STATE OF MICHIGAN

COURT OF APPEALS

In re E.A. COMBS, Minor.

UNPUBLISHED
November 16, 2017

No. 338646
Branch Circuit Court
Family Division
LC No. 15-005370-NA

Before: HOEKSTRA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to the minor child, EC, under MCL 712A.19b(3)(g) and (h). Because the trial court did not err by terminating respondent's parental rights, we affirm.

Respondent and EC's mother were incarcerated when EC was born in November of 2015. Mother placed EC in the care of her aunt. However, the Department of Health and Human Services (DHHS) removed EC from the aunt's care and placed EC in foster care because the aunt and her husband were not an appropriate placement for EC. Respondent remained incarcerated throughout the termination proceedings. He has an earliest release date of May 3, 2023. The trial court terminated both respondent's and mother's parental rights in May of 2017. Respondent now appeals as of right.

On appeal, respondent contends that his procedural due process rights were violated because the trial court terminated his parental rights without first adjudicating him as an unfit parent. Specifically, respondent argues that he did not receive a proper adjudication because, contrary to MCR 3.961, there was no written petition containing allegations against respondent and yet the trial court elicited a plea from respondent.

"Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). However, unpreserved issues are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id*. at 9.

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich at 404. "Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase."

Id. "Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being." *Id.* In *Sanders*, the Michigan Supreme Court held that the one-parent doctrine[1] was unconstitutional, concluding that "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Id.* at 422.

"Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights," provided that "termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order." *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). In other words, typically, "[m]atters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision." *In re Kanjia*, 308 Mich App 660, 667; 866 NW2d 862 (2014) (citation omitted). However, "the general rule prohibiting a respondent from collaterally attacking a trial court adjudication on direct appeal from a termination order does not apply to cases in which a respondent raises a *Sanders* challenge to the adjudication." *Id.* at 670-671. That is, if the trial court purports to issue dispositional orders without first adjudicating a parent, a challenge to the court's failure to adjudicate the parent is not regarded as an impermissible collateral attack on the exercise of jurisdiction. *In re Wangler*, 498 Mich 911; 870 NW2d 923 (2015).

In this case, respondent's argument does not involve a *Sanders* situation in which the trial court failed to adjudicate respondent. See *In re Kanjia*, 308 Mich App at 670-671. On January 21, 2016, the trial court held an adjudication hearing. Respondent attended the hearing via a "polycom" system from prison, and he was represented by counsel. The trial court advised respondent of his rights and confirmed that respondent understood those rights. Respondent admitted that he was unable to provide proper care for EC because he was incarcerated. The trial court accepted respondent's plea. Following the hearing, the trial court entered an Order of Adjudication, which identified respondent as a "respondent" and specified that his plea was "knowingly, understanding, and voluntarily made." The order showed that the trial court found, by a preponderance of the evidence, that there were statutory grounds to exercise jurisdiction for: (1) "failure to provide, when able to do so, support, education, medical, surgical, and other necessary care for health or morals;" and (2) "an unfit home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent." In short, respondent was adjudicated as an unfit parent, and his appeal does not involve a *Sanders* challenge.

Instead, respondent contends that there were irregularities in the adjudication proceedings. Respondent notes that the original petition contained allegations relating to EC's mother, but no allegations relating to respondent. See MCR 3.961(A). After EC's mother identified respondent as the child's father and a DNA test confirmed his paternity, respondent's adjudication was conducted. However, the lower court record does not contain an amended or supplemental petition adding respondent as "an additional respondent" and setting forth allegations against respondent. See MCR 3.961(C). Respondent contends that such a petition

[1] The one-parent doctrine allowed a trial court to enter dispositional orders affecting both parents even if only one parent had been adjudicated as unfit. *In re Sanders*, 495 Mich at 407.

was never filed and that, therefore, the DHHS and the trial court failed to comply with MCR 3.961. However, given that respondent received an adjudication, the time for respondent to raise this issue was on direct appeal from the trial court's jurisdictional decision following the adjudication on January 21, 2016. See *In re Kanjia*, 308 Mich App at 667, 670. At this point, respondent is appealing an order terminating his parental rights following the filing of a supplemental petition for termination; and, in relation to this appeal, he cannot collaterally attack the trial court's exercise of jurisdiction. *In re SLH*, 277 Mich App at 668. Thus, respondent is not entitled to relief on appeal based on his arguments pertaining to his adjudication.

Next, relying on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), respondent argues that the trial court erred in finding statutory grounds for termination under MCL 712A.19b(3)(g) and (g) because he provided possible relative placement options for EC while he was incarcerated.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). This Court reviews "the trial court's findings of fact under the clearly erroneous standard." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). See also MCR 3.977(K). "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).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g) and (h). In pertinent part, those provisions provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
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> (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.
>
> (h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

Under these provisions, the fact that a parent is currently incarcerated is not, on its own, grounds for termination. *In re Mason*, 486 Mich at 160. Although a parent is in prison, he or she may provide "proper care and custody" by placing the child with a relative. *Id.* at 161 n 11. Additionally, both MCL 712A.19b(3)(g) and (g) contain a "forward-looking" condition, which "asks whether a parent 'will be able to' provide proper care and custody within a reasonable

time." *In re Mason*, 486 Mich at 161, 164-165. Consequently, "a parent's past failure to provide care because of his incarceration also is not decisive." *Id.* at 161.

In this case, the trial court found that termination was proper MCL 712A.19b(3)(g) and (h) because respondent would be incarcerated until at least 2023 and he would be unable to provide for EC for more than two years. In addition, the trial court determined that there was no expectation that he would be able to provide care for EC within a reasonable time.

The trial court's findings are not clearly erroneous. At the time of termination, EC was approximately 18 months old. Respondent was incarcerated when she was born, and his earliest release date was in May 2023. Although respondent knew that mother was pregnant with EC before his incarceration, he did not make any arrangements for EC's care and EC was placed in foster care. Respondent also did not provide any support before or during his incarceration. There was also no evidence that respondent had any plans for how he would care for EC after his release from prison. Thus, the evidence supports the conclusions that respondent will be unable to provide EC with a normal home for much longer than two years that he has not provided proper care and custody, and that there is no reasonable expectation that he will be able to provide proper care and custody within a reasonable time considering EC's age.

In contrast, respondent contends that although he cannot personally provide for EC, he did suggest his mother as a possible placement, but the DHHS failed to investigate her. Absent an investigation into his mother as a possible placement, respondent contends that it cannot be concluded that he could not provide proper care and custody for EC within a reasonable time. Contrary to respondent's argument, the record shows that the DHHS considered respondent's mother as a possible placement option, but, when asked about placement, respondent's mother provided the information and telephone numbers for her two daughters as placement options. The caseworker investigated one daughter but discovered that she had CPS history and was not appropriate for placement. The other daughter never responded. The caseworker testified that she was under the impression that respondent's mother was not interested in placement. The caseworker also testified that respondent's mother, who lived in Indiana, never completed the paperwork for an interstate compact. Even if respondent's mother were interested in caring for EC, the caseworker expressed concerns about respondent's mother as a possible placement because EC had been placed in a foster-care home with her half siblings for over a year. In short, the DHHS considered his mother, but a significant amount of time passed without her taking necessary steps to become a placement for EC. Thus, the fact remains that respondent was incarcerated and that he had made no arrangements for EC's care.

Overall, EC will be deprived of a normal home for a period exceeding 2 years as a result of respondent's incarceration, respondent did not provide for EC's proper care and custody, and there was no reasonable expectation that he would be able to do so within a reasonable time considering her age. *In re Mason*, 486 Mich at 160-161. Accordingly, the trial court did not clearly err in finding that there were statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (h). *In re VanDalen*, 293 Mich App at 139.

Finally, respondent asserts that the DHHS failed to make reasonable effort to reunify him with EC. Specifically, respondent asserts that the DHHS did not reach out to the prison social

worker about services and that the DHHS failed to investigate his mother as a possible placement.

Whether reasonable efforts for reunification were made is reviewed for clear error. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). "Reasonable efforts to reunify the child and family must be made in *all* cases except those involving aggravated circumstances not present in this case." *In re Mason*, 486 Mich at 152 (citation and quotation marks omitted). The state is not relieved of its duties to engage a parent merely because the parent is incarcerated. *Id.* For example, an incarcerated parent should receive a case service plan, efforts should be made to facilitate services in prison, and an incarcerated parent must be given the opportunity to participate in proceedings by telephone. *Id.* at 152-153, 156-157; MCR 2.004.

In this case, respondent received a case service plan, the DHHS communicated with respondent via mail, he attended family team meetings via telephone, he attended court proceedings via telephone, and he participated in the services available to him in prison, including a Better Dads class, Back to Basics program, Bible Study, a Purpose Driven Life, and an Inside Out Dads class. While respondent contends that there is no specific evidence that the DHHS spoke with the prison social worker, we fail to see the significance of this point given that respondent received a case service plan and the facts show that efforts were being made to facilitate services for respondent in prison. To the extent respondent argues that the DHHS failed to investigate his mother as a possible placement, as discussed, the record shows that she was considered. On this record, the trial court did not clearly err in finding that the DHHS made reasonable efforts toward reunification. *In re Fried*, 266 Mich App at 542-543.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro