STATE OF MICHIGAN

COURT OF APPEALS

In re KASPER/ERICKSON, Minors.

UNPUBLISHED
December 10, 2015

No. 327759
Gogebic Circuit Court
Family Division
LC No. 2012-000019-NA

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

PER CURIAM.

The circuit court terminated respondent-mother's parental rights to her young daughters, LK and TE, based on her failure to overcome her methamphetamine addiction and to make sufficient strides to provide a safe and stable life for the children. Clear and convincing evidence supported the grounds for termination and the evidence preponderates in favor of the circuit court's best-interest determination. We affirm.

I. BACKGROUND

On April 13, 2012, Child Protective Services (CPS) conducted a welfare check at respondent's home based on a report of child abuse and neglect, and concerns regarding the manufacture, sale and use of methamphetamine. Respondent, claiming that she feared for the children's safety at the hands of her abusive boyfriend, had placed then 10-month-old TE and 23-month-old LK in her father's care. Respondent tested positive for meth and the Department of Human Services (now the Department of Health and Human Services or DHHS) filed a petition to take the children into court jurisdiction based on domestic violence and controlled substance abuse in the home.

Respondent was unable to immediately start services toward reunification. She was quickly arrested and pleaded guilty to two charges of meth possession, with one count reduced from a manufacturing charge. Respondent was imprisoned until October 2013, 18 months after the proceedings commenced, and recommended services were not available at the facility where she was housed.

Within a month of respondent's release, the DHHS filed a petition to terminate her parental rights. In May 2014, the circuit court terminated the rights of both children's fathers, but denied the petition as to respondent, concluding that she "had not been given a sufficient opportunity to utilize services and show that she could provide a suitable home for the children." Services were offered to respondent after that decision. As described by the circuit court:

> Counseling services were initiated as well as drug testing. . . . [Respondent] had enrolled in school at Gogebic Community College and was active locally in AA and had been a co-founder of a local Meth Anonymous program. UP Kids also attempted to work with [respondent] on issues of housing, employment and transportation.

Supervised parenting time was slowly introduced. Early in the proceedings, custody of the two girls was transferred to respondent's aunt and uncle. Respondent's slow reintroduction "was supported by prior concerns of . . . specialists . . . who had seen the children. Their reports . . . had raised concerns of reactive detachment disorder if [respondent] was reintegrated into their lives." Beginning in September 2014, respondent enjoyed one, and then two, hours of supervised visitation each week.

Parenting time seemed to have a negative effect on respondent. Respondent became volatile with the foster care worker. Their contact reduced from nearly daily to once every two weeks. Respondent stopped attending parenting classes and did not appear for random drug screens in October. After forced to appear by court order, respondent tested positive for meth, Vicodin, and alcohol. Respondent was placed on academic probation at school. Respondent's "supervised parenting sessions also did not go well . . . and she did not appear focused." The court later described, "There is testimony of her generally not engaging in life or services." Although respondent now admits she suffered a relapse, she provided a litany of excuses at the time.

The circuit court ultimately terminated respondent's parental rights and this appeal followed.

II. STATUTORY GROUNDS

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).

The circuit court terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), which provide:

> (3) 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:

* * *

(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:

(*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.

* * *

(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.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Respondent complains that the DHHS "made slow progress . . . in implementing the May 27, 2014 court ordered reunification process," provided inadequate services, and allowed insufficient parenting time to repair the parent-child bond. As a result, respondent contends, the DHHS lacked sound evidence to support termination.

"[R]easonable efforts to reunite the child and family" are required absent certain aggravating factors not present here. MCL 712A.19a(2). " 'It is only when timely and intensive services are provided for families that agencies and courts can make informed decisions about parents' ability to protect and care for their children.' " *Rood*, 483 Mich at 98 (citation omitted). The lack of services can support reversal of a termination order, see *In re Mason*, 486 Mich 142, 158-160; 782 NW2d 747 (2010), and leaves "a 'hole' in the evidence on which the trial court base[s] its termination decision." *Rood*, 483 Mich at 127 (YOUNG, J., concurring). And "frequent parenting time" is required when children are placed outside the home unless, even if supervised, it is deemed "harmful to the juvenile." MCL 712A.13a(13).

Respondent's challenges in this regard are without merit. First, respondent's parenting time was limited because an expert psychoanalyst who examined the children opined that a slow reintroduction was necessary to prevent "reactive detachment disorder." Moreover, the DHHS did make reasonable efforts to reunify respondent with her children. Following the denial of its first termination petition, the DHHS provided respondent with mental health and substance abuse counseling and parenting classes. Respondent submitted to random drug screens. The DHHS and respondent's father assisted her in securing housing. The foster care worker had nearly daily contact with respondent between May and September 2014, evidencing the high level of support

provided in this case. Despite the DHHS's efforts, respondent stopped utilizing most services in October 2014, and reverted to abusing controlled substances, prescription pain killers, and alcohol. Respondent's backslide was not caused by a lack of effort on the part of the DHHS. In any event, the proper time to challenge the adequacy of services is during the child protective proceeding. Only with timely objection can the DHHS remedy the situation. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012).

Ultimately, termination under all three cited grounds was supported by evidence that respondent had relapsed into methamphetamine abuse 2½ years after the institution of these proceedings. Respondent's children came into care not only because she abused meth, but also because she manufactured and sold the drug in the home she then shared with her infant and toddler daughters. Despite more than a year's incarceration, substance abuse counseling, and forming a support group for meth addicts, respondent began abusing multiple substances in October 2014. She stopped participating in rehabilitative services geared toward reunification. Respondent evaded random drug tests, dropped a diluted test, and tested positive for substances on more than one occasion. Respondent provided inadequate excuses for her test results, blaming her positive for methamphetamine on prescription Adderall and for alcohol on a dessert, and her diluted test on a bladder infection. She also continued to make poor life choices, such as maintaining friendships with convicted felons, which would place her in danger of returning to drug abuse.

"[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). A parent's persistent failure to gain control over a substance-abuse problem is ground for termination of parental rights. See *In re Conley*, 216 Mich App 41, 44; 549 NW2d 353 (1996) (clear and convincing evidence of a failure to overcome alcoholism despite extensive treatment may justify termination of parental rights under §§ 19b(3)(c)(*i*) and (g)). Respondent's behavior evidenced such a lack of benefit from services and failure to control her addiction.

Respondent now acknowledges that she suffered a "brief relapse," but insists that this was a normal event for a recovering addict. We agree with the circuit court that respondent's relapse so far into the proceedings was a matter of great significance. That relapses during recovery may be commonplace does not discount the use of that relapse as evidence to support termination more than 2½ years after the children left their mother's care.

Based on this evidence, the circuit court committed no error in determining that the conditions that led to adjudication continued to exist and that respondent had failed to provide proper care and custody for her children. Looking forward, given the length of these proceedings and the amount of services provided, the court also did not clearly err in determining that respondent could not overcome her addiction and provide a safe and stable home for her children within a reasonable time and that there existed a reasonable likelihood of harm to the children if returned to respondent's care.

In addition, the court's determination that termination was warranted by factor (j) was supported by evidence of the physical and emotional harm the children experienced when previously in their parents' care. The DHHS presented undisputed evidence that the children

"had significant needs" when they first came into care. They both had developmental delays and LK exhibited emotional troubles. In the care of their aunt and uncle, the children quickly progressed. However, when supervised parenting time was initiated, LK began reverting and both children were anxious and "clingy." The foster care worker tried to engage respondent in LK's special education plan, but respondent did not appear for scheduled meetings. As noted by the court, respondent's lack of attention during the proceedings to the special needs of her children is further evidence they could suffer harm if placed in her care.

Accordingly, we discern no ground to overturn the circuit court's determination that three statutory grounds supported termination of respondent's parental rights.

III. 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).

Respondent contends that termination was not in the children's best interests because she made arrangements to place her children with her father (and for her aunt to assist in their care) even before the DHHS entered the picture. Respondent contends that the DHHS had no grounds to remove the children from her father's care and that the children's continued placement with her relatives supports the retention of her parental rights.

MCL 712A.19a(6) requires a court to "order the agency to initiate proceedings to terminate parental rights" under certain circumstances, while setting forth in subsection (6)(a) an exception where "[t]he child is being cared for by relatives." In *Mason*, 486 Mich at 164, our Supreme Court, citing MCL 712A.19a(6)(a), held that the subject children's placement with relatives "was an explicit factor to consider in determining whether termination was in the children's best interests . . . ." See also *Olive/Metts*, 297 Mich App at 43.

Here, the circuit court took the children's relative placement into consideration in rendering its termination decision. The court repeatedly acknowledged that the children were in the care of their great-aunt and uncle and progressed beautifully in that setting. Respondent fails to support her contention that the court should have continued or returned the children's custody to her father. There is no record indication that the children's grandfather desired to take guardianship over the children or that the children made any improvement in the short time they were placed in his care. Respondent cites no authority for the proposition that a court must expressly look beyond an existing, satisfactory, and apparently unchallenged placement with relatives at the time of the termination hearing to consider placements with other relatives earlier in the proceedings. Accordingly, we also discern no error in the circuit court's best-interest assessment.

IV. AFFIDAVITS

Respondent argues that the circuit court erred in admitting and considering affidavits attached to her drug-testing results. We review a court's evidentiary decisions for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

The DHHS presented the two challenged affidavits at the termination hearing. Each is attached to a report of drug-test results. The affidavits are identical, with the affiant attesting that she was the director of laboratory operations and custodian of business records at the laboratory where respondent participated in testing. The affiant described that the attached laboratory reports reflected the testing of certain urine specimens, and were prepared and kept in the regular course of business. The first report indicates that a urine specimen obtained from respondent on November 12, 2014, was positive for amphetamine and methamphetamine. The second report indicates positive test results for amphetamine and methamphetamine in connection with a specimen collected on November 10. The DHHS presented the affidavits after respondent refused to stipulate to the witness's testifying by telephone. Respondent now contends that these affidavits were hearsay and were inadmissible under MCR 3.977(H)(2) because the DHHS did not "afford[] [her] an opportunity to examine and controvert" the affidavits or "to cross-examine [the] individual[] who made the [affidavit] when [the author was] reasonably available."

Pursuant to MCR 3.977(H)(2), the rules of evidence, other than those related to privileges, do not apply at termination hearings. The rule continues:

> At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

The record establishes that the drug-test results were provided to respondent's counsel ahead of the hearing, but the affidavits were not. Absent the "opportunity to examine" the affidavits, the court's admission of those documents was not in strict compliance with the court rule. We note, however, that the last-minute need to prepare and present the affidavits was caused by respondent's inexplicable refusal to allow the affiant to testify telephonically. Had the witness been permitted to testify, respondent could have challenged her attestations live.

Respondent admits on appeal that she tested positive for substances on November 10 and 12, 2014, because she relapsed and used methamphetamine at that time. Accordingly, the admission of the underlying drug-test results would be deemed harmless at this point. As respondent does not challenge the existence of the positive test results and does not claim that anything was amiss with the collection and storage of the specimen or creation of the test results, the admission of the affidavits was equally harmless. Accordingly, even if the circuit court

abused its discretion in originally admitting the affidavits, the error would not have affected the outcome of the proceedings. Respondent therefore would not be entitled to relief.

We affirm.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Elizabeth L. Gleicher