

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 20, 2013

In the Matter of BROKER, Minors.

Nos. 312225 & 312226
Ingham Circuit Court
Family Division
LC No. 11-000447-NA

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

In this consolidated matter, respondents Todd Broker and Melissa Bott appeal as of right from an order terminating their parental rights to their minor children. In Docket No. 312225, Broker argues that the lower court committed evidentiary error requiring reversal by inappropriately considering prejudicial hearsay testimony during the termination hearing. In both Docket Nos. 312225 and 312226, Broker and Bott argue that the lower court committed clear error in finding statutory grounds to terminate their parental rights. For the following reasons, we affirm.

I. BACKGROUND

The court originally removed the children on April 6, 2011, and assumed jurisdiction over the children on June 6, 2011, pursuant to Bott's no contest plea. The original allegations included claims that: (1) Bott and Broker exposed the children to instances of domestic violence between them; (2) Bott failed to protect the minor children from Broker, who physically abused the children; (3) Bott and Broker failed to comply with petitioner's services, specifically the drug screens and substance abuse treatment, which were designed to prevent removal of the children; and (4) Bott failed to protect her daughter from alleged sexual abuse by Rolland Wood, Bott's stepfather, who allegedly sexually abused Bott as a minor as well, and also attempted to mislead the police during their investigation concerning the allegations against Wood.

Following the initial dispositional hearing on June 30, 2011, the court ordered the parents to participate in, and benefit from, the following services: (1) housing and employment assistance; (2) substance abuse treatment; (3) emotional and mental health treatment; and (4) parenting skills classes. In addition, Broker was required to participate in domestic violence/anger management therapy through Prevention and Training Services ("PATS"), while Bott was required to participate in therapy for victims of domestic violence.

Petitioner later filed a supplemental petition on May 21, 2012, to terminate the parental rights of Broker and Bott based on, in relevant part, MCL 712A.19b(3) (c)(i), (g), and (j) on the grounds that respondents failed to participate in, or benefit from, the services offered them by petitioner. Following the final day of the termination hearing, the court issued its written opinion and order on August 17, 2012. The Court noted that Broker and Bott had some periods of improvement, but nonetheless found that their overall progress was “limited and sporadic.” Although the court specifically commended Broker on his recent but untimely progress, it nevertheless held that his progress was insufficient “to remedy the problem that brought this case under the jurisdiction of the court.” After reviewing the record evidence in this matter, the court found that petitioner proved, by clear and convincing evidence, the above three statutory grounds under MCL 712A.19b(3) to terminate the parental rights of Broker and Bott to the minor children.¹

II. DOCKET NO. 312225 – RESPONDENT BROKER

A. EVIDENTIARY ERROR

Broker first argues that the lower court improperly admitted and considered hearsay evidence when it allowed Deborah Delcamp, the foster care worker, to testify by summarizing victim statements contained in old police reports, which indicated that Broker had physically attacked Bott (and others) in the past. Broker also challenges the court’s consideration of statements allegedly made by Broker’s children to Delcamp during the pendency of this case on the grounds that the court did not hold a “tender years” motion before considering this evidence.

Broker did not object to the alleged evidentiary errors during Delcamp’s testimony; he has thus failed to preserve this issue for appeal. Where the claim of error was not preserved, this issue is reviewed for plain error affecting substantial rights. *In Re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008) citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). An error affects substantial rights if it causes prejudice, meaning that it affects the outcome of the proceedings. *Id.* at 9.

Broker argues that Delcamp’s testimony based on the police reports indicating past incidents of domestic violence between Broker and Bott, and the child’s statement involving the inappropriate physical discipline by Broker, was inadmissible at the hearing. The rules of evidence do not necessarily apply in a termination of parental rights hearing. See MCR 3.977(H). When a court holds a hearing to terminate parental rights from a supplemental petition based on “one or more circumstances new or different from the offense that led the court to take jurisdiction,” the court must make findings “on the basis of clear and convincing legally admissible evidence.” MCR 3.977(F). Our Supreme Court has held that, when the court takes jurisdiction over the children based on the plea of a single parent, the requirements of MCR 3.977(F) apply in full force in the event that a petitioner seeks to terminate the other

¹ The court also held that termination of Broker and Bott’s parental rights was in the best interests of the minor children, but respondents do not raise this as an issue on appeal.

parent's parental rights in supplemental proceedings. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2001); see also *In re Mays*, 490 Mich 993, 807 NW2d 307 (2012). Therefore, petitioner was required to present its evidence against Broker in an admissible form during this termination.

Generally, all nonprivileged and relevant evidence is admissible in court. MRE 402. Evidence is relevant if it has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, hearsay; i.e., a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is inadmissible, absent an applicable exception. MRE 801(c); MRE 802.

Delcamp's testimony based on the police reports was inadmissible.² The reports themselves were not hearsay because they fell into the public records exception of MRE 803(8), as the records pertained to "matters observed pursuant to duty imposed by law as to which matters there was a duty to report," and the instant case not a criminal action. However, petitioner did not seek to admit these reports; rather, Delcamp recited or summarized the victim and witness statements that were contained in the reports. These statements were made outside of the termination hearing, and they were offered to establish that Broker had been involved in several past incidents of domestic violence. Petitioner presents no other valid applicable hearsay exception. Accordingly, these statements constituted inadmissible hearsay.

Additionally, Delcamp's recitation of a previous statement one of the minor children allegedly made to her was inadmissible. The child did not make this statement in the hearing, and petitioner offered it to prove that Broker had physically disciplined the child by beating him while holding him by his neck, as well as by forcing the child to smoke a cigarette. Petitioner has not presented any valid exception that would render this hearsay admissible. While a party can admit statements made by a child below the age of ten communicated to a witness who testifies at a hearing, the statement can only be considered substantive evidence "if the court has found, in a hearing held before trial [or hearing], that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." MCR 3.972(C)(2)(a); *In re Archer*, 277 Mich App 71, 80-81; 744 NW2d 1 (2007). It is undisputed that the court did not make such a determination before the hearing.³

Regardless, these errors do not mandate reversal because, even though the trial court erred by admitting the hearsay, and even though the error was plain, the error did not affect Broker's substantial rights; that is, the error was not outcome-determinative. See *Carines*, 460 Mich at 763. Indeed, even assuming that the hearsay was not admitted, as described below, there was sufficient additional convincing and legally admissible evidence from which the court could

² To the extent that Broker could challenge the admissibility of the police report statements as a potential Confrontation Clause violation, he waives it by failing to present it on appeal.

³ Further, there was no indication in the record that Delcamp used forensic interviewing protocol when interviewing the child about these allegations.

have found that statutory grounds existed to terminate Broker's parental rights. *In re Utrera*, 281 Mich App at 8-9. Broker has therefore failed to show that the inadmissible hearsay prejudiced him such that reversal would be warranted.

B. STATUTORY GROUNDS FOR TERMINATION

Next, Broker argues that his participation and progress in his court-ordered services was of such magnitude as to render erroneous the court's finding any statutory grounds under MCL 712A.19b(3) to terminate his parental rights. We disagree.

In a case regarding the termination of parental rights, a petitioner must establish a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3). Only one statutory ground need be proven in order to terminate parental rights. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). This Court reviews both the lower court's factual findings and its ultimate decision whether a statutory ground has been proven for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding is clearly erroneous [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (citations and quotations omitted).

In this case, the court did not clearly err in finding that petitioner proved MCL 712A.19b(3)(g) with clear and convincing evidence. MCL 712A.19b(3)(g) authorizes termination if:

(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.

A parent's failure to comply with a parent agency treatment plan is evidence of one's failure to provide proper care and custody for a child, which may be used to establish the statutory ground for termination in MCL 712A.19b(3)(g). *In re JK*, 468 Mich 202, 223; 661 NW2d 216 (2003). Broker's court-ordered services were derived from his PATP, and he was required by the court order to demonstrate improvement and benefit from these services. See also *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005), superseded by statute on other grounds (noting that an order to participate in reunification necessarily entails an obligation to benefit from said services).

Admittedly, Broker demonstrated improvement in his parenting skills, as he completed his parenting classes, brought the children dinner at the parenting time sessions, and appropriately instructed the children during the sessions. In fact, the minor children noted that Broker appeared happier and less aggressive during the latter parenting time sessions. By the date of the termination hearing, Broker was participating in substance abuse treatment, counseling, and domestic violence therapy. However, he failed to complete the home study, which was a necessary predicate to being able to provide care and custody for the children.

Broker remained unemployed and lacked an independent source of income. The court also held him in contempt several times for failing to participate in his services plan.

Additionally, although Broker started participating in services in November of 2011, his mere participation does not compensate for the fact that he failed to demonstrably benefit from those services. As noted above, Broker was not honest about the full scope of his substance abuse problems, or about his past involvement in domestic violence with his partners. His frequent vacillation on these significant barriers makes it dubious whether Broker will fully recover and become a safe, stable parent for his children. Broker's mental health therapist also testified that Broker was unable to integrate the concepts taught by his service providers into his own life, which further undermined Broker's claim that he truly improved from his services. In light of his failure to demonstrate meaningful progress in his service plan, the trial court clearly had sufficient evidence to find that there is no reasonable likelihood that Broker will be able to provide proper care and custody for his children within a reasonable amount of time, regardless of his intent. MCL 712A.19b(3)(g). In short, after reviewing the record, we are not left with a "definite and firm conviction" that the trial court made a mistake when it terminated Broker's parental rights. *In re Mason*, 486 Mich at 152. "Having concluded that at least one ground for termination existed, we need not consider the additional grounds on which the trial court based its decision." *In re HRC*, 286 Mich App at 461.

III. DOCKET NO. 312226 – RESPONDENT BOTT

A. STATUTORY GROUNDS FOR TERMINATION

Bott argues that the trial court committed clear error in finding that she did not make any progress in her services plan. We interpret this argument as a general challenge to the court's finding statutory grounds to terminate Bott's parental rights. Regardless, we disagree. This issue presents the same standards of review and substantive legal principles articulated in II-B above.

The court did not clearly err in finding that petitioner proved MCL 712A.19b(3)(g) by clear and convincing evidence with regard to Bott. As noted earlier, a parent's failure to comply with a PATP is evidence of one's failure to provide proper care and custody for a child. *In re JK*, 468 Mich at 223. Bott was court-ordered to demonstrate improvement and benefit from these services. See *In re Gazella*, 264 Mich App at 676-677. The record is replete with evidence of Bott's failure to comply with, or benefit from, these services. Bott refused to participate in her services for most of the case history, which resulted in the court holding Bott in contempt several times due to noncompliance. Although she started showing improvement in November of 2011, her progress came "too little, too late" and was dwarfed by her inconsistency and relapse. Bott did not demonstrate long-term benefit from her therapy or substance abuse treatment, and she was held in contempt multiple times for failing to comply with her services plan. She also was unable to control her children during parenting time sessions and blamed her daughter for the fact that they were in care, which further demonstrated Bott's inappropriate parenting skills and her inability to benefit from services. Further, she has not completed some of these services,

including her requirement to obtain employment⁴ and independent housing from Broker and her parents. As Bott did not comply with these requirements, the court had sufficient evidence to find by clear and convincing evidence that Bott did not, and could not within a reasonable amount of time, provide proper care and custody to the minor children. Again, “[h]aving concluded that at least one ground for termination existed, we need not consider the additional grounds on which the trial court based its decision.” *In re HRC*, 286 Mich App at 461.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens

⁴ Although she claimed that she obtained employment, Bott did not verify her employment with petitioner, as required by court order.