# STATE OF MICHIGAN

# COURT OF APPEALS

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*In re* WILSON, Minor.

UNPUBLISHED
November 24, 2015

No. 326774
Roscommon Circuit Court
Family Division
LC No. 13-721148-NA

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Before: METER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Respondent appeals by right a March 13, 2015, circuit court order terminating his parental rights to the minor child HW, pursuant to MCL 712A.19b(3)(a)(*ii*) and (g). For the reasons set forth in this opinion, we affirm.

## I. BACKGROUND

On January 17, 2013, Department of Health and Human Services (DHHS) filed an abuse and neglect petition regarding the minor child. The petition listed HW's mother, MW, Neal Jones, her live-in boyfriend, and respondent, who was later confirmed to be HW's biological father. This appeal concerns the termination of respondent-father's parental rights.

Respondent was incarcerated throughout the duration of this case. On March 11, 2014, a DNA test confirmed that respondent was HW's biological father. On August 13, 2014, DHHS filed a supplemental petition to terminate respondent's parental rights. The petition alleged that respondent learned that HW was his child when the child was approximately two years old, but that respondent failed to provide any financial support and had only one physical interaction with HW. Factual allegations also included respondent's extensive criminal history and incarceration record.

Three hearings were held before the adjudication hearing. Respondent attended all of the hearings by video-conference and his attorney was present in the courtroom. The trial court held a one-day adjudication hearing on March 13, 2015. At the hearing, respondent testified that he had been incarcerated for about 18 months for a third drunk driving offense that occurred in 2012. Respondent was imprisoned from 2000 to 2005 for unlawfully driving away an automobile and for arson. In 2008, he pleaded guilty to a felony firearm offense and was sentenced to ten months in jail. Respondent admitted to

being arrested twice, in 2007 and 2011, for domestic violence offenses, one involving April Smith, the mother of three of respondent's children.

Respondent testified that he had nine children with six different women, including HW, ranging from 2 to 15 years old. The children lived with their respective mothers or with other extended family members and respondent testified that he paid child support when the mothers "ask me for money." With respect to his relationship with HW, respondent testified that he had been in a relationship with HW's mother MW in 2007, but was not certain that she was pregnant when the relationship ended. However, respondent admitted that MW informed him that HW might be his child. Respondent testified that he saw HW in 2009, two years after HW's birth, but the child had brown eyes and black hair, which was different from his other kids. Respondent eventually filed a parent complaint form in 2012, but did not know why he failed to file for a paternity test before HW was five and a half years old.

Respondent admitted that he had not provided any type of support for HW. He admitted that his only contact with HW was when he was two years old; he received a photograph "when he was probably like six." Respondent admitted that he did not have a bond with HW and stated that he just wanted to get to meet HW and did not want custody, "I just want something to do with 'em."

Respondent testified that he believed he would be released from prison in April 2015, and he planned on living with Smith and their three children upon his release. Respondent testified that he attended various programs while in prison and admitted a problem with alcohol. He planned to remain in a treatment program after his release. Respondent testified that it would be reasonable to introduce HW to him within a month or two after he was released and he stated that he did not plan on returning to prison.

MW testified that she informed respondent that he was the father of HW when HW was about two years old. MW explained that in 2009, respondent spoke with HW over the phone at least twice. That same year, MW and HW went to Jackson to pick respondent up at the paternal grandmother's house and take him up north. HW met respondent, the paternal grandparents and a paternal aunt, and they were informed that HW was respondent's child. MW gave the paternal grandmother two or three pictures of HW. MW reported that while up north, respondent visited with HW for about two hours before HW went to bed and then again for a couple of hours the following day while MW was at work. MW stated that she kicked respondent out of the house when she returned from work and found "everybody at the house was intoxicated." MW explained that every time she spoke with respondent in 2009, respondent knew and acknowledged that HW was his son. However, other than four hours, HW had not had any contact with respondent and neither respondent nor his family provided support for HW.

Jessica Domsitz, HW's case worker, testified that HW was removed from MW's care in January of 2013 because of substance abuse, domestic violence, and an alleged sexual assault that occurred against MW in front of the children (Jones was not the alleged perpetrator). There was confusion about HW's father, but respondent had not provided care for HW. Domsitz opined that HW believed that Jones was his father.

Jones provided HW with material support and emotional support, albeit not all of which had been good. Domsitz observed a bond between HW and Jones and stated that they loved each other and she concluded that Jones was HW's "psychological father." Domsitz was not aware of any bond between HW and respondent and concluded that respondent had been nothing more than a biological donor.

Domsitz testified that DHHS sought to terminate respondent's parental rights because he did not have an established bond with HW, was never a part of any aspect of HW's life, and was not confirmed to be a legal father until July 2014. Domsitz stated that respondent had essentially known that he was HW's father well before that time, yet had failed to provide any care or support. Domsitz testified that it was in HW's best interests to terminate respondent's parental rights.

Dr. Wayne Simmons, a qualified expert witness, testified regarding his psychological evaluation of HW. Simmons testified that his tests showed that HW was "a vulnerable child," who was very positive about Jones and "clearly had a big investment in him." Simmons testified that there was great risk in introducing respondent into HW's life and informing him that respondent, not Jones, was the child's father. Simmons opined that this had "the potential to be very disruptive for [HW]." Simmons explained that the risks of integrating someone into HW's life after eight years of not being involved were greater than any potential benefits. Simmons testified that HW was a challenging child. He would have to engage in weekly counseling with a sophisticated and emotionally available counselor in order to build a relationship with respondent. Simmons noted that respondent lived a far distance from HW and that the geographical challenge added another layer of complexity.

Following the close of proofs, the court found that respondent failed to provide proper or necessary support because he abandoned HW in 2009. The court determined that there were grounds to terminate respondent's parental rights under MCL 712A.19b(3)(a)(*ii*) and (g) and that termination was in HW's best interests.

## II. ANALYSIS

Respondent argues that the court clearly erred in finding statutory grounds for termination.

We review an order terminating parental rights for clear error. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); MCR 3.977(K). Clear error exists "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." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Before terminating a respondent's parental rights, the circuit court must make a finding that at least one of the statutory grounds under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). In this case, the court found grounds for termination under MCL 712A.19b(3)(a)(*ii*) and (g), which provide as follows:

(a) The child has been deserted under either of the following circumstances:

* * *

(*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

* * *

(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 finding grounds for termination, the circuit court considered respondent's conduct before DNA testing confirmed that respondent was HW's father. Respondent contends that this was improper. We disagree.

In *In re LE*, 278 Mich App 1, 23-24; 805 NW2d 234 (2008), this Court held that conduct before paternity is established can provide a basis for termination. This Court explained the circumstances in that case as follows:

> Even though [respondent], as a mere putative father, did not yet have a legal duty to care for LE, he did have, as her biological father, a clear moral duty to do so, and he could and should have offered support or at least a plan to care for her. [] [Respondent] should have more promptly taken steps to formally acknowledge paternity, and we hold that his failure to do so may be "used against him" as evidence of his failure to provide care and custody. [*Id*. at 23-24.]

This case is similar to *In re LE* in that there was evidence to support that respondent knew or reasonably should have known that he was HW's biological father. The record shows that respondent suspected that he was the father before HW was born in 2007. HW's mother testified that she told respondent that he was the father in 2009, when HW was two years old. According to MW, respondent, the paternal grandparents and a paternal aunt met the child. MW testified that respondent traveled up north for a visit with the child and acknowledged paternity during telephone conversations. In 2012, the child's mother asked respondent for help. Respondent told her to start the process to establish paternity. However, other than filing a parent complaint form, respondent did nothing to establish a relationship or provide any support for the child.

This evidence supported the circuit court's finding that respondent deserted HW for 91 or more days and did not seek custody during that period for purposes of MCL 712A.19b(3)(a)(*ii*). Here, there is no evidence to support that respondent made a reasonable effort to provide any support for HW or to seek custody of the child after MW informed him that he was the child's father. Evidence supported that respondent knew that he was HW's father in 2009, and HW's mother asked him for help in 2012.

Although respondent filed a parent complaint form in 2012, he did nothing further to establish paternity or provide support for the child.

Respondent's argument that he could not establish paternity because he did not know where MW lived is devoid of merit. Although MW had moved several times, she resided in the same city and respondent's family knew some of MW's relatives. Respondent did not take any action to determine whether he was the biological father until the court ordered him to submit to a DNA paternity test. Respondent testified that he did not plan to seek custody of HW. Even after paternity was established, respondent did not provide any type of support for HW other than sending some letters to the caseworker. In short, the circuit court did not clearly err in finding grounds for termination under MCL 712A.19b(3)(a)(*ii*).

In addition, the court did not clearly err in finding that respondent failed to provide proper care and custody for HW and that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering HW's age. MCL 712A.19b(3)(g). The record shows that respondent did not attempt to provide care or custody for HW even after MW informed him that he was HW's father and that it was unlikely that respondent would be able to provide proper care and custody for the child within a reasonable amount time. Respondent had a longstanding criminal history and problems with substance abuse. He remained incarcerated for a third drunk driving offense with a 2017 release date unless paroled. The case worker explained that it would likely take six months after respondent's release before he could be introduced to the child and if things went well, it would take up to a year before unsupervised parenting time could take place. Furthermore, respondent had not made any definitive plans for the child and he did not want custody. Respondent had eight other children to care for and he only provided child support when one of the mothers asked him for money. He did not articulate a credible means by which he would provide for HW in addition to providing for his eight other children. On this record, we are not left with a definite and firm conviction that the court erred in finding grounds for termination under MCL 712A.19b(3)(g).

Next respondent argues that DHHS failed to provide him with case services, contrary to *In re Mason*, 486 Mich at 142. However, DHHS was not obligated to provide respondent with services where termination, rather than reunification, was DHHS' initial goal in the case. *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013). Furthermore, unlike in *In re Mason*, 486 Mich at 142, in this case, respondent did not have a pre-existing bond with HW and respondent's incarceration was not the deciding factor in DHHS' failure to provide services. Rather, DHHS sought termination because there was no bond with the child and because respondent failed to take any proactive steps to provide for HW despite evidence that he knew that he was the father of the child. *Id*. at 161.

Next, respondent argues that the circuit court clearly erred in determining that termination was in HW's best interests.

After a circuit court finds a statutory ground for termination by clear and convincing evidence, the court shall then order termination of parental rights if the court also finds that termination is in the best interests of the child. MCL 712A.19b(5). Whether termination is in a child's best interests must be proved by a preponderance of the evidence. *In re Moss*, 301 Mich App at 90. In deciding a child's best interests, a court may consider the child's bond to his parent; the parent's parenting ability; the child's need for permanency, stability, and finality; and the suitability of alternative homes. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The circuit court should weigh all the evidence available to determine the child's best interests. *Id*. We review a circuit court's determination regarding the child's best interests for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

In this case, the circuit court did not clearly err in finding that termination was in HW's best interests. The record showed that there was no bond between respondent and HW and that respondent displayed no initiative in developing a relationship with or providing support for the child. Most telling, respondent testified that he did not intend to seek custody of his child, stating: "I just want something to do with em.'' The case worker and the expert witness testified that HW was vulnerable and needed stability and respondent had been incarcerated for over 8 of the previous 15 years. The child needed permanency and respondent was imprisoned with an unknown release date. He had numerous felonies and a history of domestic violence, alcohol abuse, and assault. Respondent failed to provide any support for HW even after paternity was formally established and he was not actively involved in raising and supporting his other eight children.

Moreover, Simmons provided expert testimony that HW was a "very fragile", "very vulnerable" and "a troubled boy." HW had significant issues with aggression, focusing and socialization at school, had limited capacity to form close attachments and did not expect collaborative relationships to occur. Simmons opined that it would be harmful to HW if respondent were involved in his life because HW viewed Jones as his father. Simmons explained that it would be highly disruptive and destabilizing if the child were to learn that his biological father was in prison and knew of his existence for years yet had not taken steps to be involved in his life. According to Simmons, under the best of circumstances it would take an exceptionally adept individual to meet HW and become familiar with him at a very gradual pace so as to allow that relationship to unfold in a way that was comfortable and tolerable for the child. Simmons testified that this would be difficult absent relatively sophisticated experience with children, and questioned respondent's motivations given that he had known he had this child for six to seven years and made only one attempt to see him.

Respondent contends that the trial court gave undue regard to Simmons' testimony who he characterizes as a "minimally informed source." However, the record shows that Simmons' testimony was based on his professional assessment of HW, which included a battery of tests and information gathered from the child's mother. Moreover, as noted above, in reviewing a termination proceeding, we give "due regard to the trial court's special opportunity to observe the witnesses," and make credibility determinations. *In re BZ*, 264 Mich App at 296-297. In short, the trial court did not

clearly err in finding that termination was in HW's best interests. *In re Trejo*, 462 Mich at 356-357.

Finally, respondent contends that he received ineffective assistance of counsel. Because this issue is unpreserved, our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In analyzing a claim of ineffective assistance of counsel at a termination hearing, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context. *In Re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Effective assistance of counsel is presumed and respondent bears a heavy burden of proving otherwise. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). To establish a claim of ineffective assistance of counsel, it must be shown that the counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Id*.

Respondent argues that counsel was inadequately prepared for the proceedings because he purportedly failed to properly interview respondent before the trial and was unaware of necessary witnesses. Respondent contends that counsel was unfamiliar with the case file and that additional witnesses, such as respondent's fiancé, the paternal grandparents and respondent's other children, would have further established respondent's ability to appropriately bond with and nurture the child. Additionally, respondent argues that his trial attorney failed to request a psychological evaluation for respondent, which he maintains would have shown that he had the capacity and the desire to provide care and support for his child. Respondent also contends that counsel failed to request an evaluation or assessment of the potential impact of introducing respondent into the child's day-to-day life.

Counsel advised the court during the pretrial hearing that he had talked with respondent over the phone and had enough information to proceed. During the adjudication hearing, counsel asked appropriate questions and made appropriate arguments given that the facts of the case were largely irrefutable. Counsel asked respondent limited questions but did address his parenting skills and called respondent's sister as a witness to offer positive testimony about respondent's ability to care for HW.

Moreover, additional testimony concerning respondent's ability to be a father would not have impacted the proceeding. As noted, as early as 2009 and clearly by 2012, respondent knew or had reason to know that he was HW's father, yet he failed to make an effort to establish paternity and a relationship with the child. Even after paternity was established, respondent did not support HW and stated that he did not want custody. Other evidence showed that respondent could not provide a stable home for HW where respondent remained incarcerated, had a history of alcohol abuse and domestic violence, and where respondent's eight other children were being raised by people other than respondent. In short, respondent has failed to overcome the presumption that he received effective assistance of counsel. *Uphaus*, 278 Mich App at 185.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Jane M. Beckering