STATE OF MICHIGAN

COURT OF APPEALS

In re BAKER, Minors.

UNPUBLISHED
October 17, 2017

Nos. 336757; 336760
St. Clair Circuit Court
Family Division
LC No. 14-000345-NA

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

PER CURIAM.

In these consolidated cases, respondents appeal as of right the trial court's order terminating their parental rights to their minor children under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). Because the trial court made no errors warranting reversal, we affirm.

I. BASIC FACTS

The children were removed from respondents' care in December 2014 when it was discovered that methamphetamine was being made in respondent-mother's house. MAB, then five years old, tested positive for methamphetamines at the time he was removed. In January 2011, respondent-mother had pleaded guilty to delivery or manufacture of a controlled substance less than 50 grams. Respondent-father also had a criminal history that included multiple convictions for drug- and weapons-related offenses. Respondent-father reported that he was aware of respondent-mother's substance abuse history. In June 2016, while the family was working toward reunification, there was a domestic violence incident between respondents, and respondent-mother sustained multiple injuries requiring medical care. Respondents failed to address the domestic violence and stopped complying with their treatment plan. They both tested positive for methamphetamines in October 2016. In addition, there were concerns that respondents never ensured the methamphetamine levels in the family house had been remediated to safe levels for the children. On November 30, 2016, petitioner filed a supplemental petition seeking termination of respondents parental rights. Following a termination hearing, the trial court terminated respondents' parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j).

II. STATUTORY GROUNDS

A. STANDARD OF REVIEW

Respondents argue that there was not clear and convincing evidence to terminate their parental rights under MCL 712.19b(3)(c)(*i*), (c)(*ii*), (g), or (j). We review for clear error a trial

court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "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." *Id.* at 296-297.

B. ANALYSIS

1. RESPONDENT-MOTHER

Termination of respondent-mother's parental rights was proper under MCL 712A.19b(3)(c)(*i*), which provides that termination is proper 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 . . . [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." Here, it is undisputed that more than 182 days have elapsed since the initial dispositional order was issued. Further, respondent-mother's substance abuse was the primary condition leading to adjudication and, as of the termination hearing, she had not rectified the issue. The record reflects that she missed 13 out of 15 drug tests and that she tested positive for amphetamines and methamphetamines on two occasions. Respondent-mother testified that after the children were removed she was clean for about twelve months before relapsing. She stated that during her relapse she used methamphetamine daily for about three months before she stopped using again. She testified that she "[a]bsolutely" had a substance abuse problem and noted that she would always have a substance abuse problem. She added that her history of methamphetamine use was "lengthy." Despite acknowledging the problem, she testified that she could stop using on her own and did not need to attend rehab or counseling. Respondent-mother explained that, having already went through a number of programs for substance abuse, she was aware of the resources available, and did not need to repeat the programs. Based on this record, respondent-mother had an ongoing problem with substance abuse that had not been rectified. The trial court did not clearly err by finding that termination was proper under MCL 712A.19b(3)(c)(*i*) with regard to respondent-mother.[1]

2. RESPONDENT-FATHER

Termination of respondent-father's parental rights was proper under MCL 712A.19b(3)(c)(*i*), (g), and (j)[2] because he had a long history of substance abuse that was not

[1] Because only one ground for termination is necessary, we decline to address the court's decision to terminate respondent-mother's parental rights under MCL 712A.19b(3)(c)(*ii*), (g), and (j). See *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012) ("Only one statutory ground for termination need be established.").

[2] MCL 712A.19b(3)(g), and (j) provide:

resolved by the time of the termination hearing, and this drug use interfered with his ability to provide a safe and proper home environment. Contrary to respondent-father's claim, the trial court did not disregard his rapid compliance early in the case when making its termination decision. Respondent-father's multiple marijuana positive drug screens and his use of methamphetamines at the end of October 2016 offset his early compliance with the treatment plan. Respondent-father missed more drug screens than he submitted and his positive drug screens demonstrated that he had not adequately addressed his substance issues. Respondent-father's positive drug screens and multiple missed drug screens clearly showed that he was not compliant with his treatment plan. A parent's failure to comply with the treatment plan is evidence of failure to provide proper care and custody of the child. *In re JK,* 468 Mich 202, 214; 661 NW2d 216 (2003). Moreover, even if, as respondent-father argues, the court were to have given more weight to his actions earlier in the case when he was more compliant, the court needed to consider the case in its entirety. Furthermore, mere compliance with a parent-agency agreement is insufficient when mere compliance fails to rectify the conditions that led to adjudication. See *In re Jackson*, 199 Mich App 22, 27; 501 NW2d 182 (1993). Here, given his positive drug screens, there was no indication respondent-father sufficiently complied with services to rectify conditions that led to adjudication.

In addition to the unresolved substance abuse issues, respondent-father never demonstrated that he had safe housing. The house from which the children were removed had methamphetamine contamination levels that the court did not consider safe for the children. Respondents never did the final contamination assessment or cleanup required by the court.

Respondent-father argues that had the court not held him to a higher standard than necessary regarding the methamphetamine levels in his house, the children would have been returned home earlier and he would have been allowed more time to address his issues. This claim is unpersuasive. MCR 3.973(F)(2) states that the court "may order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child." Here the court reasonably deemed it necessary for respondents to achieve lower standards than required by the state of Michigan because the 0.43 methamphetamine levels in the second floor of the house, where the children's bedrooms were located, was too close to the state's 0.5 methamphetamine cutoff requirement. Because one of the children tested positive for methamphetamines due to exposure in the home, the court indicated it did not want to take a chance of endangering the children further.

> (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.
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> * * *
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> (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.

We find unpersuasive respondent-father's claim that the standard the court held him to regarding the methamphetamine levels was too high, and that it unfairly delayed the children's return and closing of the case. Any subsequent incident involving domestic violence would not have given respondent-father significantly more time to address issues or delayed termination of his parental rights. Respondent-father's assertion that he would have been given more time had the court not made an issue of lowering the methamphetamine levels disregards the children's best interests. Any additional time given respondent-father would only have prolonged the children's time in protective care and lack of permanence. Therefore, given the lack of suitable housing, unresolved drug issues, and criminal activity, termination of parental rights was proper under MCL 712A.19b(3)(c)(*i*), (g) and (j).

The trial court also properly terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*ii*).[3] By the time of the permanent custody hearing, in addition to having drug issues, the record shows that respondent-father had engaged in domestic violence with respondent-mother.

The trial court relied on this new or other condition, which became apparent after the adjudication, when it terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*ii*). Respondent-father argues that the trial court erred because, when making its findings based on new condition, it did not comply with the Michigan Rules of Evidence. He asserts that the court erroneously relied on hearsay statements the oldest child, KB, made to her therapist and a caseworker about domestic violence. Respondent-father correctly states that only legally admissible evidence may be used to establish grounds for termination that are different from those allegations that allowed the court to take jurisdiction over the child. See MCR 3.977(F)(1); *In re Snyder*, 223 Mich App 85, 90; 566 NW2d 18 (1997).

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[3] Termination is proper under MCL 712A.19b(3)(c)(*ii*) if:

> (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:
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> * * *
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> (*ii*) Other conditions exist that cause the child to come within the court's 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.

However, any improper admission of hearsay was harmless error because the key facts underlying the allegations of domestic violence were established by admissible evidence. Both respondents testified to a domestic violence incident where respondent-father physically "tussled" with respondent-mother. And they both acknowledged that KB, their daughter, had to intercede in the fight. As a result of the incident, respondent-mother went to the hospital. A caseworker testified that photographs of respondent-mother at the time showed that she had bruises and other marks. Further, respondent-mother acknowledged that she had a leg brace when she left the hospital. Respondent-mother also testified that she reported the incident to the police. The record reflects that no criminal charges were brought against respondent-father, and that, respondent-mother felt that reporting the abuse was pointless because no one was going to do anything about it. Respondent-mother was encouraged to obtain a personal protective order (PPO) against respondent-father. Her caseworker testified that initially respondent-mother seemed supportive of the idea, but that as the case progressed she minimized the domestic violence and never obtained a PPO. Therefore, on this record, even without the children's inadmissible hearsay statements, there is substantial evidence of a domestic violence issue between respondent-mother and respondent-father. Although respondent-father was offered services to address the issue, he did not do so, leaving the domestic violence issue unrectified at the time of termination. Therefore, on this record, the trial court did not clearly err by terminating respondent-father's parental rights under MCL 712A.19b(3)(c)(*ii*).

III. LEGAL REPRESENTATION

A. STANDARD OF REVIEW

Respondent-father argues that outcome-determinative error occurred because he was not represented by his court appointed lawyer at the permanency planning hearing on November 16, 2015. Because respondent-father did not object to lack of representation in the trial court the issue was not preserved. Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Under the plain error rule, a respondent must show that an obvious error occurred and that the error affected the outcome of the lower court proceedings. *Id*. at 763.

B. ANALYSIS

It is undisputed that respondent-father's lawyer was not present at the November 16, 2015 permanency planning hearing. At the hearing, the caseworker noted that respondents had been successfully complying with their court orders and that they had a company "clean-test their home for Methamphetamines." The caseworker noted that the levels were below the legal limit, but that the trial judge indicated that he wanted to see the levels for the second floor a little bit lower. The caseworker asserted that respondents were, therefore, going to need to have the home cleaned again. Thereafter, respondent-father expressed that he was confused about what level they needed in their home, and he noted that the levels were below the required state level. The referee stated that, based on the order, if the levels came down lower after a second cleaning that would be assumptively sufficient.

Respondent-father appears to contend that, had his lawyer been present, his children would have been returned to his home before the domestic violence incident occurred, so a new case would have had to be started and he would have had more time to address the domestic violence. It is not clear, however, that a lawyer would have addressed the November 16, 2015 hearing any differently than it was addressed or that a different outcome would have arisen if, in fact, the issue had been addressed by a lawyer at the hearing. Again, MCR 3.973(F)(1) allows a trial court to "enter such orders as it considers necessary in the interest of the child," so there was nothing inherently improper with the court's order that the methamphetamine levels be lower than the required state levels.

Moreover, although a respondent has the right to be appointed a lawyer in parental rights termination proceedings, MCL 712A.17c(5); MCR 3.915(B)(1)(b), the right to a lawyer in termination of parental rights cases requires affirmative action on the part of the parent to trigger and continue the appointment of a lawyer. *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991). There was no indication respondent-father ever requested that his lawyer appear at all hearings in this case. Further, although there is a constitutional right to a lawyer in parental rights termination cases, see *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000), the lawyer need not be appointed sua sponte for all hearings where termination of parental rights may become a possibility. *In re Hall*, 188 Mich App at 222.

Furthermore, a hearing held without a lawyer can be harmless error where testimony was later taken at the termination hearing where the lawyer was present. *Id*. at 223. In the present case, respondent-father was properly represented during many of the hearings, including the termination hearing, and had the opportunity to present evidence and argue his position before the court. Accordingly, although the presence of a lawyer at every hearing would have better served respondent-father's need for representation and more fully protected his constitutional rights, the process afforded him minimally satisfied the requirements of the United States Constitution and any error caused by the absence of respondent-father's lawyer at the November 16, 2015 hearing was harmless.

III. BEST INTERESTS

Termination of respondents' parental rights was in the best interests of the children. "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss Minors*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "In deciding whether termination is in the child's best interests, the court may consider 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 Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The trial court may also consider respondents' continued involvement in domestic violence. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

The record reflects that respondents and the children had a strong bond. However, the older children's therapist testified that both KB and AB were diagnosed with adjustment disorder with anxiety based on their fears relating to the uncertainty of their future. Based on her discussions with KB and AB, the therapist opined that staying in their dysfunctional family caused permanent issues in their lives, but that being placed in a functional home could help

them. The therapist also testified that one of the children had expressed self-harm ideation in relation to the situation with respondents. There was also testimony about domestic violence in the home, and respondents both acknowledged that during one incident KB had to intervene while they were "tussling." That particular domestic violence incident was severe enough that respondent-mother went to the hospital for treatment. The children needed permanency and stability but, after almost two years in care, their needs were still not met. Instead, suitable housing remained a concern, respondents had ongoing substance abuse issues, and respondents had unaddressed domestic violence issues.

On appeal, respondent-mother contends the children's therapist testified that if respondents' parental rights were terminated, then the children would need six months to a year of additional therapy. She correctly points out that the therapist did not testify that the children would need additional therapy if respondents' parental rights were not terminated. However, based on the record before this Court, it is clear that the therapist's testimony was not meant to indicate that termination would require therapy whereas preserving the family unit would mean that therapy was unnecessary. Instead, the six months to one year of therapy post-termination was merely a measure of how the children could be expected to improve without respondents in their lives. Respondent-father also contends on appeal that the trial court wholly failed to address the best interests of the children when it terminated his parental rights. The record, however, reflects that the court considered various best interests factors, including the children's placement with a relative, before it ordered respondents' parental rights terminated. Consequently, the trial court did not clearly err by finding termination of respondents' parental rights to be in the children's best interests.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Kelly