STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of IN RE SADLER, Minors.

UNPUBLISHED
October 23, 2014

No. 321020
Kalamazoo Circuit Court
Family Division
LC No. 2007-000042-NA

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Respondent-mother appeals as of right the March 13, 2014 order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if child is returned to parent). For the reasons set forth in this opinion, we affirm.

In this appeal, respondent does not challenge the factual findings of the trial court relative to its decision to terminate respondent's parental rights. Respondent does not challenge the trial court's findings relative to the children's best interests. Rather, respondent argues that her right to procedural due process was violated because she was deprived of the "right to a fair and impartial decision maker" at the termination hearing. Respondent also argues that the Department of Human Services (DHS) violated her due process and equal protection rights by doing "nothing during the course of the case . . . ."

To support her argument that the trial court did not act as a fair and impartial decision maker, respondent makes a myriad of arguments that the trial judge demonstrated bias against her by his questioning of the DHS worker, Ashley Leonard, at the termination hearing. Specifically, respondent challenges the trial judge's questions regarding respondent's lack of housing and her mental health during the proceeding. Respondent further challenges the trial judge's alleged emphasis of her failure to consistently attend counseling and parenting time while questioning the caseworker. Because respondent's due process argument is unpreserved, respondent must demonstrate plain error affecting her substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met. *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best

interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012).

It is well established that the "fundamental requisite of due process of law is the opportunity to be heard" "at a meaningful time and in a meaningful manner" *before an impartial decision maker* after being afforded notice of the nature of the proceeding. *In re Rood*, 483 Mich 73, 91-92; 763 NW2d 587 (2009). A trial court may "examine a witness" if "at any time the court believes that the evidence has not been fully developed." *In re VanDalen*, 293 Mich App at 137, citing MCR 3.923(A). "[A] trial judge has more discretion to question witnesses during a bench trial than during a jury trial. . . ." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992).

In this case, respondent first argues that the trial judge's questioning of Leonard relative to respondent's lack of housing evidenced bias. During both direct and cross examination at the termination hearing Leonard testified that after the August 2012 adjudication trial the children were removed from the home because of "deplorable" conditions. Shortly after their removal, the home was condemned and respondent lacked housing for the remainder of the proceedings. Following the questioning of Leonard by the attorneys, the trial court stated that it had "some questions and [required] some clarification." The following exchange occurred:

> THE COURT: You came onboard when?
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> THE WITNESS: Around November 1st, 2012. . . .
>
> * * *
>
> THE COURT: At the time you came onboard [mother and father] had no place to live, correct?
>
> THE WITNESS: They did have housing, but the conditions of the housing were not sufficient for the children.
>
> THE COURT: But, they did have a place to live?
>
> THE WITNESS: Yeah. . . .
>
> THE COURT: Okay. You indicated that the[] [children] were removed due to housing conditions. That's the reason you became involved[,] the children were removed due to housing conditions, correct?
>
> THE WITNESS: Yes.
>
> THE COURT: . . . When did the[] [parents] leave that house?
>
> * * *
>
> THE WITNESS: . . . [T]hey left that house on . . . March 25, 2013.

* * *

> THE COURT: So, April of 2013, they did not have housing. May of [20]13, no housing. June of [20]13, no housing. July of [20]13, no housing. August of [20]13, no housing. September of [20]13, no housing. October of [20]13, no housing. November of [20]13, no housing. December of [20]13, no housing. January of [20]14, no housing and February of [20]14, no housing, is that correct?
>
> THE WITNESS: Yes. . . .

We note that petitioner moved for termination pursuant to MCL 712A.19b(3)(c)(*i*). In order to support termination pursuant to (c)(*i*), it must be established, in part, that the respondent has "not accomplished any meaningful change in the conditions" *that led to adjudication*. *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009). In this case, one of the conditions that led to adjudication was homelessness. Thus, the trial judge's questioning regarding the length of time that respondent had been homeless was relevant to whether respondent had resolved one of the conditions that led to adjudication and whether respondent could resolve this issue within a reasonable time. The fact that the trial court later found that termination under (c)(*i*) was appropriate because of respondent's lack of housing supports our conclusion that the trial court asked the questions in order to elicit additional relevant information to aid in his role as factfinder and determine whether termination was proper under (c)(*i*). Such questioning on the part of the trial court is permissible. MCR 3.923(A); see *In re Forfeiture of $1,159,420*, 194 Mich App at 153 (holding that the record did not support that the trial judge was biased where "a review of the trial judge's questioning of witnesses" supported that "the judge was merely attempting to . . . elicit additional helpful information to aid in his role as factfinder"). Accordingly, the trial judge did not plainly err by asking Leonard direct questions regarding respondent's housing, or lack thereof, during the proceeding. See, *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008).

Respondent next argues that the trial court demonstrated bias by emphasizing the number of parenting times respondent missed during the proceedings without acknowledging that respondent did not have reliable transportation and by "fail[ing]" to ask Leonard what DHS did about respondent's transportation issues. The record establishes that, during direct examination, Leonard testified that, out of the 71 offered parenting time visits, respondent only attended 47 visits. Later, the trial judge asked Leonard if respondent "did 47" visits. Leonard responded: "[t]hat is correct." The trial court then began questioning Leonard about another topic. Clearly, this evidences that the trial judge reiterated what it believed Leonard's previous testimony regarding respondent's visitation history to be in order to verify his recollection of the testimony and, thus, "clarify" Leonard's testimony. Such questioning on the part of the trial court is permissible. MCR 3.923(A); see *In re Forfeiture of $1,159,420*, 194 Mich App at 153. Accordingly, the trial court did not plainly err in its questioning. See, *Rivette*, 278 Mich App at 328-329.

With respect to respondent's argument that the trial judge demonstrated bias by failing to question Leonard about the transportation assistance that was offered to respondent by DHS, the record establishes that, during direct and cross examination, Leonard testified that she twice

referred respondent to a parenting class that supplied transportation and that respondent was provided bus tokens and bus passes during the proceeding. Leonard also noted that respondent and father drove a van to parenting time at some point during the proceeding and that friends occasionally transported respondent to services. Given that Leonard had already testified about the transportation assistance that was available to respondent during the proceedings before she was questioned by the trial court, respondent fails to demonstrate how the trial court's failure to question Leonard about it amounted to a showing of bias on the part of the trial court such that a clear or obvious error can be found.

Next, respondent argues that the trial court asked Leonard a leading question about respondent's mental health. Specifically, respondent challenges the trial judge asking Leonard how respondent's mental health issues prevented her from "having the best interests of the[] children" in mind. The record establishes that during direct and cross examination, Leonard testified about the mental health services that respondent was offered during the proceeding. Later, the trial court asked Leonard how respondent's mental health diagnoses would "affect her relationship with her children." Leonard referred to respondent's psychological evaluation and the fact that it recommended that respondent attend counseling. The trial court asked Leonard "[s]o you felt that the mental and physical health of this individual [were] in jeopardy?" After Leonard responded "[y]es," the trial judge noted that, in determining the best interests of the children, a trial court can consider "the mental and physical health of the parties." He then asked Leonard to explain how respondent's mental health prevented her from considering "the best interests of the children." Leonard responded that she believed that respondent needed to attend therapy in order to address her "past traumas" so that she could begin to meet her own "basic needs" and "be able to parent her children."

Case law clearly states that "[o]nce a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App at 40. Thus, the trial court's "leading question" regarding how respondent's mental illness would affect her ability to have the children's best interests in mind was relevant to whether termination was in the best interests of the children. See, *Morales*, 279 Mich App at 729-730. The fact that the trial court continued to ask Leonard follow-up questions regarding how respondent's mental health impacted her ability to parent supports our conclusion that the trial judge's questions were designed to "elicit additional relevant" evidence. Further support for this conclusion is the fact that, when rendering the oral ruling concerning best interests, the trial judge noted that he had been "driving at" issues concerning the best interests of the children when questioning "the caseworker."

Although respondent challenges the leading nature of the trial judge's question, she does not cite authority to support that a trial judge is unable to ask witnesses leading questions, because there is no legal authority to support her position. Rather, authority establishes that a trial judge's "[q]uestions designed to . . . elicit additional relevant evidence . . . are not improper." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24; 436 NW2d 70 (1989). Importantly, as previously stated, the termination hearing was held before the trial judge, and "a trial judge has more discretion to question witnesses during a bench trial than during a jury trial. . . ." *In re Forfeiture of $1,159,420*, 194 Mich App at 153. Because the trial judge's "leading question" regarding how respondent's mental health affected the best interests of the children is permissible, MCR 3.923(A); see *In re Forfeiture of $1,159,420*, 194 Mich App

at 153, the trial court did not plainly err in this questioning. *Rivette*, 278 Mich App at 328-329. Moreover, when deciding the "mental and physical health" of the parties in the context of best interests, the trial judge only noted that respondent testified that she had issues with her gallbladder. No reference was made to respondent's mental health. Respondent cannot demonstrate bias regarding the line of questioning regarding her mental health when the record reveals that the trial court ultimately did not rely on respondent's unstable mental health when finding that termination was in the children's best interests.

Next, respondent argues that the trial judge made an inappropriate statement when rendering its oral ruling and that the statement demonstrated bias. Specifically, respondent refers to the trial judge's statement that it was a "no brainer" that respondent's parental rights should be terminated. The record establishes that, when rendering the oral ruling on the record, the trial judge told respondent "you know quite well that I'm going to terminate your rights[,] but I want you to know pretty much why and I'm trying to be gentle with regard to it. But, it's a—as I say it's really a no brainer."

Case law holds that "[w]here a judge forms opinions . . . on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." See *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). In this case, the trial judge's opinion that termination of respondent's parental rights was a "no brainer" was based on the testimony introduced at the termination hearing. Our review of the record leads us to conclude that the evidence overwhelmingly supported termination of respondent's parental rights pursuant to (g) and a finding that termination was in the children's best interests. Further, given that the trial judge told respondent that he was attempting to be "gentle" while explaining to her why he was going to terminate her parental rights, respondent again fails to recognize how the trial judge's comment established any "deep-seated . . . antagonism" toward respondent or "deep-seated favoritism" toward petitioner. Moreover, even if we were to characterize the trial judge's comment that termination was a "no brainer" as hostile, case law establishes that "[c]omments critical of or hostile to . . . the parties are ordinarily not supportive of finding bias or partiality." *Wells*, 238 Mich App at 391. Because the record does not support a finding that the trial judge's comment during his oral ruling demonstrated that he was biased, the trial court did not plainly err in making this statement. *Rivette*, 278 Mich App at 328-329.

In sum, we find nothing in the record to support even a suggestion of bias or prejudice by the trial judge relative to respondent. Rather, we find the questioning complained of to have been undertaken by the trial court in an attempt to clarify and pursue the factual basis which would ultimately lead to its conclusions of fact and law. Contrary to respondent's assertions, there is no evidence to lead this Court to conclude that the trial court plainly erred at the termination hearing by failing to act as an impartial decision maker. Accordingly, respondent has failed to overcome the "heavy burden" of establishing that the trial judge was not impartial. See *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). Respondent is not entitled to relief on this issue.

Respondent next argues that reasonable efforts were not made to facilitate reunification because petitioner failed to provide services to assist respondent with employment, housing, and transportation. Because this reasonable efforts argument is unpreserved, *In re Frey*, 297 Mich

App 242, 247; 824 NW2d 569 (2012), respondent must demonstrate plain error affecting her substantial rights. *In re HRC*, 286 Mich App at 450. However, because respondent failed to cite to supporting authority or cite to the record to support this argument, it is abandoned. *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). Nevertheless, to the extent that we have considered this argument, and discussed its factual underpinnings *infra*, we find that respondent would not be entitled to relief.

Finally, respondent argues that her constitutional rights to due process and equal protection were violated because of petitioner's alleged failure to provide reasonable services to facilitate reunification. Because the constitutional arguments are unpreserved, respondent would be required to demonstrate plain error affecting her substantial rights. *In re HRC*, 286 Mich App at 450. However, because respondent abandoned her argument that reasonable efforts toward reunification were not made, and her arguments that her constitutional rights were violated are based on petitioner's alleged failure to provide services, the constitutional arguments are also abandoned. *Id.* Moreover, to the extent that we have considered the constitutional arguments, and discussed *infra*, we find that, even if not abandoned on appeal, respondent would not be entitled to relief.

Affirmed.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro