STATE OF MICHIGAN

COURT OF APPEALS

In re STEPHENSON, Minors.

UNPUBLISHED
November 22, 2016

No. 332995
Calhoun Circuit Court
Family Division
LC No. 2012-000561-NA

Before: OWENS, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to his minor children, SDS, CHS, JS, and JLS.[1] We affirm.

Respondent first argues that there was not clear and convincing evidence that statutory grounds existed to terminate his parental rights. This Court reviews for clear error a trial court's finding that a statutory ground for termination has been established. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "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).

Parents have a due process interest in the "companionship, care, custody, and management of their children." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). "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 at 80. Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks and citation omitted; alteration in original). "Only one statutory ground for termination need be established." *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012).

[1] The parental rights of the children's mother were also terminated; however, she did not participate in the trial court proceedings and is not a party to this appeal.

The trial court found that statutory grounds existed to terminate respondent's parental rights under MCL 712A.19b(3)(b)(*i*), (g), and (j). MCL 712A.19b(3)(b)(*i*) provides that the court may terminate a parent's parental rights to a child if

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> > (i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

In this case, there was significant testimony that respondent had caused the physical injuries of CHS and SDS. CHS testified that respondent struck him multiple times with a closed fist on two separate occasions around Thanksgiving in 2014, leaving CHS with a swollen face, a knot on his head, and a concussion. Both older children also testified that respondent slapped SDS around the same time period, knocking her down and, according to SDS, leaving her with a bloody nose. Respondent has been subject to two previous Children's Protective Services (CPS) proceedings stemming from physical abuse he perpetrated on CHS. Moreover, there was evidence that when CPS employees contacted respondent, he struck all four children with a belt until they admitted who had informed the agency of their household matters. This evidence, taken together, indicates that respondent continually abused the children and was not deterred by the state action taken against him. Accordingly, it is reasonably likely that, if the children were returned to respondent's home, he would continue to initiate his abusive disciplinary tactics and the children would suffer similar, if not worse, physical injuries.

MCL 712A.19b(3)(g) provides that termination is appropriate if "[t]he 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] parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child." *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

In addition to the physical abuse outlined above as evidence that respondent has failed to provide proper care or custody for his children and will not be able to do so in a reasonable time, the trial court heavily relied on respondent's failure to take responsibility for the abuse. He never acknowledged that he hurt his children, and he denied that his discipline measures were excessive. Without an ability to recognize his actions as abuse, show remorse, and rectify the situation, there was no reasonable expectation that respondent would be able to provide his children with proper care and custody within a reasonable time.

Moreover, respondent did not comply with the parent-agency agreement. Respondent failed to complete substance abuse screens as ordered. And he never obtained housing or employment. All were requirements. Although respondent provided excuses for failing to comply with these conditions, there is no record evidence that he made any significant effort to satisfy petitioner's concerns. For example, although there was evidence that respondent held a medical marijuana card, he did not call in for his required substance abuse screens, which tested for other substances as well. And respondent never obtained housing because, in his opinion, it

made no sense to get housing before he knew whether or how many of his children would be returned. Notably, the trial court found this reasonable and did not consider his failure to get housing. As for employment, respondent was injured in October 2015, but he was later denied social security benefits; there is no evidence that respondent subsequently provided proof of employment. Respondent's failure to comply, or even attempt to comply, with the parent-agency agreement evidences an inability to provide proper care and custody within a reasonable time.

MCL 712A.19b(3)(j) provides for termination 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." Again, respondent struck CHS multiple times with a closed fist on two separate occasions, causing a concussion; struck SDS hard enough to knock her down and cause a bloody nose; has been the subject of three CPS investigations; and "whoops" all four children when he suspects that one of them has been talking to authorities. Additionally, he did not acknowledge that he hurt his children and disagreed that his disciplinary tactics were excessive. Based on this conduct, it was reasonably likely that respondent would continue to punish his children with physically abusive measures if they were returned to him. All three statutory bases were supported by clear and convincing evidence.

Respondent next argues that the trial court erred in finding that termination was in the children's best interests. This Court also reviews for clear error a trial court's finding that termination is in the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). After the trial court finds that at least one statutory ground for terminating parental rights has been proven, the court must decide whether terminating parental rights is in the child's best interests. MCL 712A.19b; *In re Olive/Metts*, 297 Mich App at 40. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The court must make this best-interest finding based on a preponderance of the evidence. *In re Moss*, 301 Mich App at 83.

When deciding whether terminating parental rights is in a child's best interests, the trial court should weigh all of the available evidence. *In re White*, 303 Mich App at 713. The court may consider evidence on "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." *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). The court "may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714.

In this case, respondent had a history of violence with his children and caused physical injury, did not comply with his case service plan, and had a poor prognosis according to a psychologist who counseled the family. Additionally, SDS, who was 17 years old, was working toward independent living, and neither she nor CHS wanted to return to respondent's care. Although there was a bond between the younger two children and respondent, there was no clear error in the determination that it was not in their best interests to return to a home where they were likely to suffer physical injury whenever they perceptively disobeyed household rules. The same is true with the older children and is amplified by the fact that they no longer wish to

tolerate respondent's abusive behavior. Given the record evidence, there was a preponderance of the evidence to support the determination that terminating respondent's parental rights was in the children's best interests.

Respondent also argues that the trial court improperly denied him his right to a jury trial after he demanded one at the adjudication phase of the proceedings. A jury trial was scheduled for July 22, 2015. Respondent, however, did not appear on that date. After the court noted that respondent was properly served with notice of the trial[2], the prosecutor requested that the court find that respondent had waived his right to a jury trial by failing to appear. Respondent's trial counsel noted that the court rules provide respondent with the right to a jury trial should he request one, and that respondent had previously appeared and made clear his desire for a jury trial. The trial court stated that there was no particular court rule or statute that outlined the necessary procedure when a respondent demands a jury trial but then fails to appear. The court concluded that the demand for a jury trial is "personal to that individual," that respondent had indicated, by not appearing in the matter, that he did not "intend to avail himself of the jury trial," and that respondent had waived his right to a jury trial. It proceeded to conduct a bench trial.

While we question the propriety of the trial court's ruling, as a jury trial could have been conducted in respondent's absence, we note that respondent is challenging the adjudication phase of the proceedings. Essentially, he is arguing that the court did not properly exercise jurisdiction over the children because it did not follow the correct procedure. But "[o]rdinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights."[3] *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). An appeal from an initial order of disposition, however, is permissible. As we have previously explained, an initial order of disposition "may be an Order of Disposition (if neither parent's rights are terminated), an Order Terminating Parental Rights (if all parental rights are terminated), or both (if one parent's rights are terminated and the other parent's rights are not terminated . . .)." *Id*. at 668-669 n 12.

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[2] Pursuant to MCR 3.972(B)(1), before commencing a trial, the court must determine that the proper parties are present. "The respondent has the right to be present, but the court may proceed in the absence of respondent provided notice has been served on the respondent." *Id*.

[3] One exception to the general rule prohibiting a respondent from collaterally attacking a trial court adjudication on direct appeal from a termination order is when a respondent raises a challenge to trial court's use of the one-parent doctrine, wherein the court fails to adjudicate the parent over whom the court asserts its dispositional authority. *In re Sanders*, 495 Mich 394; 852 NE 2d 524 (2014); *In re Kanjia*, 308 Mich App 660, 670; 866 NW2d 862 (2014). Such an appeal is not considered a collateral attack on jurisdiction because it entails an "unadjudicated" parent. *Kanjia*, 308 Mich App at 670. "[T]he Court in *Sanders* recognized the inherent problem in requiring an unadjudicated parent to directly appeal an order of adjudication: 'as a nonparty to those proceedings, it is difficult to see how an unadjudicated parent could have standing to appeal any unfavorable ruling.' " *Id*., citing *Sanders*, 495 Mich at 419. In the instant case, respondent had both standing and counsel, and he could have chosen to timely appeal the bench-trial adjudication had he wished to do so.

Although some courts issue an Order of Adjudication "following the plea or trial at which jurisdiction was found," others issue "only an Order of Disposition that includes the statement that '[a]n adjudication was held and the child(ren) was/were found to come within the jurisdiction of the court.' " *Id*. at 669 n 13. An order of disposition is the first order appealable by right. *Id*.

In the present case, the initial order of disposition did not additionally order termination, but it did include the statement of adjudication referenced above, and respondent should have raised the instant issue in a timely, direct appeal of that order. By failing to appeal the initial order of disposition until nearly nine months later, after more than one dispositional review hearing and the termination proceeding subsequent to which the trial court issued an order terminating his parental rights, respondent lost his right to challenge the trial court's exercise of jurisdiction. See *Id*. at 668-669.

Affirmed.

/s/ Donald S. Owens
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering