STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 17, 2019

In re WARD, Minors.

Nos. 343691; 343692
Hillsdale Circuit Court
Family Division
LC No. 16-000572-NA

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In Docket No. 343691, respondent-mother, appeals as of right the trial court's order terminating her parental rights to the minor children, NW, EW, and AW, under MCL 712A.19b(3)(c)(*ii*), (3)(g), and (j). In Docket No. 343692, respondent-father, appeals as of right the trial court's order terminating his parental rights to the minor children under MCL 712A.19b(3)(c)(*ii*), (3)(g), and (j).[1] We affirm.

I. BASIC FACTS

The children were removed from respondents' care in August 2016 because of the dirty and unsafe condition of the family home. Shortly after removal, the Department of Health and Human Resources (DHHS) observed other concerning conditions, including developmental delays in all three children, respondent-mother's and respondent-father's lack of parenting skills, and financial instability. Respondents participated in services; however, after about 16 months, the service providers working with the family did not believe that the children could be safely returned to their care. DHHS initiated termination proceedings, and the trial court terminated respondent's parental rights following a termination hearing.

II. DUE PROCESS

[1] Respondents do not challenge the trial court's finding with regard to the statutory grounds for termination. As such, we need not address them further.

A. STANDARD OF REVIEW

Respondent-mother argues that the trial court's failure to comply with several sections of MCR 3.965 at the preliminary hearing violated her fundamental due-process rights, which ultimately rendered void the trial court's authorization of the removal petition and exercise of jurisdiction over the children. She also asserts that the trial court failed to comply with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., or the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. She did not, however, raise these issues in the trial court so they are unpreserved. See *In re Williams*, 286 Mich App 253, 273-274; 779 NW2d 286 (2009). "An unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights." *Id*. at 274. "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

B. ANALYSIS

"Matters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack in a subsequent appeal of an order terminating parental rights." *In re SLH*, 277 Mich App 662, 668 n 11; 747 NW2d 547 (2008) (quotation marks and citation omitted). In this case, the trial court explained that the purpose of the preliminary hearing was to review the removal order and authorize the petition. Adjudication and the trial court's exercise of jurisdiction over the children occurred after the bench trial. Respondent-mother did not appeal from either of these orders. The termination petition was later filed and respondent-mother's parental rights were terminated following a termination hearing. Respondent-mother is appealing the termination of her parental rights in this appeal. As a result, mother is barred from collaterally attacking the trial court's jurisdictional decision. See *id*.

Respondent-mother also argues that the trial court's failure to inquire into the possible Native American heritage of the children violated her fundamental due process rights. We disagree. 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). MCR 3.965(B)(2) requires the trial court to "inquire if the child or either parent is a member of an Indian tribe" at the preliminary hearing. Based on the record before this Court, the possible Native American heritage of mother, father, or any of the children was never discussed on the record in the trial court proceedings. Therefore, the trial court plainly erred by not inquiring whether either parent or the children were a member of an Indian tribe.

However, respondent-mother has failed to show that this error affected the outcome of the termination proceedings. See *In re Utrera*, 281 Mich App at 9. The lower court record contains no evidence to indicate that the children had any tribal affiliation. The removal petition listed the children's race as Caucasian. The first court report stated that a Native American inquiry had been made and that no Native American affiliation had been confirmed. Further, on appeal, respondent-mother does not claim that she or father has any membership with an Indian tribe. As a result, she has not established that the children would have been entitled to the protections available under the ICWA even if the trial court had inquired into possible Native American heritage.

III. REUNIFICATION EFFORTS

A. STANDARD OF REVIEW

Respondents both argue that the trial court clearly erred by concluding that the DHHS made reasonable efforts to reunify them with their children. 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). "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).

B. ANALYSIS

"When a child is removed from a parent's custody, the agency charged with the care of the child is required to report to the trial court the efforts made to rectify the conditions that led to the removal of the child." *In re Plump*, 294 Mich App 270, 272; 817 NW2d 119 (2011). Therefore, "a [trial] court is not required to terminate parental rights if the State has not provided to the family of the child . . . such services as the State deems necessary for the safe return of the child to the child's home." *In re Rood*, 483 Mich 73, 105; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.) (quotation marks and citation omitted). Furthermore, "efforts at reunification cannot be reasonable . . . if the [DHHS] has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA." *In re Hicks/Brown*, 500 Mich 79, 86; 893 NW2d 637 (2017).

Here, the record supports the trial court's conclusion that the DHHS made reasonable efforts to return the children to respondent-mother's and respondent-father's care. DHHS and the trial court were aware of possible cognitive difficulties in this case. In fact, the trial court ordered additional cognitive testing for respondents. Multiple services were offered, including parenting education classes and coaching during parenting visits. Both psychologists opined that respondents had the ability to learn with direct instruction and repetition. In fact, several of the service providers testified that respondents showed that they could learn and implement new parenting skills, but they were unable to retain those skills. Further, respondents were referred to individual counseling. Respondent-mother attended seven sessions, but she stopped going because she did not believe that it helped and she did not want to address her past traumas. Respondent-father testified that he did not believe that the foster-care worker asked him to attend counseling until later on the case, but he did not explain why he failed to go.

Ultimately, after 20 months of services, the service providers did not believe that the children would be safe in respondents' care. One psychologist opined that the prognosis for both respondent-mother and respondent-father was poor. For respondent-mother, there was evidence that she learned many appropriate parenting skills, but she could not consistently utilize those skills. He opined that her difficulty was based on her failure to understand the need for those skills. In regard to respondent-father, the psychologist opined that once the influences of external sources were removed (the service providers), he would tend to revert back to his old ways of dealing with things. In other words, he would default to allowing respondent-mother to care for the children. Two service providers testified that they did not believe that respondent-

mother and respondent-father would benefit from additional parenting classes. Based on the foregoing, the trial court did not clearly err by concluding that the DHHS made reasonable efforts to reunify respondents with the children. See *In re Terry*, 240 Mich App 14, 28; 610 NW2d 563 (2000) ("After her children have come within the jurisdiction of the family court, a parent, whether disabled or not, must demonstrate that she can meet their basic needs before they will be returned to her care.").

IV. MCR 3.976

A. STANDARD OF REVIEW

Respondent-father next contends that he was harmed by the trial court's failure to follow the requirements for permanency planning hearings in MCR 3.976. Because this issue was not raised before the trial court, it is unpreserved and will be reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8.

B. ANALYSIS

MCR 3.976(B)(2) and MCL 712A.19a(1) both provide that within 12 months of a child's removal, the trial court shall hold a permanency planning hearing if the child remains in foster care and the parental rights of the child's parents have not been terminated. In this case, the children were removed in August 2016, but the permanency planning hearing was not held until October 2017, which is more than 12 months after removal. Respondent-father further directs our attention to MCR 3.976(E)(3), which provides that a petition to terminate parental rights following a permanency planning hearing should be filed within 28 days of the hearing. In this case, it is undisputed that the termination petition was not filed until nearly 3 months after the permanency planning hearing. Thus, respondent-father can establish that there was an error that was clear or obvious. Respondent tries to show that this error affected his substantial rights because it left him unaware that DHHS was not satisfied with his participation. He asserts that without a timely permanency planning hearing and a timely petition to terminate his parental rights, he was at a disadvantage of not knowing or fully understanding what needed to be done to be reunified with his children.

However, the record reflects that before the permanency planning hearing, respondents' progress (or lack of progress) was discussed at every single review hearing. In fact, at the last review hearing before the permanency planning hearing, the trial court expressly stated that the goal would change from reunification to adoption if respondent-mother and respondent-father failed to make significant progress in the next review period. Thus, the goal change was not a surprise. Moreover, even if the goal-change were a surprise, respondent-father was provided with services in the months between the permanency planning hearing and the filing of the termination petition. At that time, having participated in the permanency planning hearing and knowing that the goal had been changed from reunification to termination, respondent-father was possessed of the knowledge he now claims he needed in order to rectify the barriers to reunification. Further, the delay in the filing of the petition to terminate could only work to respondent-father's benefit as it provided him with additional time to show that he was benefiting from services and should be reunified with his children. Thus, on the record before

us, the court's failure to comply with the timeframe imposed by MCR 3.976 did not affect respondent-father's substantial rights.[2]

V. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Respondent-father asserts that his lawyer provided ineffective assistance. Because respondent-father failed to move for a new trial or an evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

B. ANALYSIS

"[A]lthough child protective proceedings are not criminal in nature, where the right to effective counsel arises from the Sixth Amendment, the Due Process Clause indirectly guarantees effective assistance of counsel in the context of child protective proceedings." *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009).

> The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent. [*In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016).]

Respondent-father argues that he was denied effective assistance because the same lawyer represented both him and respondent-mother from the time of the bench trial until the termination hearing. However, for most of the case, respondents did not have adverse interests. They both participated in services with the goal of reunification. In addition, respondents were represented by separate lawyers at the termination hearing. Finally, contrary to respondent-father's position on appeal, he was aware that he had the option to get his own living accommodations and that doing so could improve his chances for reunification. Despite that awareness, he failed to complete any steps to do so. In fact, at the termination hearing, respondent-father testified that he believed that respondent-mother could properly care for the

[2] Respondent-father briefly complains that the permanency planning hearing was, essentially, a sham because no testimony was taken at the hearing. However, MCR 3.976(D) sets forth the procedure to be followed at a permanency planning hearing and explains what evidence can be considered. The court rule neither requires nor prohibits the admission of testimony. However, it does state that the court should afford the parties an opportunity to challenge evidence or cross-examine individuals who made the reports when those individuals are reasonably available. MCR 3.976(D)(2). Here, the record reflects that respondent-father, through his lawyer, was given the opportunity to challenge the evidence. As such, the requirements of MCR 3.976(D) were satisfied despite the lack of testimony at the hearing.

children, that she would not do anything to harm the children, and that she would maintain the house while he was at work. As a result, respondent-father has failed to show any deficiency in his lawyer's representation or that any alleged deficiency resulted in prejudice because father was aware of the possibility, but appeared to be unwilling to leave respondent-mother. See *id*.

Respondent-father also suggests that his lawyer was inexperienced, noting that on one occasion his lawyer misstated the timeframe for a statutory review hearing. Respondent-father posits that if his lawyer was ignorant on one part of the law in a child neglect proceeding, it could be "ascertained" that he was unaware of other parts of the law. He asserts that an experienced lawyer "would have made the objections to how the court handled the case to preserve it for appeal." Respondent-father fails, however, to identify the exact proceedings that his lawyer should have objected to, and he additionally neglects to explain how his lawyer's allegedly deficient performance prejudiced his defense. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we decline to consider this aspect of respondent-father's ineffective assistance claim.

VI. BEST INTERESTS

A. STANDARD OF REVIEW

Finally, respondent-father argues that the trial court clearly erred by finding that termination of his parental rights was in the children's best interests. "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). This Court reviews the trial court's decision regarding the child's best interest for clear error. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "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 at 296-297.

B. ANALYSIS

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App at 40. When the trial court considers a child's best interests, the focus must be on the child and not the parent. *In re Moss*, 301 Mich App at 87. "The trial court should weigh all the evidence available to determine the child's best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). "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 at 41-42 (citations omitted). A trial court can also consider the length of time the child "was in foster care or placed with relatives[,]" and whether it was likely that "the child could be returned to [the parent's] home within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 248-249; 824

NW2d 569 (2012). "[T]he trial court has a duty to decide the best interests of each child individually." *In re Olive/Metts*, 297 Mich App at 42. However, it is only "if the best interests of the individual children *significantly* differ, [that] the trial court should address those differences when making its determination of the children's best interests." *In re White*, 303 Mich App at 715-716.

The trial court considered respondent-father's bond with the children, finding that although he had something of a bond with NW and EV, he did not have one with AW. Despite the bond between respondent-father and two of the children, the court nevertheless found that it was in each child's best interests for respondent-father's parental rights to be terminated. As the bond between a parent and child is only one factor, the mere fact that respondent-father was bonded with two of the children does not preclude the trial court from finding that termination is in the child's best interests. See *In re Olive/Metts*, 297 Mich App at 41-42. Here, the evidence showed that each of the children suffered from developmental delays, but each made substantial progress in foster care. Additionally, after 20 months of services, respondent-father failed to show sustainable progress in parenting skills, financial stability, and appropriate housing. The trial court considered the ages of the children and how long they had been placed in foster care. Even if the children were not in preadoptive placement, two separate families were interested in adopting all three children. The court properly considered the children's need for permanency and stability, which they were each receiving in foster care but had not received—and likely would not receive in a reasonable time—in the care of respondent-father. Based on the record, the trial court did not clearly err in finding that termination of respondent-father's parental rights was in the children's best interests.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Brock A. Swartzle