STATE OF MICHIGAN

COURT OF APPEALS

In re SAWYER/ROOD, Minors.

UNPUBLISHED
December 20, 2016

Nos. 331348; 332073
Oceana Circuit Court
Family Division
LC No. 13-010103-NA

Before: BORRELLO, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

In Docket No. 331348, the minor children (EAS, AJS, CLLR, DFWR), through the lawyer-guardian ad litem, appeal by leave granted the trial court's August 5, 2015 order that did not terminate the parental rights of respondents-appellees under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). In Docket No. 332073, the minor children appeal as of right the trial court's March 3, 2016 order that terminated the trial court's jurisdiction over them. We affirm in part, reverse in part, vacate in part, and remand for proceedings consistent with this opinion.

On appeal, the minor children argue that the trial court's decision not to terminate respondents-appellees' parental rights was based on an untenable legal position because it treated the interests of respondents-appellees as being greater than their interests. The trial court did so, according to the minor children, when it stated that parents have a fundamental liberty interest in the companionship, care, custody, and management of their children and that this liberty interest was perhaps the oldest liberty interest recognized. We review constitutional questions and issues of statutory interpretation de novo. *In re AMAC*, 269 Mich App 533, 535; 711 NW2d 426 (2006).

It appears that the trial court, when it spoke of liberty interests, was reading from *In re LaFrance Minors*, 306 Mich App 713, 723-724; 858 NW2d 143 (2014), a case involving termination of parental rights. Regardless of what issues were addressed and decided by the United States Supreme Court in the two Supreme Court cases cited in *In re LaFrance Minors*, the trial court committed no error when it stated its statement about parents' liberty interests in their children. The trial court was simply summarizing the law that had been recited by this Court in the same context. Cf. *Dana Corp v Dep't of Treasury*, 267 Mich App 690, 698; 706 NW2d 204 (2005) ("The rule of stare decisis mandates that published decisions of this Court are precedential and binding on lower courts and tribunals.").

Moreover, the trial court followed the procedure set forth by statute in deciding whether to terminate the parental rights of respondents-appellees. To terminate parental rights, a trial court must find that at least one statutory ground has been proved by clear and convincing evidence and that termination is in the best interests of the child. MCL 712A.19b(3), (5). The trial court did not terminate respondents-appellees' parental rights because it found that none of the four statutory grounds on which termination was requested were established by clear and convincing evidence. Accordingly, the trial court's decision not to terminate parental rights was not based on an untenable legal position.

The minor children also argue that the trial court did not make adequate factual findings because it did not make findings on the specific requirements of the statutory grounds. Following a termination hearing, a trial court shall state on the record or in writing its findings of fact and conclusions of law. MCL 712A.19b(1); MCR 3.977(I)(1). Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. MCR 3.977(I)(1). A trial court's factual findings are sufficient so long as it appears that the court was aware of the issues in the case and correctly applied the law and where appellate review would not be facilitated by requiring further explanation. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

The trial court was aware of the four statutory grounds on which termination was requested. But when it decided not to terminate the parental rights of respondents-appellees, it only stated that the statutory grounds had not been proved by clear and convincing evidence. The only explanation that the trial court gave was that respondents-appellees had substantially complied with the case service plan and benefitted from services. Nonetheless, we do not remand for additional factual findings. The trial court was aware of the law. It knew that, in order for parental rights to be terminated, petitioner had to prove the statutory grounds alleged in the petition by clear and convincing evidence. The trial court was also aware of the issues. Before the trial court determined that petitioner had not proved the statutory grounds by clear and convincing evidence, it reviewed the reasons for why it took jurisdiction over the children, the requirements of the case service plan, the services provided to respondents-appellees, and the services completed by them. It also stated that there was disagreement between petitioner and respondents-appellees regarding their benefit from services and between the experts regarding whether the children should be returned. The trial court's review of the case is sufficient to enable appellate review of the trial court's decision. Our review would not be facilitated by further explanation.

Next, the minor children argue that the trial court erred in not terminating respondents-appellees' parental rights. To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). We review for clear error a trial court's finding whether a statutory ground for termination has been proved by clear and convincing evidence. *Id.* "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 BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).[1]

Under MCL 712A.19b(3)(c)(*i*), a trial court may terminate parental rights if "[t]he 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" 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." Respondent-appellee mother pleaded to two allegations in the petition: that she left the children in Brandon Loss's care while she and Kenneth Bromley left the home and EAS sustained injuries resulting in significant bruising and that the home conditions were deplorable and below community standards. Respondent-appellee father pleaded to an allegation that he was incarcerated in the Oceana County jail and was unable to provide for the children. Thus, the conditions that led to the adjudication were that (1) respondent-appellee mother left the children in the care of abusive adults, (2) respondent-appellee mother failed to provide suitable housing for the children, and respondent-appellee father was unable to provide for the children because he was incarcerated.

Evidence supported that these conditions no longer existed. First, there was no evidence that respondent-appellee mother, after the adjudication, left the children in the care of Loss or any other person known to be abusive. Additionally, there was no evidence that, at the time of the termination hearing, mother associated with men who were abusive. The caseworker testified that neither Loss nor Bromley was "in the picture." Second, in September 2014, respondents-appellees moved into a four-bedroom house, in which they built a fifth bedroom, and they continued to live there at the time of the termination hearing. The caseworker and the parent mentor visited the home on several occasions. Both testified that it met community standards. Third, although respondent-appellee father spent some time in the Mason County jail after he was released from the Oceana County jail, he was not incarcerated at the time of the termination hearing. The trial court did not clearly err in finding that § (3)(c)(*i*) was not established by clear and convincing evidence. *In re Moss*, 301 Mich App at 80.

Under MCL 712A.19b(3)(c)(*ii*), a trial court may terminate parental rights if "[t]he 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" that "[o]ther conditions exist that cause the child to come within the court's

[1] In their brief on appeal in Docket No. 332073, in arguing that the trial court erred in not terminating parental rights, the minor children refer to evidence that was submitted to the trial court concerning respondents-appellees' conduct after the minor children were returned to them in August 2015. Generally, this Court's review of a trial court's decision is limited to the evidence that was before the trial court when the trial court made its decision. See, e.g., *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 380; 775 NW2d 618 (2009). Accordingly, we limit our analysis of the trial court's decision not to terminate parental rights to the evidence that was before the trial court on August 5, 2015.

jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." We agree that respondents-appellees' physical, emotional, psychological, and academic neglect of the minor children was another condition that caused the children to come within the court's jurisdiction. MCL 712A.2(b)(1).

Because the children were removed, the parental fitness of respondents-appellees could only be judged by their involvement in the case and their compliance with the case service plan. See *In re Sours Minors*, 459 Mich 624, 638; 593 NW2d 520 (1999). Following the adjudication, respondents-appellees missed minimal hearings. Additionally, respondents-appellees complied with the case service plan. Respondents-appellees obtained and maintained appropriate housing. They completed two parenting classes and a nutrition class. They underwent psychological evaluations, and both were in individual and marital counseling. Respondent-appellee mother obtained medications for her mental health condition. Respondents-appellees tested negative on drug screens. They worked with a parent mentor. They attended parenting time visits, although respondent-appellee mother missed some visits because she chose to work. And during the visits, respondents-appellees generally provided appropriate meals for the children, engaged in age-appropriate activities with the children, helped the children with homework, and, at least at times, used techniques that they had learned to discipline the children. Also, according to the caseworker, respondents-appellees tried to make all of the minor children's medical appointments for which they were given notice. Based on respondents-appellees' involvement in the case, there was evidence that the neglect of the children had been rectified. The trial court did not clearly err in finding that § (3)(c)(*ii*) had not been established by clear and convincing evidence. *In re Moss*, 301 Mich App at 80.

Under MCL 712A.19b(3)(g), a trial court may terminate parental rights if "[t]he parent, without regard to intent, fails to provide proper care and 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 parent's failure to comply with a service plan is evidence of the parent's failure to provide proper care and custody. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003); *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). Conversely, a parent's compliance with a service plan is evidence of the parent's ability to provide proper care and custody. *In re JK*, 468 Mich at 214. Benefitting from services is an inherent and necessary part of compliance with the service plan. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005).

The trial court found that respondents-appellees substantially complied with the case service plan and benefitted from services. Respondents-appellees found and maintained appropriate housing, obtained jobs, and completed two parenting classes and a nutrition class. They also underwent psychological evaluations, and respondent-appellee mother obtained medications for her mental health condition. Respondent-appellee mother no longer associated with men who had been abusive toward EAS. Respondents-appellees attended parenting time visits, and they worked with the parent mentor. The parent mentor testified that respondents-appellees' parenting skills had improved. There was evidence that respondents-appellees provided appropriate meals at parenting time visits, were more consistent in their discipline,

imposed punishments that were proportionate to the offending behavior, played appropriately with the children, made a routine for the visits, and gave the children affection. Respondents-appellees were attending individual and marital counseling. Therapist Joel Engel testified that respondents-appellees had made significant progress. Respondent-appellee mother recognized her need for psychotropic medications, and she was aware of her behaviors and how her behaviors affected the children. She was working on being less impulsive. Respondent-appellee father's anti-social behaviors had improved; he was able to think through situations and not act on his emotions. Engel did not believe that some of father's recent behavior showed that he had not internalized what he had learned. Based on this evidence, we are not left with a definite and firm conviction that the trial court made a mistake in finding that respondents-appellees substantially complied with the case service plan and benefited from services. *In re BZ*, 264 Mich App at 296-297.

Those who evaluated or counseled the children did not believe that the children should be returned to respondents-appellees, but none of them engaged in any services with respondents-appellees. Engel did not believe that respondents-appellees had any problems that would interfere with the children being returned home. Similarly, the parent mentor believed that because of the significant improvements she saw in respondents-appellees the children would not be at a risk of harm if returned. Throughout the case, the minor children engaged in regressive behaviors. Although there was evidence that the regressive behaviors appeared immediately before and after parenting time visits, there was no testimony that any conduct by respondents-appellees during the visits caused the behaviors. Engel theorized that the children's regressive behaviors were expected. He explained that children are unable to be compliant in their behaviors when they are under stress and that the children were under stress because they did not know what was going to happen. Engel would be more concerned if the children did not have any regressive behaviors.

Under the circumstances, where there was evidence that respondents-appellees substantially complied with the case service plan and benefited from services, which indicates an ability to provide proper care and custody, *In re JK*, 468 Mich at 214, where Engel and the parent mentor believed that respondents-appellees could provide proper care and custody for the children, and where Engel believed that the children's regressive behaviors were caused by stress in not knowing what was going to happen, we are not left with a definite and firm conviction that the trial court made a mistake in finding that § (3)(g) had not been proved by clear and convincing evidence. *In re BZ*, 264 Mich App at 296-297.

Under MCL 712A.19b(3)(j), a trial court may terminate parental rights if "[t]here 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." Harm to a child includes both physical and emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Respondents-appellees had psychological evaluations with Dr. Jeffery Auffrey. Dr. Auffrey opined that the risk of harm to a child in respondent-appellee mother's care was severe, although the risk could be reduced if respondent-appellee mother participated in long-term intensive mental health treatment. Although there would be "great difficulty" in treating respondent-appellee mother's mental health condition, he would be encouraged that mother was addressing her condition if she went to Community Mental Health (CMH) on a weekly basis,

obtained housing and employment, and lived on a budget. Dr. Auffrey opined that the risk of harm to a child in respondent-appellee father's care was minimal and that the risk could be reduced if father used a parent mentor for six months and sought medical care for his chronic medical problems. According to Dr. Auffrey, evidence of pro-social functioning, such as law-abiding behavior, maintaining a stable residence, having stable relationships, being steadily employed, and paying bills, would be indicators of improvement.

There was evidence that respondents-appellees complied with the recommendations of Dr. Auffrey to lower the risk to a child in their care. And more importantly, there was evidence of conduct by respondents-appellees that, according to Dr. Auffrey, would show that they had improved in their ability to parent. Respondents-appellees obtained and maintained a home that met community standards. They worked and were current on their rent. The parent mentor, who worked with them for more than one year, was aware of no issues with their budget. Respondent-appellee mother had obtained medications for her mental health condition. She sought individual counseling from Engel and then from CMH. Although the program she was in at CMH ended, respondent-appellee mother had gotten her family physician to prescribe her medications, and she had an appointment to start receiving psychiatric services at Catholic Charities. According to Engel, respondent-appellee mother had made significant improvements and, because of those improvements, he thought it was highly unlikely that respondent-appellee mother would make the poor choices that she had previously made. Engel testified that respondent-appellee father's health and anti-social behaviors had improved. He did not view some of father's recent outbursts as evidence of anti-social functioning. Under these circumstances, as well as the fact that Engel believed that the children's regressive behaviors were caused by stress in not knowing what was going to happen, we are not left with a definite and firm conviction that the trial court made a mistake in finding that § (3)(j) was not established by clear and convincing evidence. *In re BZ*, 264 Mich App at 296-297. We affirm the trial court's August 5, 2015 decision not to terminate parental rights.

The minor children next argue that the trial court erred in not holding a hearing on the January 11, 2016 supplemental petition that requested removal of the children and termination of parental rights.[2] The request for removal was governed by MCR 3.974(B)(2), which provides:

> (B) Hearing on Petition for Out-of-Home Placement.
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> * * *
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> (2) Postadjudication. If a child is under the jurisdiction of the court and a supplemental petition has been filed to remove the child from the home, the court

[2] The minor children are also critical of the trial court's conduct at the December 9, 2015 statutory review hearing. However, because the minor children do not present any legally supported argument that the trial court committed any error, any argument regarding the December 9, 2015 hearing is abandoned. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

> *shall* conduct a hearing on the petition. The court shall ensure that the parties are given notice of the hearing . . . . Unless the child remains in the home, the court shall comply with the placement provisions in MCR 3.965(C) and must make a written determination that the criteria for placement listed in MCR 3.965(C)(2) are satisfied. . . . [Emphasis added.]

The word "shall" denotes a mandatory duty. *Huntington Woods v Oak Park*, 311 Mich App 96, 114; 874 NW2d 214 (2015). Consequently, because the children were under the jurisdiction of the trial court and a supplemental petition was filed to remove the children from the home, the trial court was required to hold a hearing on the removal request. The trial court erred when it failed to do so. Although the trial court found that the circumstances did not warrant immediate removal of the children, see MCR 3.963(B), nothing in MCR 3.974(B)(2) indicates that a trial court is relieved of its duty to hold a hearing on a supplemental petition requesting removal of the children if it concludes that immediate removal is not necessary.

In contrast, requests for termination of parental rights that are made in supplemental petitions are governed by MCR 3.977(F) and MCR 3.977(H). Specifically, MCR 3.977(F) provides:

> (F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.
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> (1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if
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> (a) the supplemental petition for termination of parental rights contains a request for termination;
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> (b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:
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> (i) are true; and
>
> (ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (*l*), (m), or (n); and
>
> (c) termination of parental rights is in the child's best interests.
>
> (2) Time for Hearing on Petition. The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

MCR 3.977(F) does not contain a specific mandate that a trial court shall conduct a hearing on a supplemental petition. But it clearly contemplates a hearing: a trial court may not terminate parental rights on the supplemental petition unless, "[a]t the hearing," it finds that at least one or more of the facts alleged in the petition are true and come within certain statutory grounds for termination, MCR 3.977(F)(1)(b), and "[t]he hearing on a supplemental petition for termination of parental rights under this subrule" shall generally be held within 42 days after the supplemental petition is filed, MCR 3.977(F)(2). However, the first sentence of MCR 3.977(F) provides that "[t]he court *may* take action on a supplemental petition that seeks to terminate the parental rights . . . ." (Emphasis added.) The use of the word "may" denotes discretion. *Ionia Ed Ass'n v Ionia Pub Sch*, 311 Mich App 479, 493 n 6; 875 NW2d 756 (2015). Accordingly, the trial court had discretion whether to hold a hearing on the request in the supplemental petition to terminate parental rights.

A trial court's discretionary decisions are reviewed for an abuse of discretion. *Phillips v Deihm*, 213 Mich App 389, 394; 541 NW2d 566 (1995). The supplemental petition alleged that on December 22, 2015, EAS screamed obscenities after being woken up when the caseworker arrived; that on January 8, 2016, the children's trauma therapist reported that AJS's hair was noticeably dirty and the top of her head was covered with dandruff, that EAS did not get new glasses until November 12, 2015, that respondents-appellees allowed EAS's and AJS's medications to run out, and that respondent-appellee mother was not actively participating with the Family Reunification Program (FRP). If these had been the only allegations in the supplemental petition, we do not believe that the trial court would have abused its discretion in choosing not to take action on the request in the supplemental petition to terminate parental rights. A statutory review hearing was scheduled to be held within two months on March 2, 2016, and the trial court had just heard at the December 9, 2015 statutory review hearing that respondent-appellee father was very engaged with the FRP and received evidence that EAS was wearing glasses, that respondents-appellees had gotten medications for EAS and AJS and that the two children were taking the medications as prescribed, and that respondents-appellees were maintaining a clean home. However, the petition also alleged that EAS had intentionally cut himself, including on the wrist, with the metal edge of a ruler. According to the supplemental petition, the only action that respondents-appellees took in response was that respondent-appellee father told EAS that such conduct was not okay. Cutting one's wrist is a well-known and common method of suicide. And at the termination hearing, there had been evidence that EAS, upon being taken to the emergency room after choking himself, said that he would hurt himself, either by choking himself or stabbing himself in the chest with a butter knife, if he had to live with respondent-appellee mother. Knowing of EAS's previous threats of self-harm, respondents-appellees' failure to seek any kind of help for EAS after he engaged in self-harm indicates that respondents-appellees did not or may not have an adequate understanding of EAS's needs and that they may not be able to provide him proper care or custody or a home where he will not be harmed. Given the possible severe consequences of self-harm behavior, we conclude that the trial court's decision not to hold a hearing on the request for termination of parental rights in the

supplemental petition fell outside the range of reasonable and principled outcomes. *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 629; 853 NW2d 459 (2014).[3]

Because the trial court erred in not holding hearings on the requests in the supplemental petition to remove the minor children and terminate parental rights, we reverse the January 11, 2016 order that did not authorize the supplemental petition, vacate the March 3, 2016 order that terminated the trial court's jurisdiction over the children, and remand for hearings on the supplemental petition. Given our conclusion, we need not address the minor children's argument that the trial court erred when it terminated its jurisdiction over them.

Affirmed in part, reversed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Jane E. Markey

[3] We find no merit to the minor children's argument that the trial court erred when it did not hear any testimony at the March 2, 2016 statutory review hearing. Although the trial court did not hear any testimony, it received an "[a]ddendum report" prepared by Bethany Christian Services. Based on the addendum report, the trial court, which had presided over every hearing since the petition was filed in September 2013, was appraised of the most recent circumstances. The trial court was not uninformed about the circumstances that prompted it to take jurisdiction over the minor children and all subsequent circumstances. *In re LaFlure*, 48 Mich App 377, 390-391; 210 NW2d 482 (1973).