

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 29, 2013

In the Matter of J. N. OSBORNE, Minor.

No. 310171
Livingston Circuit Court
Family Division
LC No. 2011-013903-NA

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Respondent-mother appeals by right the order terminating her parental rights to the minor child under MCL 712A.19b(3)(d) (failure to comply with limited guardianship placement plan); (3)(g) (failure to provide proper care or custody); and (3)(j) (reasonable likelihood of harm if child is returned to parent). The record supports the termination for failure to comply with the limited guardianship placement plan, and we affirm on that statutory basis. We do not consider the remaining statutory bases for termination.

I. FACTS AND PROCEDURAL HISTORY

Respondent and her child have a history with child protective services. In 2004, when the child was not yet two years old, the police searched respondent's home and found crack cocaine in a room where the child slept. As a result, the St. Clair County Department of Human Services (DHS) filed a neglect petition against respondent, to which she pleaded no contest. DHS removed the child from respondent's home for more than a year while respondent participated in services, including parenting classes, counseling, and drug testing.¹ Respondent eventually regained custody and attempted to provide sufficient care for the child.

Less than two years later, however, respondent was fired from her job. Respondent became homeless, and she gave custody of the child to a friend. Respondent and the friend signed a limited guardianship placement plan and submitted the plan to the Macomb County Probate Court (the friend resided in Macomb County at the time). In the plan, respondent confirmed that she lacked adequate housing for the child, and that she intended the limited

¹ Respondent contended the cocaine belonged to the child's biological father. The St. Clair court terminated the father's rights; he is not a party to this appeal.

guardianship to continue until she was gainfully employed and had established herself in a new residence. In addition to other provisions in the plan as discussed below, respondent acknowledged: “As a custodial parent of the minor, I understand that if I substantially fail, without good cause, to follow this plan, my parental rights may be terminated by the court through proceedings under the juvenile code.” The probate court approved the limited guardianship placement plan.

For the next several years the child lived with the limited guardian, who provided for all of the child’s needs. Respondent generally saw the child weekly. During those years, the limited guardian moved with the child to Livingston County, and the Macomb Probate Court transferred the limited guardianship to the Livingston Probate Court. The Livingston Probate Court twice amended the placement plan. The amendments required respondent to, among other things, attend services for substance abuse and domestic violence issues.

By January 2011, respondent had obtained a job and had rented a home. Nonetheless, she apparently did nothing to attempt to regain custody of the child. In February 2011, the police found marijuana plants in respondent’s home, and she was charged with delivering/manufacturing a controlled substance and with maintaining a drug house. Petitioner attempted to investigate respondent’s living situation, but had difficulty arranging a home visit. In October 2011, petitioner filed a child protective proceeding against respondent and sought termination at initial disposition.² The same month, the circuit court held a preliminary hearing, at which respondent indicated that she had no objection to the then eight-year-old child continuing to reside with the limited guardian. The circuit court authorized the petition.

In January and March 2012, the circuit court held proceedings on the termination petition. By agreement of the parties, the court received evidence on jurisdiction and termination in the same proceedings. During the proceedings, the court confirmed that respondent had received parenting services in St. Clair County, and the court took judicial notice of the limited guardianship file. The court specifically asked respondent why she had allowed the limited guardianship to continue even after she had obtained a job and a residence. Respondent told the court that she wanted to wait a year after obtaining the job and to have time to be sure she could take care of the child. When the court asked respondent why she now sought custody of the child, respondent testified, “because all this court stuff is going on and I’m not just gonna sit back and let it happen. . . . I mean [the child was] fine where she was at.”

After reviewing the evidence, the court found that respondent’s testimony was “not wholly credible.” Specifically, the court found that respondent had given conflicting testimony concerning whether the child’s biological father had ever lived with respondent in her current residence. The court concluded that there were at least two statutory grounds for taking

² Respondent appears to argue on appeal that petitioner lacked sufficient grounds to seek termination at the initial disposition. We note that MCR 3.977(E) authorizes termination at initial dispositional hearing under the circumstances present in this case.

jurisdiction over the child: MCL 712A.2(b)(2) (parental home unfit for child), and (b)(3) (failure to comply with limited guardianship).³

Regarding the limited guardianship placement plan, the court found that respondent had failed to comply with the plan provisions and had failed to provide a reason for the lack of compliance. In addition, the court found that respondent had thwarted petitioner's efforts to assess respondent's home. Specifically, the court stated, "Most telling to this court is the clear and convincing testimony that [respondent] did not comply with the visitation requirements of the 2008 plan, including the frequency [sic] multiple visits per week, even before distance became an issue in scheduling parenting time. . . . [Respondent] . . . took no action to call the school, or even ask the guardian about scheduled appointments with the school or for medical care." The court determined "[i]t was not a desire to maintain a regular relationship with the child that motivated [respondent] to visit, but the initiation of child protective proceedings." The court concluded that a statutory basis for termination existed under MCL 712A.19b(3)(d) (failure to comply with limited guardianship placement plan).⁴

II. ANALYSIS

Respondent first argues that MCL 712A.19a(2) required petitioner to make reasonable reunification efforts and that petitioner failed to make the requisite efforts. Respondent maintains that in the absence of reunification efforts, the circuit court erred by terminating her parental rights. This preserved issue presents a mixed question of fact and law. We review de novo the legal issue of whether MCL 712A.19a(2) required petitioner to make reunification efforts in this case. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008). We review the court's factual findings for clear error. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009).

MCL 712A.19a requires circuit courts to conduct permanency planning hearings for children who are in foster care. MCL 712A.19a(1). In general, when a child is in foster care the petitioner must make reasonable efforts to reunite the child with the child's family. MCL 712A.19a(2). Under certain aggravated circumstances, such as a parent's conviction for felony assault of the child, the petitioner need not make reunification efforts. MCL 712A.19a(2)(a)-(d).⁵

³ The court identified these two statutory grounds in its findings of fact and law. In the order of adjudication, however, the court identified the additional statutory ground of respondent's failure to provide support, education, or medical or other care for the child (MCL 712A.2(b)(1)). The order did not identify the limited guardianship ground for jurisdiction.

⁴ As noted at the outset of this opinion, the court found additional grounds for termination under MCL 712A.19b(3)(g) and (3)(j).

⁵ MCL 712A.18f(1) similarly requires that the petitioner report to the court on efforts made to rectify the conditions that caused removal of the child, if the petitioner is advising against placement of the child with the parent, guardian, or custodian. In this case, petitioner

Respondent has not established as a matter of law that the reunification requirements of MCL 712A.19a(2) were applicable here. The child was not in foster care; rather, the child had been in a court-approved limited guardianship for several years.⁶ Moreover, the governing court rules indicate that reunification efforts are not required for a child who has been in a limited guardianship, if the petitioner is seeking termination of parental rights at the initial disposition. Specifically, the rules indicate that the circuit court may determine jurisdiction, disposition, and termination in a single proceeding. See MCR 3.973(B) (“Unless the dispositional hearing is held immediately after the trial”); see also MCR 3.977(E) (“The court shall order termination of the parental rights of a respondent at the initial dispositional hearing . . . and shall order that additional efforts for reunification . . . shall not be made, if . . . [sufficient grounds are established for termination] under MCL 712a.19b(3) . . . (d) [failure to comply with limited guardianship]). In this case, the parties agreed that the child was in a limited guardianship and that court could combine the proceedings on adjudication, disposition, and termination. Under these circumstances, the statutory requirement for a permanency planning hearing did not apply, and petitioner was not required to offer formal reunification services.

Even if reunification services were required, the circuit court correctly found as a factual matter that respondent had received reasonable services. Services were provided to respondent in St. Clair County when the child was of preschool age. In addition, the original limited guardianship placement plan identified respondent’s obligations for regaining custody of the child, and the Livingston probate court added obligations that were in the nature of a service plan. The circuit court noted that the amended limited guardianship placement plan required respondent to maintain a drug-free home and to attend services regarding domestic violence and substance abuse.⁷ The record indicates that even though respondent claimed to be participating in Narcotics Anonymous, she was unable to identify any of the lessons or steps involved in substance abuse treatment. Nothing in the record suggests that the provision of additional services would have enabled respondent to comply with the limited guardianship placement plan. See *In re Fried*, 266 Mich App 535, 543; 702 NW2d 192 (2005) (appellate relief not warranted for failure to offer additional services when respondent’s independent efforts were unsuccessful).

recommended that the child remain with the guardian, so the report requirement did not apply. In addition, given that the court determined adjudication, disposition, and termination in a single set of proceedings, petitioner had no statutory duty to prepare a case service plan under MCL 712A.18f(2).

⁶ “‘Foster care’ means care provided to a juvenile in a foster family home, foster family group home, or child caring institution licensed or approved under 1973 PA 116, MCL 722.111 to 722.128, or care provided to a juvenile in a relative’s home under a court order.” MCL 712A.13a(1)(e).

⁷ Respondent testified that she never received the amended placement plans and was unaware of the services required therein, and the record indicates that the amended plans were mailed to an outdated address. However, the record also establishes that respondent had at least sporadic contact with the limited guardian, and that respondent was aware of one or more provisions of the amended placement plans. The circuit court was in a better position to assess respondent’s veracity and, thus, we defer to its finding concerning her lack of credibility. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

In sum, respondent's argument concerning reunification services is unpersuasive both as a matter of law and as a factual matter.

Respondent next asserts that the referee violated her due process rights by failing to maintain impartiality and neutrality. Respondent never objected to the referee's conduct in the circuit court. Cf. MCR 2.003(C)(1) (motion for disqualification must be filed within 14 days of discovery of grounds for disqualification). Thus, respondent did not preserve this issue for appellate review. *In re Utrera*, 281 Mich App at 8. We review the unpreserved issue for plain error affecting respondent's substantial rights. See *id.* at 8-9, citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Respondent asserts that the referee demonstrated bias by posing questions to respondent and by making erroneous factual findings. We disagree. Regarding the referee's questions to respondent, MCR 3.923(A)(1) authorizes a court to question a witness at any time if "the court believes that the evidence has not been fully developed[.]" Regarding the referee's factual findings, this Court has explained that a court's rulings, even if erroneous, are not sufficient to demonstrate bias or prejudice. See *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). Further, this Court presumes that judges are impartial, and an appellant's references to a judge's remarks or rulings cannot overcome that presumption. See *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). In sum, respondent has not overcome the presumption of impartiality and has not shown plain error concerning her right to be heard by an impartial decision maker.

Next, respondent challenges the circuit court's jurisdictional findings. Respondent argues that the court erred by taking jurisdiction under MCL 712A.2(b)(2) and (3). "To acquire jurisdiction, the factfinder must determine by a preponderance of the evidence that the child comes within the statutory requirements of MCL 712A.2." *In re Brock*, 442 Mich 101, 108-109; 499 NW2d 752 (1993). In this case, the circuit court case recognized that jurisdiction could be proven by a preponderance of the evidence, but the court emphasized the weight of the evidence that supported jurisdiction by expressly stating that clear and convincing evidence established jurisdiction.

The record supports the court's jurisdictional finding under MCL 712A.2(b)(3), i.e., there was clear and convincing evidence that respondent "has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the juvenile." Respondent stipulated that the limited guardianship placement plan had been established in 2008. The plan required respondent to visit the child four times each week, to speak with the child by telephone daily, and to attend all of the child's nonemergency health care appointments. The plan also required respondent to pay for transportation to and from respondent's visits. During the proceedings, respondent conceded that she had not complied with these requirements.⁸

⁸ For the analysis of this portion of the trial court's findings, we need not consider or address whether respondent complied with the requirements of the amended placement plans because the

On appeal, respondent argues that she had good cause for her noncompliance. Good cause requires evidence of a legally sufficient or substantial reason for noncompliance with the placement plan. See *In re Utrera*, 281 Mich App at 22. The record in this case contains no legally sufficient or substantial reason for respondent's lack of compliance. Respondent relies on factors such as the distance between her residence and the guardian's residence, the guardian's refusal of respondent's occasional offers of payment for transportation, and the guardian's alleged failure to inform respondent of school conferences and health care appointments. The circuit court found the distance factor unconvincing, because respondent's visits were inconsistent even before the guardian moved to a different county. Similarly, the court found respondent's other testimony not wholly credible. We must defer to the court's opportunity to assess the credibility of respondent's testimony. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). Accordingly, we find no clear error in the court's decision to take jurisdiction over the child on the ground that respondent, without good cause, substantially failed to comply with the limited guardianship placement plan.

Given that the circuit court correctly took jurisdiction over the child under MCL 712A.2(b)(3), we need not consider whether jurisdiction was also appropriate under MCL 712A.2(b)(1) or (b)(2). See *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008) ("In order to find that a child comes within the court's jurisdiction, *at least one* statutory ground for jurisdiction contained in MCL 712A.2(b) must be proven" (emphasis added)).

Respondent next maintains that even if jurisdiction was appropriate for lack of compliance with the limited guardianship placement plan, the circuit court erred in finding that the lack of compliance was a sufficient statutory basis for termination under MCL 712A.19b(3)(d). We review the court's decision for clear error. *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011).

The termination statute pertaining to children in limited guardianships is similar to the jurisdictional statute. Compare MCL 712A.19b(3)(d) (termination) and MCL 712A.2(b)(3) (jurisdiction). Both statutes require proof that the parent substantially failed, without good cause, to comply with the limited guardianship placement plan. The termination statute, however, imposes an additional element. The petitioner must prove by clear and convincing evidence that the parent's noncompliance with the limited guardianship placement plan "resulted in a disruption of the parent-child relationship." MCL 712A.19b(3)(d).

The record in this case demonstrates that respondent's noncompliance with the placement plan disrupted the parent-child relationship. Evidence established that respondent's visits with the child primarily involved play time, and that the child looked to the guardian, not to respondent, for daily discipline and direction. The guardian testified that the child was upset by the prospect of having to relinquish a home with the guardian in order to live with respondent. The guardian's testimony also established that respondent had a narrow role in the child's life. The record therefore supports the circuit court's finding:

record is sufficient to support the termination decision on the basis of respondent's failure to comply with the initial placement plan.

It is clear that [respondent] was content with her limited role, and complete absolution of responsibility, in her child's life until such time as the department sought to terminate her rights. At that time, and only at that time, did Mother seek to regularly visit her child or announce her intention to terminate the guardianship.

On the basis of this record, we find no clear error in the trial court's finding that respondent's noncompliance with the placement plan disrupted the parent-child relationship. Accordingly, we conclude that termination of respondent's parental rights was appropriate under MCL 712A.19b(3)(d). We need not consider the remaining grounds for termination, because a single statutory basis is sufficient to affirm the termination decision. *In re HRC*, 286 Mich App at 461.

Lastly, respondent challenges the circuit court's determination that termination was in the child's best interest under MCL 712A.19b(5). The record supports the circuit court's determination. The record indicates that even during the short periods of time that respondent lived with the child, respondent failed to provide the child with a safe, stable, drug-free home. In contrast, the guardian provided a long-term home where the child was thriving. Further, while there was evidence that the child had a bond with respondent, there was also evidence of a strong bond between the guardian and the child, as well as among the child, the guardian's fiancé, and his child. The record also indicates that the guardian intended to adopt the child. This evidence supported the court's determination that termination of respondent's parental rights was in the child's best interests. See *In re VanDalen*, 293 Mich App at 141 (holding that "[t]he evidence clearly supported the trial court's finding that termination was in the children's best interests" where "[t]he children had been placed in a stable home where they were thriving and progressing and that could provide them continued stability and permanency given the foster parents' desire to adopt them.").

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio