STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 25, 2013

In the Matter of S. GIRARD, Minor.

No. 312899
St. Joseph Circuit Court
Family Division
LC No. 2010-000337-NA

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

On April 19, 2010, petitioner filed a petition to remove the minor child from her mother's care. At the time, respondent-father was incarcerated, and had been since the minor child was approximately two months old. Respondent-father remained incarcerated, and the protective proceedings continued without his involvement until June of 2011, when respondent-father first received notice of the proceedings and was ordered to attend the next pretrial hearing by telephone. Respondent-father subsequently appeared at several hearings by telephone. He was also given a case services plan and he participated in services. In July of 2012, petitioner changed its goal from reunification to termination, and filed a petition to terminate respondent-father's parental rights. After a termination hearing, which respondent-father attended by telephone, the trial court entered an order terminating respondent-father's parental rights under MCL 712A.19b(3)(j). Respondent-father appeals that order as of right. For the reasons set forth in this opinion, we affirm.

Respondent-father argues that he was denied the right to participate in the proceedings and that petitioner failed to make reasonable efforts to reunify him with his child because he did not participate in the first 14 months of the proceedings.

"'Reasonable efforts to reunify the child and family must be made in *all* cases' except those involving aggravated circumstances . . . ." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010), quoting MCL 712A.19a(2) (emphasis in *In re Mason*). In the case at bar, there were no aggravated circumstances; thus, petitioner was required to make reasonable efforts to reunify respondent-father with his child. Furthermore, "[t]he state is not relieved of its duties to engage [the respondent] merely because [the respondent] is incarcerated." *Id.* at 152.

However, in order to be entitled to reunification services, the respondent must be a legal parent, not merely a putative parent. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008) (emphasis in original) ("these statutory provisions require that services be provided to *a parent*, not to a putative parent."). In the case at bar, the record lacks clarity as to when respondent-

father became the minor child's legal father. A legal father is someone whose paternity has been established pursuant to MCR 3.903(A)(7). Until a putative father perfects paternity, he is not a "parent" who is entitled to services. *In re LE*, 278 Mich App at 19.

Respondent-father argues that he became the minor child's legal father in May of 2010 when he signed an affidavit of parentage. However, it is unclear from the record when this affidavit was completed. Indeed, respondent-father's signature on the affidavit was not sufficient to establish his parentage because MCR 3.903(A)(7)(e) requires that *both* "the man and mother must each sign the acknowledgment of parentage before a notary public appointed in this state." Because we have no record with which to verify respondent-father's assertion that he was the minor child's legal father in May of 2010, we decline to find that respondent-father is entitled to relief based on an alleged delay in allowing him to participate in the proceedings. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) ("As the appellant [ ], defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated.")

Moreover, we find that even if respondent-father could establish that he was the minor child's legal parent in May of 2010, any delay in including him in the proceedings or offering him services does not entitle him to relief. In so finding, we distinguish the case at bar from cases such as *In re Mason*, 486 Mich at 154-155, and *In re DMK*, 289 Mich App 246, 253; 796 NW2d 129 (2010). In *In re Mason*, 486 Mich at 154-155, 157, the respondent, who was incarcerated, participated in two hearings, but was denied access to services. Moreover, the respondent missed several permanency planning hearings during the review period in which the trial court evaluated whether reunification could be achieved. *Id.* at 155. Additionally, by the time the respondent resumed participating in the proceedings after a 16-month break, "the court and the DHS were ready to move on to the termination hearing." *Id.* Our Supreme Court reversed the trial court's termination order in *In re Mason*, finding that the respondent's "absence affected both his ability to participate and the information available for the court's consideration." *Id.*

Similarly, in *In re DMK*, 289 Mich at 253, we held that the trial court's failure to involve the respondent in a majority of the proceedings entitled him to reversal. In that case, the incarcerated respondent was unable to participate in the proceedings for nine months, and he missed several significant dispositional review hearings "during which the court was called upon to evaluate the parents' efforts and decide whether reunification of the children with their parents could be achieved." *Id.* at 254, quoting *In re Mason*, 486 Mich at 155. Additionally, petitioner deliberately withheld services from the respondent. *Id.* at 255. We held that the respondent's lack of participation in the review hearings prevented the trial court from acting on complete and accurate information, and therefore, the respondent's lack of participation could not be considered harmless. *Id.* Indeed, because the respondent was not included in the proceedings and was denied services, there was a "'hole' in the evidence on which the trial court based its termination decision [.]" *Id.* at 256, quoting *In re Mason*, 486 Mich at 160 (quotation omitted).

Significantly, we find the case at bar to be distinguishable from both *In re Mason* and *In re DMK* because by the time petitioner moved to terminate respondent-father's parental rights, he had been participating in the proceedings and receiving services for approximately 13 months. Cf. *In re Mason*, 486 Mich at 155; *In re DMK*, 289 Mich App at 254. Accordingly, we find that

respondent-father did not miss "the crucial . . . review period during which the court was called upon to evaluate [his] efforts and decide whether reunification of the children with [respondent-father] could be achieved." *In re Mason*, 486 Mich at 155.

Moreover, because respondent-father participated in the proceedings and the trial court reviewed his progress for 13 months, there was not a "hole" in the evidence on which the trial court based its termination decision. Cf. *In re Mason*, 486 Mich at 160; *In re DMK*, 289 Mich App at 256. Indeed, petitioner in the case at bar created a parent-agency treatment plan for respondent-father and respondent-father had access to services during his incarceration. Additionally, in significant contrast to *In re Mason*, petitioner in the case at bar evaluated respondent-father as a future placement for the minor child, and found that respondent-father was not a viable option for placement. Cf. *In re Mason*, 486 Mich at 159 (emphasis in original) ("the court and the DHS failed to consider that respondent had *never* been evaluated as a future placement or provided with services.") Consequently, even if respondent-father established legal parentage before June of 2011, we find that he is not entitled to relief.

Next, respondent-father argues that he was denied due process because he did not receive notice of the proceedings before June of 2011. Respondent-father failed to raise this issue before the trial court; thus, our review is for plain error affecting substantial rights. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* (quotation omitted).

Due process requires the opportunity to be heard; "[t]he 'opportunity to be heard' includes the right to notice of that opportunity." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (CORRIGAN, J) (quotation omitted). "In Michigan, procedures to ensure due process to a parent facing removal of his child from the home or termination of his parental rights are set forth by statute, court rule, DHS policies and procedures, and various federal laws . . . ." *Id.* at 93. Pursuant to statute and court rule, a parent, whether named as a respondent or otherwise, is entitled to notice and the ability to participate "in each hearing, including dispositional review hearings, permanency planning hearings, and termination proceedings." *Id.* at 94.

The record is devoid of evidence from which this Court could conclude that respondent-father was denied due process. Respondent-father again fails to document that he was established as the child's legal father before June of 2011 when he began receiving notice. A putative father is not entitled to notice of child protective proceedings until he establishes that he is the child's legal father. *In re AMB*, 248 Mich App 144, 174; 640 NW2d 262 (2001). Under plain error review, the party asserting plain error bears the burden of establishing the error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). With no proof that he was the minor child's legal father before June of 2011, respondent-father's claim fails. *Id.* See also *Elston*, 462 Mich 762.

Moreover, even assuming respondent-father could establish that he was the minor child's legal father before June of 2011, he is not entitled to relief because he fails to establish that the alleged lack of notice affected his substantial rights. In *In re Rood*, 483 Mich at 118 (CORRIGAN, J.), the respondent's substantial rights were affected because he was deprived "of even minimal procedural due process by [petitioner's failure] to adequately notify him of proceedings affecting

his parental rights and then terminating his rights on the basis of his lack of participation without attempting to remedy the failure of notice." By contrast in the case at bar, although respondent-father was not initially given notice of the proceedings, he nonetheless had ample opportunity to participate in the proceedings and to prove his ability to care for his child. And, significantly, respondent-father's parental rights were not terminated because he failed to participate in the proceedings; rather, they were terminated because he did not make sufficient progress with regard to his ability to care for the minor child. Therefore, we distinguish the case at bar from *In re Rood*, and find that any lack of notice did not offend due process or affect respondent-father's substantial rights. Cf. *id.* at 113-119.

Next, respondent-father challenges the trial court's findings as to statutory grounds and best interests. An appellate court "review[s] for clear error both the [trial] court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the [trial] court's decision regarding the child's best interest." *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court's termination decision "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." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The trial court did not clearly err when it found that statutory grounds for termination existed under MCL 712A.19b(3)(j). Section 19b(3)(j) is satisfied if "[t]here 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." Respondent-father argues that the trial court's finding was clearly erroneous because it ignored the fact that he participated in services while incarcerated. While respondent-father provided evidence that he participated in services, there was evidence that respondent-father did not benefit from services, at least with regard to his substance abuse issues. "[I]t it is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody." *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded in part on other grounds by statute as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009), vacated on other grounds 486 Mich 1037 (2010). Respondent-father's failure to benefit from services demonstrates a risk of harm to the minor child. *Id.* Moreover, there was evidence of respondent-father's recidivist criminal history and concerns that he may not be able to refrain from being a menace to society or public safety. He, thus, posed a risk to the minor child either emotionally or physically.

Additionally, the trial court did not clearly err when it found that termination of respondent-father's parental rights was in the minor child's best interests. Respondent-father was incarcerated for all but approximately two months of the minor child's life. Moreover, respondent-father had a history of substance abuse, and he failed to make sufficient progress in alleviating this issue. Further, the minor child was in foster care for nearly her entire life, and the caseworker testified that the minor child needed permanency and stability, something respondent-father was unable to provide. The minor child's need for permanence and stability support the trial court's decision. See *In re VanDalen*, 293 Mich App at 141-142. Although it was undisputed that respondent-father loved the minor child, his love for the minor child is not enough for this Court to find that the trial court's best interests determination was clearly

erroneous when it was established that respondent-father could not care for the minor child. *In re CR*, 250 Mich App 185, 196-197; 646 NW2d 506 (2002).

Finally, respondent-father suggests that the trial court harbored bias against him because it determined that respondent-father was "selfish." "A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption." *In re MKK*, 286 Mich App 546, 566; 781 NW2d 132 (2009). To allege disqualification because of bias, the party alleging bias must show a deep-seated personal and extrajudicial bias. *Cain v Mich Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996). "Further, a trial judge's remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying bias." *In re MKK*, 286 Mich App at 567. Additionally, "[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, or of prior proceedings, do not constitute bias or partiality unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester Mich Lodge No 2225, of Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998).

We find no merit to respondent-father's assertion of bias. Although he objects to the trial court's characterization of him as "selfish," it is well established that the trial court as the trier of fact has the ability to consider the demeanor of witnesses in making credibility determinations. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Here, the trial court deemed respondent-father selfish based on the court's communications with and testimony of respondent-father during the proceedings. The trial court was permitted to do so. See *id.* Moreover, because this characterization was based on the proceedings, respondent-father cannot demonstrate that the trial court's characterization of his attitude amounts to bias. *Schellenberg*, 228 Mich App at 39. Furthermore, the characterization of respondent-father as "selfish," with no other disparaging remarks or actions directed towards respondent-father, does not rise to the level of a deep-seated, personal bias that would have required judicial disqualification. See *In re MKK*, 286 Mich App at 567 (the trial court's remarks ordinarily do not establish disqualifying bias).

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto