STATE OF MICHIGAN

COURT OF APPEALS

In re DAVIS-WRIGHT, Minors.

UNPUBLISHED
October 18, 2016

No. 330806
Oakland Circuit Court
Family Division
LC No. 13-815284-NA

Before: SAAD, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Respondent-father D. Davis appeals the trial court's order that terminated his parental rights to his two children under MCL 712A.19b(3)(c)(*i*) and (g). For the reasons provided below, we affirm.

I. STATUTORY BASIS FOR TERMINATION

Respondent argues that the trial court erred in finding that clear and convincing evidence supported a statutory ground for termination. Before terminating a parent's rights to his or her child, a court must find by clear and convincing evidence that one or more of the statutory grounds for termination listed in MCL 712A.19b(3) exists. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). This Court reviews for clear error the trial court's determination regarding the statutory grounds for termination. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding of fact is clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made." *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). "When reviewing the trial court's findings of fact, this Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

As part of his argument, respondent claims that the trial court violated statutory requirements with respect to the parent-agency agreement (PAA) and review hearings. Because he did not object on this basis below, this argument is unpreserved, and we review the issue for plain error affecting substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

The trial court terminated respondent's parental rights in October 2015, pursuant to MCL 712A.19b(3)(c)(*i*), which allows a court to terminate parental rights if "182 or more days have elapsed since the issuance of an initial dispositional order," and the court finds by clear and convincing evidence that "[t]he 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."

Allegations in the original petitions included (1) domestic violence and (2) failure to pay child support. Regarding domestic violence, respondent was incarcerated for assaulting the children's mother at the time the court took jurisdiction. The deputy who arrested respondent knew the couple because domestic violence had occurred between them before. The couple's family also reported to the Department of Health and Human Services (DHHS) that domestic violence was ongoing, even when no charges resulted. Several children reported that they had observed instances of domestic violence between their parents and that they were consequently fearful of respondent.

During the proceedings, the court referee and the DHHS took several steps to curtail the domestic violence and the potential risk to the children. First, considering the couple's combative relationship when together, upon the recommendation of the guardian ad litem (GAL) and the DHHS, the referee ordered that respondent and the children's mother visit the children separately. The record demonstrates that respondent disregarded this order by nevertheless allowing the mother to participate with his visitation. Second, the couple's domestic violence tended to be linked to their use of alcohol, so the PAA required respondent to abstain from alcohol. The record nevertheless demonstrates that respondent continued to drink alcohol, even while the termination hearing was pending and his probation requirements prohibited it. Third, respondent was precluded from committing additional crimes. The record demonstrates, however, that respondent continued to entangle himself in violent episodes with the mother. Deputy Daniel Vasquez testified that in May 2014, respondent attacked, punched, and choked the mother before she threw hot cooking grease on him. In March 2015, the mother was arrested and her mugshot showed bruises and marks on her body. The mother did not implicate respondent to the police, but she told others that respondent had assaulted her. Later, in the same month, respondent was arrested after slapping the mother repeatedly at a motel when he was reportedly dissatisfied with her sexual performance.

In his evaluation with Dr. Melissa Sulfaro, a senior psychologist, respondent acknowledged an "issue" involving the use of alcohol when the domestic violence occurred, but he still maintained that he did not have a substance-abuse problem. Despite statements by several children that they had observed domestic violence between respondent and the mother and were fearful of respondent, respondent claimed that the children were "clueless" about the domestic violence. He also denied that the children were placed under the court's jurisdiction, in part, because of his actions. While the best-interests hearing was occurring, respondent began fulfilling a probation requirement to attend weekly domestic violence classes, but he missed 30 percent of the classes and admitted that part of the reason for his absences was disinterest. Dr. Sulfaro concluded that respondent's "lack of insight regarding the severity of his substance abuse and his anger issues suggest that his ability to benefit from treatment services is fair to marginal."

Respondent acknowledges, in part, his continuing problem regarding domestic violence but claims that the court lacked sufficient evidence to terminate because the DHHS failed to refer him for domestic violence counseling. Catholic Charities recommended anger management and individual therapy for respondent, which was consistent with the referee's original dispositional

order from March 2014. At a hearing in January 2015, Robert Lieblang, a foster care service specialist for the DHHS, pledged to investigate this recommendation and respondent expressly objected to this therapy, stating, "I don't think it's necessary." When Lieblang attempted to follow up with him about the therapy, regardless of his statements at the hearing, he could not be reached and did not get in touch with Lieblang. Because respondent expressly objected to the provision of this service, he cannot now complain on appeal that it should have been provided. See *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010) ("A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute."). Accordingly, the issue is waived.

In addition, respondent claims that the trial court violated MCL 712A.13a(10)(a) and MCL 712A.18f(2) by entering the order of disposition before a case-service plan was created for him. MCL 712A.13a(10) provides, in pertinent part:

> If the court orders placement of the juvenile outside the juvenile's home, the court shall inform the parties of the following:
>
> (a) That the agency has the responsibility to prepare an initial services plan within 30 days of the juvenile's placement.

MCL 712A.18f(2) directs that "[b]efore the court enters an order of disposition in a proceeding under section 2(b) of this chapter, the agency shall prepare a case service plan that shall be available to the court and all the parties to the proceeding." Respondent cannot establish that any delay in providing services until he was released from jail affected his substantial rights. He claims that if he had been provided with services related to the domestic violence earlier, he would have been able to rectify the problem within a reasonable time. But respondent was, in fact, offered domestic violence counseling by the jail during that same period of time and he declined it because he "didn't think [he] needed it."

In a related argument, respondent argues that the referee failed to consider at review hearings whether respondent was complying with the prior order to complete domestic violence counseling. MCL 712A.19(6) provides, in relevant part:

> At a review hearing under subsection (2), (3), or (4), the court shall review on the record all of the following:
>
> (a) Compliance with the case service plan with respect to services provided or offered to the child and the child's parent, guardian, custodian, or nonparent adult if the nonparent adult is required to comply with the case service plan and whether the parent, guardian, custodian, or nonparent adult if the nonparent adult is required to comply with the case service plan has complied with and benefited from those services.

* * *

> (c) The extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency.

Respondent is correct that the referee never stated on the record that respondent failed to comply with the original dispositional order requiring him to participate in a domestic violence program—either through a referral by the DHHS or by applying for a program himself. But again, respondent cannot demonstrate how any error affected his substantial rights because, when such a program was subsequently recommended by the parenting class and raised by Lieblang, respondent objected to it.

Regarding the failure to pay child support, when the DHHS first investigated the case in the fall of 2013, the children were living with their mother in a home without utilities and had begged neighbors for food. Around that time, respondent owed nearly $2,000 in unpaid child support. Throughout the proceedings, there is no record that respondent took any steps to rectify the arrearage or otherwise support his children. Although the record indicates that respondent was employable, he did not maintain consistent employment throughout the proceedings because of periods of incarceration. Following his last stretch in jail, respondent was unemployed for more than three months before finding temporary employment, which he had only begun 11 days before the last day of trial. In addition, the PAA required respondent to obtain suitable housing for himself and the two children, but the record demonstrates that he continuously had difficulty finding affordable housing to accommodate all of them.

With all of these facts demonstrating respondent's lack of progress with regard to domestic violence and his efforts to support the children, we are not left with a definite and firm conviction that a mistake was made when the trial court concluded 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. MCL 712A.19b(3)(c)(*i*). Because one ground for termination existed, it is not necessary to consider the additional ground upon which the trial court based its decision. *In re Powers*, 244 Mich App 111, 119; 624 NW2d 472 (2000).

II. PSYCHOLOGICAL REPORT

On the first day of the best-interests hearing, respondent asked to read Dr. Sulfaro's report despite, as he explained it, a court policy precluding him from viewing it. The court told respondent that he could discuss it with the psychologist rather than read it; respondent's attorney also viewed it. Respondent argued that he should have been warned about this policy before participating in the session. Respondent asked for an explanation of the rule and the court promised to "find out." There was no further reference to the policy in the record. Respondent's attorney later stated that he had no objection to the admission of Dr. Sulfaro's report.

Petitioner claims that any challenge to the admission of the report into evidence should be deemed waived. Respondent does not expressly challenge the admission of the report, but instead argues that he should have first been allowed to read it and because he did not, his constitutional rights to due process and equal protection were denied by its use against him. Because respondent is challenging the use of the report against him, we agree with petitioner that, by conceding to the admission of the report, respondent waived any claim of error. To

conclude otherwise would permit respondent to harbor error as an appellate parachute. See *Bates Assoc*, 290 Mich App at 64.

III. BEST INTERESTS

Respondent also argues that the trial court improperly determined that termination of his parental rights was in the children's best interests. We review for clear error the trial court's determination regarding the children's best interests. MCR 3.977(K); *In re Mason*, 486 Mich at 152.

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court should weigh all the evidence available to it in determining the child's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). Factors relevant to a determination of the child's best interests include the child's bond to the parent, the parent's compliance with his or her case service plan, the parent's visitation with the child, the child's need for permanency, stability, and finality, the advantages of a foster home over the parent's home, and the possibility of adoption. *Id*. at 713-714. A trial court may also consider a parent's history. See *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

As respondent argues on appeal, the record demonstrates that the children and respondent were bonded and loved each other. But the parent-child bond is only one factor to consider. Respondent took parenting classes, but the record demonstrates that he was still unable to care for the children. Much of his problems surrounded domestic violence. Despite their volatile history, respondent continued interacting with the children's mother. He also failed to maintain a consistent visitation pattern with his children and failed to remain in constant contact with the DHHS throughout the proceedings, contrary to his PAA. In addition, his repeated incarcerations interrupted his employment and impaired his ability to find suitable, low-income housing for his family. Respondent also continued to use alcohol, even though he admitted it was a factor in his domestic violence pattern, was against the terms of his probation, and risked a four-year period of incarceration if his probation was revoked. The referee ordered respondent to attend domestic violence counseling in 2014, but he opposed such counseling and only started attending classes (with sporadic attendance) in the summer of 2015 as a condition of his probation months after the DHHS filed a supplemental petition for termination. These choices demonstrated respondent's inability to put his children's interests first.

Dr. Sulfaro opined that termination of respondent's parental rights was in the children's best interests because of respondent's instability and volatility and the lack of treatment for his aggression. Respondent's son told Dr. Sulfaro, as late as the summer of 2015, that he was still afraid of respondent. Lieblang testified that stability is important for the children so they know they will not be in danger or exposed to violence or substance abuse. Both Dr. Sulfaro and Lieblang testified that the children are in a stable environment with their paternal aunt, Shawnell Pratt, who wants to adopt them and will continue their relationship with respondent if he "was being appropriate." Lieblang observed that the children are healthy, happy, and well cared for with Pratt.

On appeal, respondent complains that the children were initially placed in nonrelative foster care instead of with his mother, Ruth Ann Eaddy. But the DHHS explained on the record that a foster care placement of that kind was not immediately possible because of Eaddy's criminal record. In addition, respondent claims that guardianship with either Eaddy or Pratt should have been considered as an alternative to termination. Although the court did not expressly reject the concept of guardianship on the record, it noted the children's parents' failure to "step[] up," their acquiescence to care by family, and their sporadic involvement with the children while in Pratt's care. The record further demonstrates that Pratt was interested in caring for the children "over the long term" and wanted to adopt them. With the children's need for stability so that they could have confidence that they would no longer be exposed to violence or substance abuse, and Pratt's desire for more than a short-term solution, a preponderance of the evidence supports the trial court's determination that termination of respondent's parental rights was in the children's best interests. Accordingly, the trial court did not clearly err in determining that termination, rather than a guardianship, was the proper course of action.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Michael J. Kelly