings. After a genetic test established that he was the minor's biological father, however, he began to participate in the proceedings. By then, the child was almost 2-1/2 years old. Moreover, although he began to participate in the proceedings after the genetic test, he did not take any steps to establish his paternity under the law.

The record supports an inference that respondent did not pay support even after he learned that he was the minor child's father. The evidence further showed that respondent barely interacted with the minor child during his visits, that no bond existed between him and the minor child, and that there were concerns about his parenting skills. The trial court ultimately suspended respondent's visits on the basis of his failure to show improvement during visits, and he failed to take the necessary steps to resume his visits. Accordingly, the trial court did not clearly err when it found that there was clear and convincing evidence that respondent failed "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." MCL 712A.19b(3)(g); see *In re LE*, 278 Mich App 1, 24-25, 28; 747 NW2d 883 (2008). Finally, the trial court did not clearly err when it found that termination was in the child's best

interests. MCL 712A.19b(5). The child needed permanency and stability, which respondent had not demonstrated he could provide.

Having determined that the trial court did not clearly err in terminating respondent's parental rights to the minor child under MCL 712A.19b(3)(g), we decline to consider the remaining grounds upon which the trial court based its decision. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

Respondent next argues that the trial court denied him due process by failing to protect his right to the assistance of counsel and that his lawyer did not provide effective assistance. This Court reviews de novo whether the trial court's actions were consistent with due process. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). This Court also reviews respondent's ineffective assistance claim using the same standards that apply to criminal proceedings; as such, we review his claim de novo on the existing record to determine whether his lawyer's acts or omissions amounted to ineffective assistance. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001).

On appeal, respondent argues that he did not receive timely assistance from a lawyer because the trial court did not appoint a lawyer to assist him until just three weeks before his termination hearing. However, the trial court had no obligation to provide respondent with a lawyer until respondent established his right to have a lawyer appointed and requested one. See *In re Hall*, 188 Mich App 217, 220-222; 469 NW2d 56 (1991) (holding that trial courts are no longer required to sua sponte provide a lawyer to respondents; rather, the respondent must take affirmative action to request the appointment of a lawyer); see also MCR 3.915(B)(1)(b). Even after the trial court informed respondent about his right to counsel at the December 1, 2011, hearing, respondent did not request a lawyer until February 23, 2012. And, once respondent made his request, the trial court appointed a lawyer to assist him. Thus, respondent has not established that the trial court erred by failing to earlier appoint him a lawyer.

Respondent nevertheless argues that the trial court denied him due process of law by failing to take steps to establish his right to have a court-appointed lawyer earlier in the proceedings; specifically, he argues that the trial court should have taken steps to ensure that he established his status as the child's legal father after genetic testing showed that he was the child's actual father in January 2011. Respondent has not identified a single authority that establishes that the trial court had an affirmative duty to ensure that respondent took steps to establish his legal status as the child's father after he learned that he was the child's biologic father. See *Rood*, 483 Mich at 93 (noting that in Michigan, the procedures to ensure due process to a parent are established by statute and court rule). Moreover, the record shows that in January 2010, the trial court actually told respondent that he needed to submit an affidavit of parentage in order to be considered the minor child's father under the law. But respondent initially refused to participate in the proceedings and, even after he started participating, he took no steps to establish his legal status until he signed an affidavit of parentage in December 2011. Therefore, on this record, we conclude that the trial court did not deprive respondent of due process by failing to take steps to compel or cajole him into establishing his legal status. See *id.* at 91-93 (summarizing the minimal requirements to ensure fundamental fairness under the right to due process).

Respondent also argues that his appointed counsel was ineffective for failing “to take any steps to contact” him and failing to request an adjournment. At the termination hearing, respondent’s lawyer informed the trial court that he had not had any contact with respondent. However, the record does not indicate whether the lack of contact was the result of counsel’s failure to try to contact respondent or respondent’s failure to respond. Accordingly, on this record, respondent has not established the factual predicate for his claim; namely, that his counsel failed to communicate with him. See *People v Gioglio*, 296 Mich App 12, 24-25; 815 NW2d 589 (2012) (explaining that the defendant bears the burden to prove the factual predicate for his claim of ineffective assistance of counsel).

Respondent also contends that his lawyer’s failure to request an adjournment fell below an objective standard of reasonableness and prejudiced him. A trial court should grant an adjournment in a child protective proceeding only for good cause, after considering the child’s best interests. MCR 3.923(G). This case had lasted for over two years and the minor child’s guardian ad litem and foster care worker had each previously stated that the child needed stability and permanence. Respondent failed to appear at the termination hearing despite having notice, which was consistent with his pattern of sporadic participation throughout the case. Thus, on this record, it appears that any request for an adjournment would likely have been futile. For that reason, we cannot conclude that respondent’s lawyer’s decision fell below an objective standard of reasonableness. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”).

Finally, even if we were to conclude that respondent’s lawyer failed to properly communicate with respondent and should have requested an adjournment, respondent failed to establish that either decision resulted in prejudice. *Gioglio*, 296 Mich App at 23. As noted above, the trial court properly terminated respondent’s parental rights. And respondent has not explained how better communication or an adjournment would have altered that outcome.

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly