STATE OF MICHIGAN

COURT OF APPEALS

In re C. R. DIGIACOMO, Minor.

UNPUBLISHED
October 25, 2018

No. 343147
Macomb Circuit Court
Family Division
LC No. 2016-000149-NA

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to parent). We affirm.

The child lived with his mother in his maternal grandfather's home until he was four months old. The child was removed from the home in June 2016 due to concerns of neglect and domestic violence in the home. The child was placed with respondent's mother—the child's paternal grandmother—where he remained throughout these proceedings.

Respondent has a history of mental illness. He was diagnosed with bipolar disorder and depression as a teenager, for which he receives monthly Social Security disability benefits. His employment history has been limited to a job delivering newspapers—which he held for approximately a year and a half sometime around 2014—and a job at a carwash for a short period in 2014 or 2015. Respondent had never lived outside his parents' home before these proceedings, but he was not permitted to stay there after the child was placed with his mother. Respondent thereafter stayed with his grandmother and a friend.

I. PLEA PROCEEDINGS

Respondent first argues that the trial court improperly asserted jurisdiction over the child based on his no-contest plea because the trial court failed to fully advise him of his rights as required by MCR 3.971(B). Because respondent did not challenge the validity of his plea at the plea hearing, in a motion to withdraw his plea, or at any other stage in the trial court, this issue is unpreserved. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Generally, we review unpreserved claims of error for plain error affecting respondent's substantial rights. *Id.* In this case, however, respondent is prohibited from collaterally attacking the trial court's exercise of jurisdiction after his parental rights were terminated.

It is well established that a respondent in a child protective proceeding cannot collaterally attack the trial court's exercise of jurisdiction in an appeal from the order terminating the respondent's parental rights. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993); *In re Collier*, 314 Mich App 558, 574; 887 NW2d 431 (2016). In *In re Bechard*, 211 Mich App 155; 535 NW2d 220 (1995), this Court explained that when the trial court issues a written order taking jurisdiction, the respondent must appeal that written order; he cannot later challenge the court's exercise of jurisdiction collaterally in an appeal of a subsequent order terminating his parental rights. *Id.* at 159-160, citing *In re Hatcher*, 443 Mich at 444. The trial court asserted jurisdiction in a written order dated August 24, 2016, and it issued its initial dispositional order on the same day. No claim of appeal was filed from these orders as permitted by MCR 3.993(A)(1). Respondent is therefore barred from now collaterally challenging the trial court's exercise of jurisdiction in this appeal.[1]

II. INDIAN CHILD WELFARE ACT

Respondent next argues that the trial court did not comply with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., because the court failed to inquire whether the child's mother was of Native American heritage. The mother's parental rights also were terminated, but she has not appealed the order. Neither respondent nor the child's mother raised this issue in the trial court, leaving it unpreserved. *In re Utrera*, 281 Mich App at 8. Generally, this Court reviews de novo issues involving the application and interpretation of the ICWA. *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009). But because this issue is unpreserved, it is reviewed for plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App at 8-9. An error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. *Id.* at 9.

The "ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children." *In re Morris*, 491 Mich 81, 99; 815 NW2d 62 (2012). Pursuant to 25 USC 1914, "the Indian child, a parent, an Indian custodian of the child, or the child's tribe may petition a court to invalidate foster care placements and terminations of parental rights if the state court violated *any* provision included in 25 USC 1911, 1912, or 1913." *In re Morris*, 491 Mich at 101. The trial court must inquire at the preliminary hearing "if the child or either parent is a member of an Indian tribe." MCR 3.965(B)(2).

Petitioner concedes that the trial court failed to make the requisite inquiry of the child's mother. We agree with petitioner, however, that this error did not affect respondent's substantial rights because there is evidence to establish that the child's mother was not of Native American

[1] Even were we to consider respondent's challenge, we would find it meritless. Respondent complains that the trial court failed to advise him that his plea may be used as evidence in a later termination hearing. See MCR 3.971(B)(4). Based on this Court's review of the record, it is clear that the trial court did not rely on respondent's no-contest plea when terminating respondent's rights, but rather on other evidence submitted during the proceedings that established the allegations in the petition. Respondent thus fails to show that his substantial rights were affected by the trial court's omission of the advice concerning the possible consequences of his plea.

heritage. MCL 712B.9(3) requires petitioner to investigate whether a child is an Indian child. The Child Protective Services investigation reports dated June 11, 2016, and May 6, 2017, show that the child's mother denied any Native American heritage. Respondent does not offer any contrary evidence. Because there is no evidence that the child's mother actually has Native American heritage, and indeed, there is evidence that she expressly denied any Native American heritage, the trial court's error did not affect respondent's substantial rights. *In re Utrera*, 281 Mich App at 8-9. Respondent is not entitled to relief on the basis of this issue.

III. STATUTORY GROUNDS

Respondent next argues that the trial court erred in finding that the evidence supported the statutory grounds for termination. We disagree.

In an action to terminate parental rights, the petitioner must prove by clear and convincing evidence that at least one statutory ground for termination in MCL 712A.19b(3) exists. MCR 3.977(A)(3) and (H)(3); *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). The trial court's decision is reviewed for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich at 356. A finding is clearly erroneous when the reviewing court is left with the firm and definite conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). "[T]his 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).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j), which provide grounds for termination under the following circumstances:

> (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:
>
> (*i*) The 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.
>
> * * *
>
> (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.[2]

[2] Pursuant to 2018 PA 58, effective June 12, 2018, subparagraph (g) is amended as follows:

* * *

> (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.

The child was adjudicated a court ward based on respondent's history of domestic violence, history of mental illness, and inability to independently care for the child. Respondent waited a full year to complete the Alternatives to Domestic Aggression (ADA) assessment. He refused to participate in anger-management group therapy, and failed to provide documentation that he addressed anger management in individual therapy. Respondent also gave inconsistent and uncorroborated information about his mental health treatment. He reported hospitalization at Havenwyck Hospital, but there were no records to support this. He had no documentation that he completed goals in therapy. More generally, respondent demonstrated a lethargic attitude towards his housing, transportation, employment, and income concerns. He suggested that his disability would make him eligible for additional assistance besides Social Security benefits, but he did not take the initiative to identify specific programs that could help him parent the child.

Respondent's languid approach toward reunification services and failure to complete several components of his treatment plan demonstrated that the conditions that led to adjudication had not been rectified. At the time of termination, respondent remained essentially helpless and dependent, no more able to assume care of the child than when the case began, thereby supporting termination under MCL 712A.19b(3)(c)(*i*). Respondent's failure to adequately address his issues also demonstrated that he was unable to provide proper care and custody for the child. See *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014) ("A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody."). He could not independently provide for the child's material and emotional needs at the time of termination. The child's needs will become more complex as he matures, and, based on respondent's actions in this case, there is no reasonable likelihood that respondent will be able to meet those needs. Termination was therefore also justified under MCL 712A.19b(3)(g). Finally, although there was no evidence that respondent ever deliberately harmed the child or was likely to do so, the child was nonetheless reasonably likely to be harmed by respondent's negligence and inability to provide diligent care. MCL 712A.19b(3)(j) authorizes termination where a child is reasonably likely to be harmed due to the parent's conduct or capacity, and we conclude that the trial court did not clearly err by terminating under this ground based on respondent's demonstrated inability to provide appropriate care for the child.

> The parent, although, in the court's discretion, financially able to do so, 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.

Respondent cites several alleged errors in his caseworker's testimony and the trial court's findings. We find no basis for relief in any of the alleged errors. Respondent argues that the trial court erred in finding that he failed to complete parenting classes because the caseworker testified that he could not recall whether respondent told him that he completed the classes. But respondent acknowledged in his own testimony that he did not satisfy the parenting class requirement, so the trial court's finding was proper.

Respondent argues that petitioner's services were insufficient because he was not offered alternatives to taking a parenting class outside his home or alternatives to attending group therapy. Failure to make reasonable efforts toward reunification may prevent petitioner from establishing statutory grounds for termination. *In re Newman*, 189 Mich App 61, 65-68; 472 NW2d 38 (1991). Respondent did not argue in the trial court, nor does he argue in this Court, that he was entitled to accommodation under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*.[3] The record discloses that respondent failed to follow up with parenting-class referrals. Thus, his implication that the classes were in an inaccessible location is speculative and does not excuse his failure to attend the parenting classes. As for respondent's failure to attend group therapy, the record suggests that respondent did not fail to participate because he was physically unable to attend, but rather because he did not want to go. Respondent did not follow through with the alternative of addressing domestic violence in individual therapy. While petitioner had a responsibility to expend reasonable efforts to provide services to respondent, there existed a commensurate responsibility on the part of respondent to participate in the services that were offered. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). The record evidences that petitioner expended reasonable efforts, but that respondent failed in his commensurate responsibility to engage in the offered services.

Respondent argues that the trial court erred by concluding that he lacked parenting skills. In support of his argument, respondent points to testimony of his mother, who supervised his visits with the child, and argues that she gave favorable testimony regarding his parenting abilities. But contrary to respondent's claim, his mother's answer to whether respondent could parent the child independently was equivocal. The trial court did not err in giving greater credence and weight to testimony that respondent never demonstrated an adequate ability care for the child independently. *In re Fried*, 266 Mich App at 541.

Respondent lastly argues that his lack of independent housing was not a barrier to reunification because he planned to move back to his parents' house. Respondent asserts that petitioner did not present evidence that the child would be harmed if respondent returned to the house to live with his parents and son, and to care for the child with their assistance. We reject

[3] The ADA does not provide a defense to proceedings to terminate parental rights, *In re Terry*, 240 Mich App 14, 24-25; 610 NW2d 563 (2000), but it does require petitioner to reasonably accommodate a disabled parent in the provision of services to achieve reunification and avoid termination of parental rights, *In re Hicks*, 500 Mich 79, 86; 893 NW2d 637 (2017), citing 42 USC 12132 and 25 CFR 35.130(b)(7).

this argument because respondent's inability to assume full parental responsibilities would endanger the child if respondent retained his parental rights and petitioner ended its involvement.

In sum, the trial court did not clearly err by finding by clear and convincing evidence established that respondent's parental rights should be terminated under MCL 712A.19b(3)(c)(*i*), (g), and (j).

IV. BEST INTERESTS

In his final argument, respondent contends that the trial court erred in finding that termination of his parental rights was in the child's best interests. We again disagree.

Once a statutory ground for termination is established, the trial court shall order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). We review the trial court's best-interest decision for clear error. *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 637; 853 NW2d 459 (2014). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

The focus at the best-interest stage is on the child, not the parent. *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). The trial court should weigh all the evidence available to it in determining the child's best interests, *In re Trejo*, 462 Mich at 364, and may consider such factors as "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 35, 41-42; 823 NW2d 144 (2012) (citations omitted). Other considerations include "the parent's compliance with his or her case service plan [and] the children's well-being while in care[.]" *In re White*, 303 Mich App at 714.

Here, the evidence established that respondent had a bond with the child, but it also showed that the child would look for respondent's mother or father for emotional support, which demonstrates that the bond was not very strong. Also, as explained, the trial court did not err by giving credence to the evidence that respondent failed to exhibit adequate parenting skills. We also again note that respondent failed to comply with his case service plan, often showing a lack of initiative and an overall lethargic attitude towards completing services. The evidence also suggested that the child's well-being could not be reasonably assured in respondent's care. On appeal, respondent repeatedly argues that his ability to parent independently is irrelevant because he will be living with his parents and they can assist him. This argument ignores that respondent, at any time, could be tasked with independently caring for the child if anything were to happen to his parents or if his parents simply chose to no longer support respondent. In either scenario, respondent would be responsible for independently caring for the child, which the record establishes—and respondent apparently does not contest—that he is unable to do.

Respondent argues that the trial court's best-interest decision is erroneous because the court gave insufficient consideration to the child's placement with respondent's mother and to the alternative of a guardianship. In *In re Olive/Metts*, 297 Mich App at 43, this Court held that a child's "placement with relatives weighs against termination under MCL 712A.19a(6)(a)."

"[T]he fact that a child is living with relatives when the case proceeds to termination is a factor to be considered in determining whether termination is in the child's best interests." *In re Olive/Metts*, 297 Mich App at 43, citing *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). This Court explained in *In re Olive/Metts*:

> Although the trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests, *In re IEM*, 233 Mich App 438, 453; 592 NW2d 751 (1999), overruled on other grounds by *In re Morris*, 491 Mich 81; 815 NW2d 62 (2012); *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991), the fact that the children are in the care of a relative at the time of the termination hearing is an "explicit factor to consider in determining whether termination was in the children's best interests," *Mason*, 486 Mich at 164. A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal. *Mason*, 486 Mich at 163-165; *In re Mays*, 490 Mich 993, 994 (2012). [*In re Olive/Metts*, 297 Mich App at 35.]

The trial court considered the child's relative placement with respondent's mother and the possibility of a guardianship arrangement, but found that "adoption is the best measure to provide stability and safety" for the child. The court remarked that "[r]elative placement [i.e., the paternal grandmother] has expressed the opinion that they are not willing to participate in the Guardianship . . . ." This remark was not entirely accurate. Although respondent's mother expressed ambivalence about a guardianship, she did not express unwillingness to participate. The caseworker testified that the paternal grandmother told him that she did not want a guardianship because of the uncertainty, not that she would reject participation in a guardianship. Nonetheless, the trial court did not clearly err in finding that the child's best interests would be served by termination of respondent's parental rights, and adoption by the child's grandparents. Adoption would give the adoptive parents full parental rights, avoiding the uncertainty that would arise if respondent exercised poor judgment or interfered in a way that would adversely affect the child. The child was two years old at the time of the termination hearing, leaving 16 years of uncertainty if a guardianship were imposed. Under these circumstances, the trial court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood