STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 26, 2013

In the Matter of K. J. HAMMONS, Minor.

No. 313453
Wayne Circuit Court
Family Division
LC No. 11-502408-NA

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Respondent father appeals as of right an order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(*i*) and (g). We affirm.

Petitioner sought the termination of respondent's parental rights following respondent's inappropriate sexual conduct involving the minor child. Respondent's defense was that he was sleeping or in a confused state when the conduct occurred and thought that his conduct was directed at his wife, not his child. After these proceedings were instituted, respondent sought evaluations from sleep disorder and sexual dysfunction professionals. Eventually he pleaded no contest to the allegations set forth in the petition and the court took temporary jurisdiction over the child. Subsequently, a hearing was conducted "to determine whether the statutory burden had been met for grounds to terminate parental rights and whether it is in the child's best interest to terminate."

Following the hearing, the trial court issued its opinion and order holding: "Based on the evidence presented this Court finds the material allegations in the petition to be substantiated and determines by clear and convincing evidence that the parental rights of [respondent] be terminated based upon statutory provisions of MCL 712A.19(3)(b)(*i*) and (g)." With regard to the child's best interests, MCL 712A.19b(5), the trial court concluded: "While this court finds no intent on father's part to harm his child, and a sufficient loving bond between [respondent] and child, the evidence shows that [respondent] is still struggling with his pornography addiction, has failed to seek out several of the services recommended to him (such as: 12-step program and psychiatric evaluation for medication), still suffers from occasional sleep 'confusion', and generally believes that since he didn't intend to molest his daughter, he shouldn't be held accountable for his actions." Further, the court held: "Regardless of [respondent's] intent or lack thereof, he has not eliminated the underlying problems that appear to be responsible for this 'unconscious' behavior." Accordingly, the trial court held that

termination of respondent's parental rights was in the child's best interests. This appeal followed.

Respondent first argues that the trial court abused its discretion when it denied his request to present testimony from his experts at the trial. We disagree.

This Court reviews a trial court's evidentiary rulings in a child protection proceeding for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Id*. (citation omitted).

On June 25, 2012, respondent stipulated on the record, through his counsel, that his experts' reports would be admitted into evidence in lieu of presenting their testimony at trial. The stipulation was clearly understood by respondent's counsel, who stated at the beginning of the August 9, 2012 trial: "I am not calling any witnesses at this trial at all." However, during the course of the trial, respondent apparently decided to testify. After the attorneys completed their examinations of respondent, the trial court asked numerous clarifying questions. At the conclusion of respondent's testimony, his counsel stated:

> I think in light of the extensive questioning about his sleep disorder and Dr. Miller's report . . . I think I will have to have Dr. Miller and doctor - - and Matthew Rosenberg . . . come in and give - - and testify on the record as to why they do their testing, what their - -

The trial court then reminded counsel that they were in the middle of the trial and everyone was notified to have all witnesses ready to present testimony on that date. Respondent's counsel never requested an adjournment of the proceedings.

Thereafter, respondent's counsel requested to admit a report authored by Dr. Miller and the trial court reminded counsel that the report was already admitted by stipulation of the parties. Respondent's counsel then requested to admit a report authored by Matthew Rosenberg, LMSW, but was reminded that the report was already admitted by stipulation of the parties. Respondent's counsel then requested to admit a report authored by Dr. John Penek. Opposing counsel objected to its admission on the ground that they had never been provided the report. The trial court sustained the objection and denied admission of the report. In response, respondent's counsel stated:

> Well, I can still call the doctor in to testify to his report, then I imagine as rebuttal material, seeing that they don't want to agree this is a situation I would have to - - have to bring that doctor in. Dr. Pennic's [sic] report - -

The trial court indicated that neither opposing counsel nor the court had been provided with a copy of Dr. Penek's report and respondent's counsel agreed that the report had not been provided "because I didn't know that sleep apnea was going to be centered to the investigation at that time." The trial court responded that sleep apnea was part of respondent's defense to the claims and counsel agreed, but indicated that she thought that Dr. Miller's report would have been sufficient evidence in that regard. Because neither the court nor opposing counsel were previously provided with Dr. Penek's report, as respondent's counsel admitted, the court held

that it was "not going to allow that report or any testimony at this point to be presented based on that report." Shortly thereafter, respondent's counsel stated: "Again, am I being told that I cannot bring in Dr. Miller as a rebuttal witness to the questions that were asked?" The trial court responded: "Right, you can't because you didn't present the report or show it to any of the parties. I just made that ruling on this . . . ." Respondent's counsel then stated: "Okay. And not Dr. Rosenberg either, correct? There is confusion about the testimony of whether [respondent] was told to go to sex anonymous." The trial court responded that there was no confusion on the issue because respondent testified that it was recommended that he go, but he was not told that he had to go.

On appeal, respondent argues that the trial court "erroneously concluded that Dr. Miller's report had not been provided to the other attorneys" because it had been admitted into evidence. It appears that, near the end of the discussion when respondent's counsel confirmed that Dr. Miller was not being allowed to testify, the trial court believed that counsel was referring to Dr. Penek because the court had "just made that ruling." Respondent's counsel did not make any clarifying statements in response to the trial court's ruling, which followed a clearly confusing discussion. In any case, respondent's counsel stipulated on the record that Dr. Miller's report would be admitted into evidence in lieu of his testimony at trial. Respondent's counsel also stipulated on the record that Rosenberg's report would be admitted into evidence in lieu of his testimony at trial. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). And, although respondent argues on appeal that he was improperly denied a "continuance," his counsel never, in fact, requested that the matter be adjourned. Therefore, we reject respondent's unsupported claim that his attorney "had a legitimate reason for asking for the continuance and to allow the experts to testify because it was clear that the trial court had lost its impartiality." Accordingly, the trial court did not abuse its discretion when it denied defendant's request to present testimony from his experts at trial. See *In re Jones*, 286 Mich App at 130.

Next, respondent argues that the trial court "pierced the veil of impartiality and was not an impartial fact finder," in violation of his right to due process, as evidenced by the court's repeated admonishments directed at his counsel during the proceedings. We disagree.

Due process requires that all parties have an unbiased and impartial decisionmaker. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). "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). In this case, we have reviewed the entire lower court record and there is no evidence to support respondent's claim that the trial judge was biased or in any way antagonistic against him. The lower court record, however, is replete with evidence of respondent's counsel's disrespectful manner toward the court which included repeated interruptions, unwarranted and insulting comments, and a general lack of civility. Respondent's counsel had to be reminded on numerous occasions that only one person could speak at once, that she was not to interrupt the court or the other attorneys when they were speaking, and that she was not permitted to argue with the court or to interject gratuitous and hostile comments. Respondent's counsel also made several objections unsupported by the Michigan Rules of Evidence and then refused to accept the court's ruling without further disruption as she was instructed. Despite respondent's counsel's behavior, the trial court remained patient and spoke to her with respect. Although there were times when the

court's patience was taxed and, after repeated warnings, counsel was threatened with a finding of contempt, respondent's counsel's behavior did not change. Even during closing argument, when respondent's counsel apparently disagreed with the trial court's instruction to limit argument to the facts of this case, respondent's counsel said: "Would you like to finish my argument for me, your Honor?" This is just one of numerous instances of respondent's counsel's discourteous and disrespectful behavior directed at the court, as well as opposing counsel. In any case, we reject respondent's claim that he was denied due process on the ground that the trial court "pierced the veil of impartiality and was not an impartial fact finder." See *Cain*, 451 Mich at 497; *In re MKK*, 286 Mich App at 566.

Next, respondent argues that the trial court clearly erred when it terminated his parental rights pursuant to MCL 712A.19b(3)(*i*) and (g) "because it disregarded, distorted and misunderstood the opinion of the experts and its findings of fact were erroneous and insufficient to support the termination of [his] parental rights." We disagree.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence and that termination is in the best interests of the child, MCL 712A.19b(5). *In re Beck*, 488 Mich 6, 11; 793 NW2d 562 (2010); *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). This Court reviews for clear error the trial court's determination that a statutory ground for termination has been established, as well as the court's decision regarding the child's best interests under MCL 712A.19b(5). *Id*. at 356-357. A finding is clearly erroneous if, despite evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Respondent's parental rights were terminated under MCL 712A.19b(3)(b)(*i*) and (g), which provide:

> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> * * *
>
> (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.

In reaching its decision in this matter, the trial court considered the trial testimony of the Child Protective Services worker and respondent, as well as reports from respondent's medical professionals.

On appeal, it appears that respondent is challenging the weight accorded by the trial court to the reports from the medical professionals. However, we generally do not interfere with the

fact-finder's determinations regarding the weight of evidence or the credibility of witnesses. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). In any case, as the trial court noted, Dr. Miller's 2011 report failed to reference one of the instances of sexual misconduct and inaccurately reported that respondent had stopped viewing pornography—contrary to respondent's testimony. Further, Dr. Miller's report recommended psychological counseling and an evaluation for psychotropic medication but, according to respondent's testimony, he did not seek the evaluation and was not engaged in psychological counseling on a regular and continuing basis. The trial court also considered a report from Dr. Penek, but noted that it failed to reference two of the instances of sexual misconduct and referenced an incident involving respondent's wife that respondent denied occurred during his testimony. The court also noted that Dr. Penek inaccurately described one of the incidents of sexual misconduct compared to respondent's testimony. Thus, it appears the trial court concluded that the factual basis for Dr. Penek's opinion was, at least, incomplete. The trial court also referenced Rosenberg's letter regarding respondent, but noted that his opinion was based on what respondent "has related to this writer." The court noted that Rosenberg's opinion was that respondent, "with continued intervention (therapy) and with the development of a 'safety plan', will not be a harm to his daughter." However, again, respondent failed to engage in psychological counseling or "therapy" on a regular and continuing basis and there was no evidence of any such "safety plan." In light of the record evidence, the trial court's determination that clear and convincing evidence established the statutory grounds for termination was not clearly erroneous.

Finally, respondent argues that the trial court erred in concluding that termination of his parental rights was in the best interests of the child. We disagree.

On appeal, respondent argues that he "was working on a treatment plan by reading his bible, counseling with the elders, attending Jehovah Witness meetings, exercising and using the CPAP (sleep apnea) machine." However, much of this "treatment plan" does not comport with the recommendations of his medical professionals as discussed above. And while respondent argues that a 12-step program was not "urged," respondent admitted that such a program was recommended but he did not participate because he did not feel it was necessary. Further, the fact that respondent's 4-year-old daughter is not afraid of him is not persuasive. Additionally, while Dr. Miller opined in September 2011 that respondent's prognosis was "excellent," the trial in this matter was conducted almost a year later and respondent had not followed the therapeutic recommendations of his medical professionals. As the trial court concluded, respondent "has not eliminated the underlying problems that appear to be responsible for this 'unconscious' behavior."

Respondent also argues that the trial court failed to address the fact that the child was placed with relatives at the time of the termination proceeding; thus, the factual record was inadequate to make a best-interests determination and reversal is required. We disagree.

When determining the best interests of a child in a termination case, the trial court may consider several factors, including the respondent's history, mental health issues and parenting ability, as well as the child's safety, well-being, and need for permanency, stability, and finality. *In re Jones*, 286 Mich App 126, 129-131; 777 NW2d 728 (2009); *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001); *In re*

Gillespie, 197 Mich App 440, 446-447; 496 NW2d 309 (1992). The fact that the child is placed with relatives at the time of the termination hearing is also a factor to consider when determining whether termination is in the child's best interests. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010); *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

In this case, the factual record was not inadequate for the court to make a best-interests determination. The trial court was well aware of the fact that the child was placed with relatives during these proceedings. Respondent's counsel had requested that the court allow respondent supervised visitations several times during these proceedings and eventually he was granted supervised visitations. However, the placement of the child with a relative during the proceedings is only one consideration with regard to a best-interests determination. It is apparent in this case that the trial court concluded that several other relevant factors weighed in favor of termination. That is, respondent continued to struggle with his admitted longstanding pornography addiction, although he thought it may have contributed to the sexual misconduct at issue and the lack of intimacy in his marriage. He also testified that Dr. Miller told him to "stay away from porn." Respondent did not undergo an evaluation to determine if medication would help his conditions and he did not seek regular and continuing therapy, although he still had incidences of "sleep confusion"—which had purportedly led to the sexual misconduct at issue. Further, respondent testified that, because his conduct was not intentional, he did not prohibit the child from falling asleep with him on the couch (which led to a third and fourth incidence of inappropriate sexual conduct) and he did not feel that he had to leave the house where the child lived to prevent further incidences. In light of the evidence of record, we are not left with a definite and firm conviction that a mistake has been made; thus, we affirm the trial court's determination that clear and convincing evidence established that termination of respondent's parental rights was in the best interests of the child. See *In re Trejo*, 462 Mich at 355; *In re Miller*, 433 Mich at 337.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder