STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KEITH, Minors.

UNPUBLISHED
September 18, 2014

No. 320045
Wayne Circuit Court
Family Division
LC No. 96-336424-NA

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating his parental rights over the minor children pursuant to MCL 712A.19b(3)(a)(*ii*) (parent has deserted child for 91 or more days), (c)(*i*) (conditions that led to adjudication continue to exist), (g) (without regard to intent, failure to provide proper care or custody), (j) (reasonable likelihood that child will be harmed if returned to parent), and (k)(*i*) (parent abused the child or child's sibling and the abuse included abandonment of a young child). We affirm.

This case arises from the termination of parental rights of respondent over his two children, T.K. and S.K. In October 2008, the Department of Human Services (DHS) initiated a case against respondent and the children's mother, Kim Keith. Keith was homeless, had substance abuse issues, and the children had not lived with Keith since shortly after they were born. At the time the case was initiated, respondent had not established paternity over the children; paternity was established in May 2009. At a September 2009 hearing, the trial court[1] took jurisdiction over the children based on admissions by respondent that he had an extensive criminal history, had a history with Child Protective Services (CPS), lacked legal housing, and had substance abuse and mental health issues. Respondent was provided a service plan and given referrals. The children were placed with Kathy Kelly, Keith's sister. The permanency plan was reunification. Throughout the next few years, respondent was involved in the case and continued to work on his service plan. On June 21, 2011, Keith passed away. After Keith died, all parties, including respondent, agreed to change the permanency plan to guardianship. The trial court approved the change. The guardianship documentation and approval took over a year to complete. On April 4, 2013, the court was ready to proceed with the guardianship, but

[1] We note that this case was presided over by a referee, and Judge Cavanagh adopted the referee's findings and conclusions by reference in the order terminating parental rights.

respondent expressed that he wanted to plan for his children. The trial court agreed to allow respondent to plan for his children, but informed respondent he needed to be fully compliant with his service plan going forward. Following the April 4, 2013 hearing, respondent failed to comply with his service plan, and the trial court changed the permanency plan to adoption. On September 4, 2013, DHS filed a petition to terminate respondent's parental rights. After a termination hearing, respondent's parental rights were terminated on November 19, 2013. Respondent now appeals.

On appeal, respondent argues that the trial court should have gone forward with a subsidized guardianship instead of changing the permanency plan to adoption and terminating his parental rights. He also contends that the trial court clearly erred in finding that statutory grounds for termination were proven by clear and convincing evidence and that termination of his parental rights was in the best interests of the children. We disagree.

This Court reviews "for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). A trial court's determination that termination of parental rights is in a child's best interests is also reviewed for clear error. *In re Olive/Metts Minors*, 297 Mich App 35, 40-41; 823 NW2d 144 (2012). " 'A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses.' " *Moss*, 301 Mich App at 80, quoting *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

INTRODUCTION

"To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been proved by clear and convincing evidence." *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *Id.* If a statutory ground for termination is found by clear and convincing evidence, the petitioner must prove by a preponderance of the evidence that termination is in the child's best interests. *Moss*, 301 Mich App at 90. If the court finds that this burden has been met, "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); see also *Moss*, 301 Mich App at 83.

FAILURE TO APPOINT GUARDIAN

Respondent's primary argument on appeal is that the trial court should have approved the subsidized guardianship instead of changing the permanency plan to adoption and terminating his parental rights. MCL 712A.19a(7)(c) provides that permanent guardianship is a permanency plan available in lieu of termination of parental rights:

> If the agency demonstrates under subsection (6) that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child

> under subsection (6), then the court shall order 1 or more of the following alternative placement plans:
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> * * *
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> > (c) Subject to subsection (9),[2] if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated. [Footnote added.]

The trial court did not proceed with the guardianship plan because respondent expressed that he wanted to plan for his children. "[E]rror requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *In re Utrera*, 281 Mich App 1, 11-12; 761 NW2d 253 (2008) (citation and quotation marks omitted). In addition, "a party may not successfully obtain appellate relief on the basis of a position contrary to that which the party advanced in the lower court." *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). At the hearing on April 4, 2013, respondent's counsel specifically objected to guardianship as the permanency plan. At that hearing, the court was prepared to go forward with guardianship until respondent expressed his dissatisfaction with that plan. Respondent asked the trial court to not go forward with the guardianship plan and allow him to plan for his children; respondent cannot now argue on appeal that the trial court erred in abiding by his request. See *Utrera*, 281 Mich App at 11-12; *Leete Estate*, 290 Mich App at 655.

Despite these deficiencies, we also address the merits of respondent's argument. As respondent asserts, there is nothing in the statute governing guardianship in lieu of termination that requires parental consent. See MCL 712A.19a. However, the court did not err in taking respondent's request into consideration. The parties initially agreed to pursue a legal guardianship to maintain the children's strong bond with respondent while allowing respondent to "continue to work on some things that he needs to work on personally." The parties agreed that it was in the best interests of the children to proceed with the guardianship. If respondent felt that he had worked through his issues and was ready to pursue reunification once more, then the reasons for seeking the guardianship in the first place may no longer have been present at the time of the April 3, 2013 hearing. The trial court was not wrong to give respondent the opportunity to prove that he was, in fact, ready to care for the children on a permanent basis.

While a trial court can place a child with a guardian in lieu of terminating parental rights, it is not required to do so if it is not in the child's best interests. See MCL 712A.19a(7)(c); *In re Mason*, 486 Mich 142, 168-169; 782 NW2d 747 (2010). After respondent said he wanted to plan for his children, he still did not fully comply with his service plan. Respondent was not present at the next hearing. While respondent did a few drug screens, he did not do all of the screens required. Respondent was positive for opiates on the screens he completed. Although

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[2] MCL 712A.19a(9) requires the court to order Department of Human Services to investigate and file a report on the potential guardian after performing a criminal record check, a central registry clearance, and a home study.

respondent had a prescription for pain medication, the medication would not have caused the type of positive opiate test result that respondent received. In addition, respondent had still not provided verification of his income. Throughout the proceedings below, respondent's compliance with his service plan was irregular. Furthermore, the trial court had previously said that guardianship was not usually viewed as a solid long-term plan for children as young as T.K. and S.K. In 2013, T.K. would have been about nine years old and S.K. would have been about eight years old. The court also noted that the children had already been in care for a long time. Therefore, the court did not err in changing the permanency plan to adoption in 2013, after the children had been in care for more than four years and respondent was still not in full compliance with his service plan.[3]

STATUTORY GROUNDS

The trial court did not clearly err in concluding that DHS proved a statutory ground for termination by clear and convincing evidence. Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (g), (j), and (k)(*i*).

The trial court did not clearly err in finding that MCL 712A.19b(3)(c)(*i*) applied. MCL 712A.19b(3)(c)(*i*) provides that the court may terminate parental rights if it finds:

> 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:
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> > (*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.

Respondent's parental rights were terminated in November of 2013. Respondent became the children's legal father in May of 2009. On September 21, 2009, the court entered an order requiring respondent to participate in a service plan. Thus, even if this later date – when the trial court ordered respondent to comply with a service plan – is used, more than four years elapsed between that date and the date that respondent's parental rights were terminated.

In addition, there was evidence that the conditions that led to the adjudication continued to exist and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages. See MCL 712A.19b(3)(c)(*i*). With respect to respondent, the court found it had jurisdiction based on respondent's testimony regarding his

[3] We disagree with respondent that the trial court's decision not to proceed with the guardianship was retaliatory. A review of the record does not support respondent's assertion. The court chose not proceed with the guardianship primarily based on respondent's desire to plan for his children. The trial court urged respondent to comply with his service plan or the court would proceed to termination because of the length of the proceeding and the children's need for permanency.

history of substance abuse, mental health problems, lack of legal housing, and lack of legal income. These problems continued to exist at the time of the termination hearing.

First, respondent continued to have an issue with substance abuse. Respondent completed two drug treatment programs, through New Light Recovery Center and SHAR House. However, Jessica Quick, the foster care worker from Spectrum Child and Family Services, testified at the termination hearing that she had not received a drug screen from respondent in more than five months. Before that, respondent had three drug screens that were positive for unprescribed opiates. Second, with respect to his mental health treatment, respondent stopped attending counseling through Detroit Central City on April 29, 2013. His last visit with a psychiatrist was in July of 2013. Third, respondent claimed that he worked in construction and was paid under the table. He also said that he received social security benefits. However, he did not provide Quick with verification of either source of income. Finally, it was unclear if respondent had suitable housing at the time of the termination hearing. Respondent testified that he continued to live in a two-bedroom apartment that was found suitable in May of 2013. However, between May and November of 2013, mail was sent to the apartment's address and returned as undeliverable. Thus, it appeared that respondent may not have been living at that address.

There was also clear and convincing evidence that termination of respondent's parental rights was proper under MCL 712A.19b(3)(g), which provides that termination is proper when:

> 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.

"[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); see also *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014).

The court-ordered service plan required respondent to participate in a substance abuse assessment, follow-up treatment as required by the assessment, random drug screens, parenting classes, a Clinic for Child Study evaluation, consistent mental health treatment, and participation in a psychological or psychiatric evaluation or the release of his medical records from his current treating physician. The court also ordered respondent to prove he had a legal source of income and suitable housing. In addition, the court mandated regular contact with the foster care worker and visitation with the children.

As discussed above, respondent did not comply with the aspects of the service plan regarding consistent mental health treatment, random drug screens, a legal source of income, and suitable housing. Although respondent participated in substance abuse treatment, it appears that he did not benefit from this treatment. He subsequently refused to submit to drug screens and some of his drug screens were positive for opiates that did not match the opiates in the prescription pain medication he was taking. It is not enough to participate in the services offered; a respondent must demonstrate that he or she benefitted from the services provided. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012); *White*, 303 Mich App at 710. Similarly, respondent completed parenting classes in July of 2010, but Quick opined that

respondent did not benefit from the classes because he did not change his ability to parent his children and he had been very inconsistent in visiting his children.[4]

The most concerning aspect of respondent's noncompliance was the fact that he had not visited his children since May 30, 2013; the termination hearing was in November of 2013. Although respondent called twice in June to say that he would be unable to visit, he did not call or provide any explanation for missing visits in July and August. It is not clear if respondent called or gave explanations for missing visits in September and October. In addition, respondent was granted unsupervised visitation on two different occasions, but both times the visitation returned to being supervised. Respondent was never granted overnight visitation and the children were never placed in his care. Given respondent's noncompliance with his service plan, and particularly, his failure to consistently visit with his children, the trial court did not clearly err in finding that he has failed to provide the children proper care and custody.

The trial court also did not clearly err in finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering the children's ages. The children have been in care since at least October of 2008; for about half of their lives. Respondent signed affidavits of parentage in May of 2009. Since then, respondent had more than four years in which he was provided services and given the opportunity to comply with his service plan and demonstrate his ability and willingness to care for his children. Respondent failed to do so. The court did not clearly err in concluding that respondent would not be able to comply in a reasonable amount of time, given that T.K. and S.K. were about eight and nine years old, respectively, and had been in care for almost five years.

Because we conclude that DHS proved the applicability of MCL 712A.19b(3)(c)(*i*) and (g) by clear and convincing evidence, we need not review the other statutory grounds on which the trial court based its decision. "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights." *Ellis*, 294 Mich App at 32; see also MCL 712A.19b(3).

BEST INTERESTS

Finally, the trial court did not clearly err in concluding that termination of respondent's parental rights was in T.K.'s and S.K.'s best interests. When deciding if termination is in a child's best interests, the trial court can 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." *Olive/Metts*, 297 Mich App at 41-42 (citations omitted).

Quick testified that the children have a close relationship with respondent, but the children have also said that they wanted to stay with Kelly, their foster mother and maternal aunt, and be adopted by her. They have lived with Kelly since October of 2008. The children are

[4] The trial court also stated that respondent failed to participate in a Clinic for Child Study evaluation. However, respondent did participate in both Clinic for Child Study evaluations that were ordered.

young – eight and nine years old at the time of the termination hearing – and had been in care for about five years. The court noted the children's need for permanency and stability, and the fact that Kelly was interested in long-term planning. The children were never placed with respondent. He was never granted overnight visitations. At the time of the termination hearing, he had not visited them in over five months. Given respondent's failure to show he was capable of parenting his children on his own and the children's need for permanency and stability, the trial court did not clearly err in finding that termination was in T.K.'s and S.K.'s best interests. See MCL 712A.19b(5); *Olive/Metts*, 297 Mich App at 40-42.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood