STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
January 12, 2012

In the Matter of LILLY and GREEN, Minors.

No. 304310
Wayne Circuit Court
Family Division
LC No. 08-481406

In the Matter of GREEN, Minor.

No. 304311
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Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent mother appeals by right the order terminating her parental rights to her children BL and KG, and respondent father appeals by right the same order terminating his parental rights to KG. The trial court terminated mother's rights pursuant to MCL 712A.19b(3)(b)(*i*) (physical or sexual abuse of child or sibling), (b)(*ii*) (failure to prevent physical or sexual abuse), (c)(*i*) (conditions of adjudication continue), (c)(*ii*) (other conditions exist and are not rectified), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood children will be harmed if returned to parent's home). The trial court terminated father's rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

Respondents are a married couple who came to the attention of the police when they were arrested on 2008 for snatching purses, which was followed by a police chase with KG in the car and BL left alone at the motel in which they were living at the time. Respondents were in and out of jail, and sometimes in and out of contact even with their attorneys, during the pendency of the proceedings. They had issues with drugs and low intellectual functioning. Mother in particular had issues with noncompliance with court orders that she refrain from contacting BL, and father had particular problems with disappearing for extended periods and being incarcerated. While respondents made some progress, it appeared that the children did better when respondents were not in contact with them. BL was born positive for cocaine.

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000); *In re B & J*, 279 Mich App 12, 17; 756 NW2d 234 (2008). This Court reviews the lower court's findings under the clearly erroneous standard. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520; reh den 460 Mich 1205 (1999); *B & J*, 279 Mich App at 17. 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. *Mason*, 486 Mich at 152; *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *B & J*, 279 Mich App 17-18. Once a statutory ground for termination is established by clear and convincing evidence, the trial court must terminate parental rights if termination is in the child's best interests. MCR 3.977(H)(3); MCL 712A.19b(5) ; *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009). The trial court's decision on the best-interest question is reviewed for clear error. MCR 3.977(K); *Trejo*, 462 Mich at 356-357.

We find that the respondents' history clearly shows that they could not adequately parent the children. Respondents were unavailable most of the time, because they were either out of state or incarcerated. The conditions that led to removal were quite serious, and respondents did little to rectify them. Respondents did complete parenting classes, but their benefit was questionable in part because respondents repeatedly failed to visit the children for long periods. Respondent father's only plan was to move to Tennessee and live in his father's house, where his mentally ill brother was the caretaker. Respondents apparently intended to stay together, but the mother still had a drug issue, and the parents were charged with additional crimes while the case was pending. A parent must benefit from services to be able to provide a safe, nurturing home. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005).

History is the best predictor of future behavior, and the evidence clearly and convincingly showed that neither respondent would be able to provide proper care or custody within a reasonable time. Additionally, although the parents loved their children, father's lengthy and repeated absences, and mother's detrimental effect when she contacted BL in violation of the trial court's order and contrary to BL's therapist's recommendations, showed that termination was in the children's best interests.

Father additionally argues that he was denied sufficient time and services to reunify with KG, arguing that it was not his responsibility to contact the agency and that it is inconceivable that the agency could not find him in jail and in prison. It appears that to some extent, father was not contacted because his name had been misspelled and because the referee and a caseworker believed that services could not be provided when a parent was incarcerated. The latter view is now incorrect, *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), but *Mason* had not been decided at the time. Nonetheless, for the most part, father's own actions were to blame; after his release from incarceration, he failed to provide a valid address or telephone number and left the state. He received some services but disappeared again. He missed psychiatric evaluation appointments and went long periods without visiting his daughter before being again arrested and imprisoned. By that time, the children had been in care for more than two years and respondents were no closer to achieving reunification. *Mason* does not require that caseworkers visit parents in jail, only that parents be allowed meaningful participation. See also *In re DMK*, 289 Mich App 246; 796 NW2d 129 (2010). The agencies might have done more, but prolonging

the matter would not have been good for KG, particularly given that father seemed uninterested in participating when he could.

Mother additionally argues that she was denied effective assistance of counsel because her trial counsel called the director of Stanford House, who provided highly prejudicial testimony that mother had tested positive for cocaine and benzodiazepines that morning. To prove ineffective assistance, the parent must show that counsel's performance was defective and that the deficient performance was prejudicial and deprived the parent of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999); *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002). To show prejudice, the appellant must show that but for counsel's error, there is a reasonable likelihood that the result would have been different. *Id.*; *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998). We conclude that mother has no legal right to prevent the trial court from knowing the truth about her progress. Furthermore, she herself knew that she had tested positive, and if the trial court had not learned that she did so on the day it terminated her rights, it would have learned the same fact at the next hearing at the latest, even if it did not learn about it during cross-examination. Given the other new crimes respondent committed during the pendency of the case, as well as her disobedience to court orders and failure to complete any service successfully, we do not find that even if it was a tactical mistake to call the director, it was not outcome-determinative.[1]

Mother finally argues that she was denied due process rights when she was jailed for 30 days for contempt. Contempt orders are reviewed for abuse of discretion. *Porter v Porter*, 285 Mich App 450, 454; 776 NW2d 377 (2009). Factual findings are reviewed for clear error, while questions of law are reviewed de novo. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). The trial court held mother in contempt for disobeying its order to have no contact with BL. While mother's violation does indeed appear to have been flagrant, it was not "direct contempt," which is to say, a contempt that occurred within the trial court's direct perception. Consequently, mother was entitled to an adequate opportunity to prepare a defense, secure the assistance of counsel, and produce witnesses on her behalf. *Porter*, 285 Mich App at 455-456; *DeGeorge*, 276 Mich App at 591-593; *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 713; 624 NW2d 443 (2000). The trial court appears not to have given mother any such opportunity here.

[1] Mother also argues that counsel was ineffective for failing to call her to answer the contempt charge. We disagree, because it is apparent that any attempt to do so would have been futile.

However, there is no indication that her contempt sentence had any effect on the outcome of the proceedings. And because she has served her entire sentence—and may not even have had to serve that much—and we are unable to discern any potential collateral consequences or reason why this would constitute an issue likely to recur yet evade judicial review, we deem it moot and decline to consider it further. See *In re Contempt of Dudzinski*, 257 Mich App 96, 99 n 4, 112; 667 NW2d 68 (2003).

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause