STATE OF MICHIGAN

COURT OF APPEALS

	UNPUBLISHED September 23, 2010
In the Matter of J. L. THURMOND, Minor.	No. 296972 Wayne Circuit Court Family Division LC No. 07-471125-NA
In the Matter of J. L. THURMOND, Minor.	No. 296973 Wayne Circuit Court Family Division LC No. 07-471125-NA

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, respondents DV Johnson and LL Thurmond each appeal as of right the trial court's order terminating their parental rights to the minor child. The court terminated respondent Johnson's parental rights under MCL 712A.19b(3)(b)(ii), (c)(i), (g), and (j), and terminated respondent Thurmond's parental rights under MCL 712A.19b(3)(b)(i), (c)(i), (g), and (j). Because we conclude there were no errors warranting relief, we affirm.

I. STATUTORY GROUNDS FOR TERMINATION AND THE BEST INTERESTS DETERMINATION

Both respondents argue that the trial court erred in finding that there was sufficient evidence to establish the statutory grounds for termination, and in finding that termination of their parental rights was in the child's best interests. A statutory ground for termination must be proven by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). In reviewing a trial court's decision to terminate parental rights, this Court reviews "for clear error a trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); see also MCR 3.977(K). A finding is clearly erroneous if, despite there being some evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *In re Mason*, 486 Mich at 152. Once a statutory ground for termination is established, the trial court shall order

termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). This Court also reviews for clear error the trial court's best interests finding. *In re Trejo*, 462 Mich at 356-357.

The evidence showed that respondent Thurmond physically abused respondent Johnson's two older children. Although Thurmond admitted committing the abusive acts, he never acknowledged that his conduct constituted physical abuse, or that it was inappropriate and excessive discipline. His therapist, whose testimony was generally favorable to Thurmond, acknowledged that Thurmond might be minimizing the physical abuse. Thurmond's abusive treatment of Johnson's older children was probative of his potential abuse of JL. *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). Further, considering Thurmond's failure to recognize that his treatment of the children was abusive, the trial court did not clearly err in finding that there was a reasonable likelihood that JL would suffer from similar abuse in the foreseeable future if placed in his home. Thus, the trial court did not clearly err in finding that termination of Thurmond's parental rights was justified under § 19b(3)(b)(i).

KM testified that respondent Johnson was present when she and BJ were abused by Thurmond. Thus, the trial court did not clearly err in finding that Johnson had the opportunity to protect the children from Thurmond's physical abuse and failed to do so. The evidence also showed that respondent Johnson continued to associate with Thurmond and allowed him to have unsupervised contact with JL, in violation of the trial court's orders. In addition, Johnson would not discuss Thurmond's abusive behavior in therapy. Accordingly, the trial court did not clearly err in finding that there was a reasonable likelihood that JL would suffer injury or abuse in the foreseeable future if placed in Johnson's home. Accordingly, the trial court did not clearly err in finding that termination of Johnson's parental rights was justified under § 19b(3)(b)(ii).

The evidence of the abusive environment in respondents' home and each respondent's failure to benefit from services designed to resolve that issue also supports the trial court's decision to terminate their parental rights under §§ 19b(3)(c)(i), (g), and (j).

The trial court also did not clearly err in its consideration of JL's best interests. Although there was evidence of a bond between JL and both respondents, and evidence that JL showed signs of stress after his separation from Johnson, it was in his best interests to be removed from an environment in which he would be subject to a risk of harm or abuse. See MCL 712A.19b(5).

II. MODIFICATION OF THE COURTROOM

Both respondents argue that the trial court improperly modified the courtroom at the 2007 adjudicative trial to accommodate KM's testimony. They contend that the modification was improper because no prior notice was given and because the court failed to make any findings on the record that the modification was necessary to avoid psychological harm to the witness. See MCR 3.922(E) and MCL 712A.17b(12). Because neither respondent objected to the trial court's modification of the courtroom, this issue is not preserved. This Court reviews unpreserved issues for plain error affecting substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

This issue is not properly before this Court. The issue addresses a procedure that was used at the adjudicative trial to determine whether the trial court had jurisdiction over the child.

It is well established that a respondent in a child protection proceeding cannot collaterally attack the trial court's exercise of jurisdiction in an appeal from a subsequent order terminating the respondent's parental rights. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). Respondents had an opportunity to raise this issue in a direct appeal from the initial dispositional order after the trial court's exercise of jurisdiction. MCR 3.993(A)(1); *In re Bechard*, 211 Mich App 155, 159-160; 535 NW2d 220 (1995). They did not do so, and may not now collaterally challenge the trial court's exercise of jurisdiction in this appeal.

III. FAILURE TO MODIFY THE TREATMENT PLAN

Respondent Johnson argues that the trial court erred by failing to modify her treatment plan to specifically address her relationship with Thurmond. There is no indication in the record that Johnson ever requested that her treatment plan be modified in the manner argued on appeal. Accordingly, this issue is unpreserved and our review is limited to plain error affecting Johnson's substantial rights. *In re HRC*, 286 Mich App at 450.

MCL 712A.19(7)(a) provides that a trial court may modify any part of a case service plan, including the prescription of additional services, to alleviate or mitigate the conditions that caused a child to be placed in foster care. Johnson appears to argue that the trial court should have ordered petitioner to provide services directly targeting her continued relationship with Thurmond. However, she does not specify what additional services should have been provided, other than to generally suggest that the trial court could have modified the goals of her therapy or required additional parenting classes. However, petitioner's treatment plan was already tailored to address Johnson's relationship with Thurmond. The original goal of therapy was to address allegations of sexual abuse by Thurmond, but Johnson's continued disbelief in the allegations thwarted this goal. Johnson's caseworker and therapist attempted to resolve the problem by establishing the more neutral goal of helping Johnson learn to identify healthy and unhealthy relationships, but Johnson's unwillingness to acknowledge the problems with Thurmond still prevented her from engaging in productive therapy. In sum, the record discloses that it was Johnson's failure to benefit from therapy, not any deficiency in the treatment plan, that thwarted the reunification efforts. Accordingly, there was no plain error.

IV. RIGHT AGAINST SELF-INCRIMINATION

Respondent Thurmond argues that his constitutional right against self-incrimination was violated when the trial court required him, as a condition of the court-ordered treatment plan, to admit that he sexually abused his stepdaughter. Thurmond did not object to this condition when it was imposed. Further, although he later challenged the fairness of this condition in his closing argument at the termination hearing, he did not argue that it was constitutionally prohibited. Therefore, Thurmond's constitutional claim is unpreserved and our review is limited to plain error affecting his substantial rights. *In re HRC*, 286 Mich App at 450.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Child protective proceedings are not criminal in nature and, therefore, the constitutional right against self-incrimination does not directly apply. *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). In *Baxter v Palmigian*o, 425 US 308, 318; 96 S Ct 1551; 47 L Ed 2d 810 (1976), the United States Supreme Court held that the Fifth Amendment does not preclude an adverse inference where the privilege against self-

incrimination is claimed by a party to a civil case. Nevertheless, "[t]he privilege against self-incrimination applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution." *In re Stricklin*, 148 Mich App 659, 664; 384 NW2d 833 (1986). "The privilege against self-incrimination not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also permits him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Phillips v Deihm*, 213 Mich App 389, 399-400; 541 NW2d 566 (1995). Any testimony "having even a possible tendency to incriminate is protected against compelled disclosure." *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). The privilege may be invoked even when criminal proceedings have not been instituted or even planned. *People v Guy*, 121 Mich App 592, 609-610; 329 NW2d 435 (1982).

The specific circumstances here do not directly involve either an adverse inference from Thurmond's refusal to testify or a compulsion to answer official questions in an informal or formal proceeding. The trial court essentially ordered Thurmond to admit sexual abuse in therapy, and concluded that his failure to do so would reflect a failure to benefit from therapy. These circumstances are problematic. Thurmond's therapist was subject to the mandatory reporting statute, MCL 722.623(a), and Thurmond could not assert a patient-counselor privilege because his statement would have been made pursuant to court-ordered treatment. MCR 3.972(E). It is possible that the trial court could have provided immunity to prevent the use of any admissions in therapy in a subsequent criminal proceeding. See *People v Seals*, 285 Mich App 1, 6; 776 NW2d 314 (2009). However, it is not clear that the trial court has the authority to provide immunity with respect to statements made in a therapy session rather than in the course of compelled testimony. As the trial court below, observed, had Thurmond timely raised this issue in the trial court, the court could have determined whether a modification of the condition in the treatment plan would have been appropriate.

Notwithstanding our concerns about the challenged condition, we conclude that it did not affect Thurmond's substantial rights. The condition related solely to the subject of sexual abuse. As discussed previously, termination of Thurmond's parental rights was independently justified because of his physical abuse of JL's half-siblings and his failure to address and resolve his propensity for engaging in physical abuse as a perceived form of discipline. Therefore, because the challenged condition did not affect the outcome of the proceedings, even if we were to conclude that the trial court erred, any error would not warrant relief.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Both respondents argue that they were denied the effective assistance of counsel. Because neither respondent raised this claim in an appropriate motion in the trial court, our review is limited to mistakes apparent from the record. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). In analyzing claims of ineffective assistance of counsel at termination proceedings, this Court applies by analogy principles of ineffective assistance of counsel in criminal cases. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Thus, each respondent must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Respondent Johnson argues that her attorney was ineffective for failing to call her treating psychologist, Dr. Larry Berkhaur, and other unspecified witnesses. Here, Johnson has not submitted an offer of proof indicating what testimony Dr. Berkhaur would have provided, nor is the substance of his testimony apparent from the record. Further, she does not identify any other witnesses or explain what testimony they could have provided. Accordingly, she has not satisfied her burden of establishing the factual predicate for her claim. *People v Carbin*, 463 Mich 590, 600-601; 623 NW2d 884 (2001).

Respondents Johnson and Thurmond also both argue that their attorneys were ineffective for failing to object to the trial court's modification of the courtroom at the adjudicative trial. As previously explained in section II, *supra*, the trial court's exercise of jurisdiction is not subject to collateral attack in this appeal. Thus, this claim of error relating to the trial court's exercise of jurisdiction at the adjudicative trial may not be considered in this appeal.

Lastly, respondent Thurmond argues that his successive attorneys were ineffective for failing to object to the court-ordered therapy requirement discussed in section IV, *supra*. Even if Thurmond's attorneys performed deficiently by failing to timely challenge that requirement, in light of our conclusion that this condition did not affect Thurmond's substantial rights, Thurmond cannot establish that he was prejudiced by the failure to raise the Fifth Amendment issue. Accordingly, Thurmond's ineffective assistance of counsel claim cannot succeed.

There were no errors warranting relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly