

STATE OF MICHIGAN
COURT OF APPEALS

In re HUNTER, Minors.

UNPUBLISHED
March 10, 2016

No. 327726
Wayne Circuit Court
Family Division
LC No. 06-450379-NA

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

PER CURIAM.

In this child protective proceeding, the circuit court terminated respondent's parental rights to her children, SRH, SLDH, and EDH, pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). Respondent appeals as of right. We affirm.

Respondent first argues that the circuit court erred in omitting her testimony when it recreated the record from the tender-years hearing and adjudication trial on October 4, 2013. Respondent further argues that the October 4, 2013 proceedings violated her right to due process because petitioner provided insufficient notice of the tender-years hearing. In addition, respondent argues that the circuit court erred in admitting a statement by SRH, who was more than 10 years old at the time of the hearing.

Respondent did not timely challenge, in either the circuit court or on appeal, the circuit court's exercise of jurisdiction over the children on the basis of the October 4, 2013 proceedings. Respondent improperly waited until after the circuit court terminated her parental rights in April 2015 to contest the validity of the October 4, 2013 proceedings. "Matters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack in a subsequent appeal of an order terminating parental rights." *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005); see also *In re Hatcher*, 443 Mich 426, 439-440; 505 NW2d 834 (1993). Accordingly, respondent may not raise arguments challenging the tender-years and adjudication proceedings on October 4, 2013.

Even if we were to consider the merits of these issues as forfeited, respondent would have to establish a plain error affecting her substantial rights. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Respondent has not established any plain error affecting her substantial rights arising from the October, 4, 2013 hearing or the circuit court's recreation of the unavailable transcript.

Respondent challenges the circuit court's summary of the October 4, 2013 hearing because it did not reference her testimony. In the order settling the record, the circuit court ruled as follows concerning respondent's contention that she had testified on October 4, 2013:

Court has deemed this to be a sufficient [sic] concise statement of the testimony that took place at the hearings that were held on 10/4/2013. The appellate attorney for the mother objected to it on the basis that it was not sufficient for purposes of allowing her to render a proper appeal on behalf of her client and she prepared a proposed order to indicate the grounds for her objection. Court admitted her order into evidence for the purpose only of indicating her objections and the written basis for the objections. The court also allowed the mother's appellate attorney to call the mother as a witness during the hearing of 10/02/2015. Mother stated that she testified during the hearing on 10/4/2013. Court is aware that the above statement of facts indicates that the mother did not testify. The Court was aware of that dispute, but the Court still holds that the above statement of facts is the courts [sic] best recollection of what happened during the hearings held on 10/4/2013. The Court considers this to be a certified statement of facts concerning the testimony from the court hearings held on 10/4/2013 in this case and will be provided to all of the appellate attorneys.

In light of respondent's concession that in October 2015 "she could not recall the substance of her 10/04/13 testimony," the circuit court did not clearly err in omitting any testimony by respondent on October 4, 2013. See *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003) (a decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made"). Moreover, even assuming error, respondent failed to identify in the circuit court, and similarly fails to identify on appeal, any relevant facts that she purportedly made on October 4, 2013. Accordingly there is no basis for concluding that the omission of respondent's testimony in the order settling the record adversely affected her substantial rights. See *In re Utrera*, 281 Mich App at 8.

We next consider, and reject, respondent's alleged due process violations. Due process essentially signifies fundamental fairness. *In re Beck*, 287 Mich App 400, 401; 788 NW2d 697 (2010). Procedural due process demands "notice and a meaningful opportunity to be heard before an impartial decision maker." *Id.* Respondent complains that petitioner failed to timely file its tender-years motion pursuant to MCR 2.119(C)(1)(a), which generally requires the filing of motions "at least 9 days before the time set for the hearing." The court file reflects that petitioner filed its motion on October 2, 2013, two days before the tender-years hearing took place. However, respondent ignores that the clear language of MCR 2.119(C)(1) also authorizes a court to change the time for filing a motion if "good cause" supports the change. Respondent also ignores that on September 17, 2013, petitioner apprised respondent of its intent to move for a tender-years hearing. And the tender-years motion hearing involved the same child statements about respondent's physical abuse that petitioner identified in the August 26, 2013 petition for temporary custody. Furthermore, MCL 712A.1(3) provides that the chapter governing juvenile proceedings "shall be liberally construed so that each juvenile coming within the jurisdiction of the court receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state." *In re Osborne*, 459 Mich 360, 369 n

10; 589 NW2d 763 (1999). Even assuming error in the timing of petitioner's filing of the tender-years motion before the hearing date, the record does not reflect that respondent "suffered an actual deprivation of an important right." *Id.*

Respondent also complains that the circuit court erred in admitting SRH's statement about respondent's physical abuse because SRH "was over 10 years of age at the time of the Tender Years hearing." Under MCR 3.972(C)(2), "[a]ny statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation . . . may be admitted into evidence through the testimony of a person who heard the child make the statement . . ." Although SRH turned 10 years of age in July 2013, before the tender-years hearing occurred on October 4, 2013, SRH made her statements describing respondent's physical abuse on April 14, 2013. Thus, SRH was "under 10 years of age" when she made her statements, and therefore, the statements qualified for admission under MCR 3.972(C)(2).

Respondent also maintains that the circuit court erred in finding the existence of a statutory ground for termination of her parental rights because petitioner failed to provide her with a meaningful opportunity to complete family therapy. The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). This Court reviews for clear error a circuit court's decision to terminate parental rights. MCR 3.977(K). The clear error standard controls this Court's review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich at 356-357. A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich at 209-210. Clear error signifies a decision that strikes this Court as more than just maybe or probably wrong. *In re Trejo*, 462 Mich at 356. This Court "give[s] deference to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

Respondent did not timely challenge in the circuit court the reasonableness of the services that petitioner provided. See *In re Terry*, 240 Mich App 14, 26-27; 610 NW2d 563 (2000) (noting that the respondent untimely complained about the unreasonable nature of the services in "her closing argument at the hearing regarding the" termination petition). "Generally, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re HRC*, 286 Mich App at 462, citing MCL 712A.18f.

The circuit court found as follows regarding respondent's family, individual, and substance abuse therapies:

Even though therapy . . . began to occur after that and there is some dispute as to how the therapies were completed but from the worker's perspective and the Court, at this point, because of mother's hostility and mother's attitude

toward the process itself, is inclined to believe the worker. The worker testified that mother cut off the therapy classes; that there were I think 16 classes, she attended four. Mother says that they were cut off because of problems that the therapist had. I don't believe that's true. I'm more inclined to believe what the worker has said that mother just failed to continue to participate.

In light of respondent's repeated expressions of anger toward the caseworkers and the court process in general, the circuit court did not clearly err in crediting caseworker Allina Coleman's testimony that petitioner provided respondent with family, individual, and substance abuse therapies, which respondent never successfully completed. See *In re HRC*, 286 Mich App at 459 (observing that this Court should not revisit the factfinder's credibility determinations). Contrary to respondent's contention that petitioner failed to pursue reasonable efforts to reunify her with the children, the evidence established that respondent did not follow up on most of the services that petitioner supplied. See *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

A circuit court may order the termination of parental rights under MCL 712A.19b(3)(c)(i) if at least 182 days elapsed since an initial dispositional order and it was established by clear and convincing evidence that 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." More than 18 months elapsed between the circuit court's entry of an initial dispositional order and the termination hearing. At the adjudication trial in October 2013, the circuit court found that respondent physically abused SRH and SLDH, and that EDH and respondent tested positive for marijuana when EDH was born. The circuit court ordered that respondent complete parenting classes, submit to a substance abuse evaluation and weekly random drug screens, complete anger management, family, and individual therapy, submit to psychiatric and psychological evaluations, "obtain and maintain suitable income and housing," and attend supervised parenting times with the children.

Abundant evidence showed that the conditions that led to the children's adjudication in October 2013 continued to exist in April 2015, with no reasonable likelihood that they would be rectified within a reasonable time. Although respondent completed parenting classes, Coleman denied that respondent benefitted from the classes, as primarily reflected in respondent's failure to attend many parenting times and medical appointments, and her ongoing inappropriate interactions with the children. Coleman specified that respondent had "threatened to spank [SLDH] at one of the [parenting times] because she didn't complete her homework," told the children "that she didn't want them to be around and also for the [children] to play with each other and not" interact with her, and continually behaved loudly and with hostility toward the children. In January 2015, after Coleman requested to talk with the children outside respondent's presence, respondent became hostile, grabbed SLDH's arm, and threatened to kill Coleman. SRH wanted no interaction with respondent, and EDH cried whenever he saw respondent.

Respondent earned minimal income from a work-study job. She participated in both psychological and psychiatric evaluations, which diagnosed her "with post traumatic stress disorder and . . . cluster B personality disorders." Respondent attended family therapy between 2013 and February 2014, but the therapy was suspended pending respondent's psychiatric

evaluation, and respondent only completed the psychiatric evaluation in October 2014. Regarding individual and substance abuse therapy, respondent initially refused to attend. Coleman re-referred respondent for the therapy in March 2014, but the therapy was terminated because of respondent's lack of cooperation, and respondent never resumed the therapy. With respect to random drug screens, respondent refused to attend any screens between October 2013 and March 4, 2014, thereafter missed 34 of 60 scheduled screens, and tested positive for marijuana five times. In 2013, respondent was convicted of domestic violence.

A decision regarding a reasonable time for improvement "appropriately focus[es] not only on how long it would take respondent to improve her parenting skills, but also on how long her . . . children could wait for this improvement." *In re Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991). The young children had languished for more than 18 months as temporary court wards, and urgently needed permanency and stability. Beginning in 2006, CPS substantiated complaints regarding respondent's physical abuse of the children and substance abuse. Since October 2013, respondent repeatedly blamed others for the children's arrival in foster care, and made minimal progress toward addressing her prolonged history of physical abuse or substance abuse. Respondent also made minimal to no progress toward attaining the other goals of her treatment plan. The record clearly and convincingly establishes the unlikelihood that respondent might demonstrably improve her parenting skills "within a reasonable time given the child[ren]'s age[s]." See *In re LE*, 278 Mich App 1, 28; 747 NW2d 883 (2008).

In light of the record evidence, the trial court did not clearly err when it concluded that clear and convincing evidence supported termination of respondent's parental rights under MCL 712A.19b(3)(c)(i). The conditions leading to adjudication continued to exist with no reasonable likelihood that they would be remedied within a reasonable time considering the children's ages. Because only one statutory ground must be established by clear and convincing evidence, *In re HRC*, 286 Mich App at 461, we need not address whether the trial court clearly erred in finding MCL 712A.19b(3)(g), and (j) were established; nevertheless, we conclude that the trial court did not clearly err in that regard.

"Even if the trial court finds that the [petitioner] has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children. MCL 712A.19b(5)." *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). In making that determination, the court may consider a variety of factors, such as: the parent's history, parenting ability, and compliance with her case service plan, including participation in a treatment program; the child's age and bond to the parent; the child's safety and well-being; the foster care environment; and the child's need for permanency, stability, and finality. See *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014) (citation omitted).

SRH and EDH shared little to no bond with respondent. Although respondent and SLDH shared a slightly stronger bond, SLDH had expressed that she did "not want to return back home with mom, she hasn't changed and . . . [she felt] afraid of mom." Abundant evidence in the record confirmed respondent's longstanding difficulties with physically abusing the children and substance abuse. After more than 18 months that the children spent in foster care, respondent minimally improved her parenting skills, and did not begin to address her long-term substance

abuse issues. The children had pronounced needs for finality, permanency, and stability. All three children had developed normally during their foster care placements, and EDH's current relative placement intended to adopt him. In light of all the record evidence, the circuit court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. The court was not required to address the interests of each child individually, because none of the children's circumstances significantly differed from the others. See *id.* at 715.

Affirmed.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Douglas B. Shapiro