STATE OF MICHIGAN

COURT OF APPEALS

In re A. A. N. KONKE, Minor

UNPUBLISHED
November 17, 2015

No. 326625
Bay Circuit Court
Family Division
LC No. 11-010919-NA

Before: SHAPIRO, P.J., and O'CONNELL and GLEICHER, JJ.

PER CURIAM.

The circuit court terminated the parental rights of respondent-father to his young daughter pursuant to MCL 712A.19b(3)(c)(*i*) and (g).[1] These grounds are supported by clear and convincing record evidence and we affirm. However, we vacate that portion of the court's March 17, 2015 written order citing MCL 712A.19b(3)(k)(*i*) as that ground was added in error.

I. BACKGROUND

On November 4, 2013, the Department of Human Services[2] filed a petition to take newborn AK into care because her mother abused alcohol and drugs and attempted suicide during her pregnancy, and respondent had been convicted of domestic violence against mother. At the hospital following AK's birth, respondent admitted to a case worker that he had used marijuana "within the last few days." Following the preliminary hearing, the court ordered AK's placement into foster care, indicating in relation to respondent that it would not place the infant in the care of a regular marijuana user. A November 8 drug test confirmed the court's concerns as respondent tested positive for THC. Respondent also refused to sign a "Zero Tolerance Packet" explaining the DHS's anti-drug use policy.

Later that month, the parents admitted several grounds permitting the court to take jurisdiction over their child. Specifically, respondent admitted that he had been convicted of domestic violence against mother. The order of adjudication, however, indicated that the court

[1] The child's mother voluntarily released her parental rights, and she is not a party to this appeal.

[2] The department has since been reconfigured as the Department of Health and Human Services.

took jurisdiction based on respondent's domestic violence conviction *and* his history of substance abuse.

During the child protective proceedings, the court ordered respondent to submit to random drug screens and obtain substance abuse treatment. Respondent was required to take domestic violence classes and undergo a psychological evaluation. Going forward, respondent continued to test positive for THC at those screens he actually attended, which were few and far between. Respondent submitted to psychological and psychiatric evaluations, during which he admitted to using marijuana almost daily. Respondent was diagnosed with bipolar disorder and substance abuse. Respondent disputed these findings, asserting that he suffered from ADHD and post-traumatic stress disorder. He refused to take prescribed psychotropic medications, instead securing a medical marijuana card from Dr. Gavin Awerbuch. Respondent contended that only marijuana adequately controlled his symptoms so that he could work as a computer programmer. Respondent even told AK's foster mother that he intended to return to his frequent marijuana use as soon as the proceedings ended because he did not think his use would affect his parenting ability.

Respondent's visitation with AK also did not go well. The foster mother described that respondent did not retain information about how to care for AK between visits. He was sometimes too rough with the infant and the child showed no bond toward him. When visitation was moved to DHS supervision, the case workers noted that respondent did not interact much with his child.

Ultimately, the DHS filed a petition to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j). The court subsequently terminated respondent's rights, but under factors (c)(*i*) and (g).[3] This appeal followed.

II. ANALYSIS

Pursuant to MCL 712A.19b(3), a circuit court "may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been proven. The petitioner bears the burden of proving that ground. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review a circuit court's factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "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." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (quotation marks and citation omitted). "Clear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

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[3] In the final written termination order, the court also listed factor (k)(*i*) as supporting the termination decision. This appears to be a scrivener's error as that ground was never raised and is inapplicable to the facts of this case. Accordingly, we vacate that portion of the termination order.

Here, the court relied upon MCL 712A.19b(3)(c)(*i*) and (g) in terminating respondent's parental rights. These factors state:

> 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:
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> * * *
>
> (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:
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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.
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> * * *
>
> (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.

A. FACTOR (C)(*I*)

In relation to factor (c)(*i*), respondent contends that termination was inappropriate because the only ground he admitted at the jurisdictional trial was that he had been convicted of domestic violence against mother. The evidence established that he completed a domestic violence course, thereby negating that this condition continued to exist by the time of the termination hearing, respondent posits. However, mother testified at the termination hearing that respondent did not benefit from his domestic violence services. Mother asserted that respondent told her on more than one occasion to kill herself, as recently as two months before the termination hearing. Mother averred that respondent often insulted her and made mean and "snarky" comments. Respondent also threatened that once he regained custody of AK, he would ensure that the child knew her mother was an awful person.

"[I]t is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody." *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded in part on other grounds as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009), vacated on other grounds 486 Mich 1037 (2010). Despite going through the motions, respondent did not internalize the lessons he learned in classes geared toward ending his use of violence in relationships. Respondent should have known that his emotional abuse of mother was especially dangerous given his awareness of her fragile mental state and history of suicide attempts. Considering the length of time respondent had participated in services without benefit, the court could determine that he would be unable to rectify this condition within a reasonable time given the child's age. Accordingly, the court did not err in finding termination supported under this factor.

B. FACTOR (G)

Although a circuit court need only base its termination decision on one factor, the court also relied upon factor (g). In this regard, respondent challenges the evidence relied upon and the burden of proof imposed, as well as the court's underlying decision.

Respondent asserts that the court improperly relied upon the mental health report prepared after his psychological and psychiatric evaluations and presented into evidence by the DHS. Respondent's mental health was not a ground raised at the adjudication and therefore, respondent asserts, the petitioner was required to present legally admissible evidence to establish that termination was appropriate on this ground. See *In re Jenks*, 281 Mich App 514, 516; 760 NW2d 297 (2008) (holding that when termination is based on "grounds new or different from those that led the court to assert jurisdiction over the children, the grounds for termination must be established by legally admissible evidence"), citing MCR 3.977(F)(1)(b). As the doctors who prepared the report were not presented as witnesses, the report's content was inadmissible hearsay, respondent concludes. He further contends that he had a right to cross-examine the report's preparers.

However, respondent waived his challenge in this regard. Although respondent stated his intent during a dispositional review hearing to require the presence of the doctors who prepared the report, he changed his position at the termination hearing. Respondent personally informed his attorney that he desired the admission of the report. Respondent submitted his own written objections to the report's findings for the court's review. "A party may not take one position in the trial court and then seek redress in an appeal on a contrary ground." *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148; 809 NW2d 444 (2011). Nor may a party harbor error, to which he consented, as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109, 651 NW2d 158 (2002).

Respondent further contends that the court was required to rely on admissible evidence to determine that his lack of adequate housing and marijuana use[4] supported termination under factor (g) because those grounds were not raised in the initial petition. In this regard, the court found that respondent "was not making any appreciable lifestyle changes which would put him in shape to have custody of [AK]." The court emphasized respondent's continued marijuana use after promising the court that he would "try and stay off" the drug, culminating in respondent obtaining a medical marijuana card "from a doctor who's a well known prescriber of such things, and got himself a diagnosis that was a convenient diagnosis, if nothing else." The court further noted that respondent still had not located stable and suitable housing.

The main impediment to respondent's evidentiary challenge regarding his marijuana use is that he personally made several admissions throughout the proceedings. Respondent ultimately stipulated to the admission of his mental health report, which diagnosed respondent as having a substance abuse problem. During the evaluation, respondent reported that he used

[4] Although the court cited respondent's marijuana use in its jurisdictional order, respondent did *not* admit this factor as a ground for taking jurisdiction.

marijuana almost daily. Although respondent filed objections to the report, he did not question these provisions.

Further, statements respondent made to the case worker and the child's foster mother were excluded from the definition of hearsay and therefore were admissible against him at the hearing. MRE 801(d)(2)(A) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity . . . ."

At the termination hearing, respondent testified extensively about his mental health history and his decision to secure a medical marijuana card, instead of taking prescribed medication. Through this testimony, respondent attempted to establish that he made a responsible and well-reasoned decision to use marijuana. However, the case worker testified that respondent was only making efforts to "appease the powers that be" and that respondent made statements "all the way through" the proceedings indicating that he continued to use marijuana. He told the case worker that "it helps him focus and helps him sleep." The child's foster mother testified that respondent told her on

> a few occasions that he was just doing all of this, the not smoking the marijuana and such, to just make everybody happy and to get through this, and then when it was all done and he got [AK] back, he was gonna go back to his old lifestyle because that's just what he wanted to do, because . . . he doesn't really see a problem with it.

As the statements admitted through the testimony of the case worker and the foster mother were respondent's "own statements[s]" and the witnesses were available for cross-examination, the statements fall outside the definition of hearsay and were admissible.

Respondent takes issue with the court's characterization of the doctor who provided his medical marijuana card. Respondent attempted to legitimize his frequent marijuana use by describing Dr. Awerbuch's prerequisites to issuing the card. However, the circuit court did not clearly err in characterizing Dr. Awerbuch's medical opinion as suspect, considering his indictment for Medicare fraud and public allegations that the doctor had over- and improperly prescribed certain medications. While respondent argues that no evidence was placed on the record concerning Dr. Awerbuch's reputation, the circuit court could properly take judicial notice of these public facts. MRE 201(c).

Ultimately, despite respondent's challenges, the court had more than adequate evidence to support termination under factor (g). Respondent had never provided care and custody for AK as she was taken immediately into foster care upon her birth. When given the chance, respondent failed to provide even basic baby supplies. And the evidence established no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time. As noted, the evidence revealed that respondent intended to continue his daily marijuana use indefinitely. In addition to the mental health report and respondent's admissions, other witnesses testified from their personal knowledge. The child's mother testified about her personal observations regarding respondent's frequent marijuana use, although she asserted that marijuana actually benefited respondent and should not be considered against him. A friend who

permitted respondent and the child's mother to live in her basement for a time during the child protective proceeding also testified to witnessing respondent's marijuana use.

The petitioner also presented admissible evidence supporting that respondent had not secured suitable housing for himself and the child. Respondent lied to his case worker about having an interview to obtain government-subsidized housing. When the case worker followed up, the apartment manager indicated that respondent had been taken off the waiting list because he failed to appear for his interview. During a large portion of the proceedings, respondent lived in his mother's basement. Respondent's mother had a history with the child protective system and respondent had spent part of his childhood in foster care. Despite knowing that a DHS representative was coming to review the safety of this residence, respondent chose not to tidy his basement living space. The worker testified that the area was "unclean," with cigarette butts and pop cans on the floor. Although respondent "presented a half-filled out lease on the day of" the hearing and claimed he was saving up his security deposit and first and last month's rent to secure an apartment, this was too little too late. As aptly noted by the court, AK had already waited 16 months for respondent to secure housing and could not continue to wait for an undefined period on the chance that respondent might secure housing that would prove appropriate.

The DHS presented admissible evidence in the form of eyewitness testimony regarding respondent's parenting ability to support that he would be unable to provide proper care and custody within a reasonable time. The foster mother testified that she always informed respondent of AK's doctor appointments, but he had attended only one. Respondent even declined to accompany the foster mother to the emergency room when AK spiked a high fever during his visitation. The foster mother described how respondent never learned how to properly diaper the child nor did he ever remember how to make a bottle. Overall, the DHS provided more than sufficient admissible evidence to support termination under factor (g).

C. HEARING BIFURCATION

Respondent argues that the circuit court should have bifurcated the termination hearing into separate proceedings regarding each factor to ensure that only admissible evidence was considered in relation to factor (g). Nothing requires such bifurcation. Respondent's reliance on *In re Trejo*, 462 Mich at 349 n 6, is misplaced. *Trejo* recognizes that a bifurcated proceeding may be appropriate to separately consider the existence of a statutory ground for termination and whether termination is in the child's best interests. *Trejo* does not support that separate proceedings are required to consider alternative statutory grounds for termination. To the extent that different grounds for termination would be governed by different evidentiary standards, we must presume that the circuit court was familiar with the applicable law and was capable of considering the evidence in accordance with the appropriate standards. See *People v Lanzo Constr Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006).[5]

[5] Respondent contends that counsel was ineffective for failing to request a bifurcated hearing. Any such request would have been without merit and therefore counsel's performance cannot be

D. BEST INTERESTS

Finally, respondent challenges the circuit court's determination that termination of his parental rights was in AK's best interests. "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), citing MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *Moss*, 301 Mich App at 90. The lower court should weigh all the evidence available to it in determining the child's best interests. *Trejo*, 462 Mich at 356-357. Relevant factors in this consideration include "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).

A preponderance of the evidence supports the circuit court's best-interests judgment. Record evidence established that AK was not bonded with her father and that respondent had not made sufficient strides to improve his parenting abilities during the 16-month proceedings. Respondent repeatedly demonstrated his preference to continue abusing marijuana over proving his parenting ability in order to gain custody of his child. Potentially because of this lifestyle choice, respondent moved from job to job during the proceedings and never secured a suitable home into which he could bring his child. Respondent never even earned unsupervised visitation because he never achieved a sufficient number of clean drug screens in a row. Considering respondent's failure to benefit from services, the child's young age and her bond with her foster parents who were interested in adoption, we discern no error in the circuit court's analysis.

We affirm in part and vacate in part. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher

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deemed deficient in this regard. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).