STATE OF MICHIGAN

COURT OF APPEALS

In re S CAPE, Minor.

UNPUBLISHED
March 15, 2016

No. 329010
Kent Circuit Court
Family Division
LC No. 15-050417-NA

Before: METER, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court order terminating his parental rights to a minor child under MCL 712A.19b(3)(a)(*ii*) (child deserted for 91 or more days) and (f) (child has a guardian and the child's parent, despite having the ability to do so, fails to support or contact the child for a period of two years or more).[1] We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In October 2012, petitioners, who are the maternal grandparents of the minor child, were appointed as the year-old child's guardians.[2] The guardianship order stated that "[t]he welfare of the minor will be served by the appointment[] and by payment of reasonable support" along with "reasonable parenting time and contact by the parent(s)." Additionally, the order indicated that parenting time should occur "as the parties mutually agree," and that child support should be paid by respondent and respondent-mother, although it did not specify an amount.

On February 10, 2015, petitioners filed a supplemental petition[3] seeking the termination of both respondents' parental rights. The petition alleged that

[1] The trial court also terminated the parental rights of the child's mother, but she is not party to this appeal. Thus, we will refer to respondent-father as "respondent" in this opinion. Where relevant, we will refer to the child's mother as respondent-mother.

[2] The events and circumstances surrounding the establishment of the guardianship were not admitted as evidence in this case.

[3] The initial petition is not included in the lower court record received on appeal.

> (i) the parent, having the ability to support or assist in supporting the child(ren), has failed or neglected, without good cause, to provide regular and substantial support for two years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for two years or more before the filling of the petition, and (ii) the parent, having the ability to visit, contact, or communicate with the child(ren), has regularly and substantially failed or neglected, without good cause, to do so for two years or more before the filing of the petition.

The petition also alleged, in relevant part, that (1) respondent was the subject of an abuse and neglect proceeding in 2012; (2) "in 2012, [respondent] was substantiated for neglect by CPS"; (3) "the minor child has been in the care and custody of [petitioners] for over two years"; (4) "[t]here has been substantial non compliance [sic] in providing support as well as visitation with the child"; and (5) "[respondent] has abandoned the minor child and failed to provide her support."

The trial court authorized the petition after conducting a preliminary inquiry or hearing. Petitioners later filed a brief in support of the supplemental petition.

Following an adjournment of the initial termination hearing, the trial court held a second hearing on July 29, 2015. The only witnesses were the child's grandmother, who is one of the petitioners, and the respondent. After hearing testimony, the trial court concluded that petitioners established, by clear and convincing evidence, that termination of respondent's parental rights was proper under MCL 712A.19b(3)(a)(*ii*) and (f). Then, after considering the best interest factors under MCL 722.23, a section of the Child Custody Act, MCL 722.21 *et seq.*, it concluded that termination of respondent's parental rights was in the best interest of the child.

Consistent with its findings on the record, the trial court entered an order terminating respondent's parental rights on August 4, 2015. The child remained placed with petitioners, and petitioners were required to file a petition for adoption within 30 days.

Respondent now appeals.

II. STATUTORY BASIS FOR TERMINATION

Respondent argues that the trial court erred in finding that a statutory basis for termination existed under MCL 712A.19b(3)(f). We disagree.

A. STANDARD OF REVIEW

In order to terminate parental rights, the trial court must find that a statutory basis for termination under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). "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." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted; alteration in

original); see also *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004) ("A finding of fact is clearly erroneous 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*." [Emphasis added.]).

B. ANALYSIS

MCL 712A.19b(3)(f) provides that termination is proper if the trial court finds, by clear and convincing evidence, that:

> (f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and *both* of the following have occurred:
>
> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.
>
> (*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition. [Emphasis added.]

Thus, in order for termination to be proper under MCL 712A.19b(3)(f), the trial court must find that subsections (*i*) and (*ii*) both have been proven by clear and convincing evidence.

1. MCL 712A.19b(3)(f)(*i*)

Here, in ruling that MCL 712A.19b(3)(f)(*i*) had been established by clear and convincing evidence, the trial court found that the guardianship order was, in effect, a child support order that required reasonable support, even though it did not specify the amount of support to be paid. It also found that respondent had that order in his possession, yet failed to comply by paying any amount of child support. It further noted that respondent indicated that he had the ability to provide such support.

Respondent first contends that the guardianship order did not qualify as a child support order for purposes of MCL 712A.19b(3)(f)(*i*). Even if the order did not qualify, that issue is not dispositive to this appeal. Assuming that the guardianship order did not constitute a child support order,[4] the trial court properly concluded that MCL 712A.19b(3)(f)(*i*) had been proven

[4] See *In re SMNE*, 264 Mich App 49, 54-56; 689 NW2d 235 (2004), in which we held that a support order has not been entered for purposes of MCL 710.51(6), which is substantially similar to MCL 712A.19b(3)(f)(*i*), when the order does not specify a specific sum of money that a

by clear and convincing evidence. See *In re White*, 303 Mich App at 709. The use of a disjunctive "or" in the statute provides two possible bases for terminating respondent's rights under this provision, see *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010); see also *In re Newton*, 238 Mich App 486, 490-491; 606 NW2d 34 (1999), and the trial court did not clearly err in finding that respondent had the ability to provide support and failed, without good cause, to support the child.

Respondent expressly testified that he had "been gainfully employed" since moving to Michigan in 2011 and had the ability to provide support. In particular, he noted that he had, at one point in time, worked three jobs simultaneously to support himself, the minor child, and respondent-mother, and he also specified the companies where he had worked since moving here. He also testified that he had consistently supported his son, who was in respondent's custody, explaining that the son "is perfectly taken care of, perfectly provided for. He has ever [sic] single possible need he could ever have." Further, respondent expressly said that he would have been willing to provide support for the child if he had not been "met with hostility" from petitioners and explicitly acknowledged that he had failed to provide support for the minor child since 2012. This testimony undermines respondent's claim that the record includes no evidence regarding whether he was able to pay child support. Respondent's statements clearly established his ability to provide support for the child and addressed each of the categories of information that he contends are missing from the record.

In addition, respondent notes on appeal that he testified that he would have been willing to provide support for the child but for petitioners' "hostility and refusal to communicate with him." In so doing, it appears that respondent contends that he had good cause for failing to provide support. See MCL 712A.19b(3)(f)(*i*). However, in finding that respondent had the ability to provide support and failed to do so, the trial court implicitly rejected respondent's testimony regarding his communications with petitioners and credited the grandmother's testimony that respondent never contacted her regarding visitation or contact with the child and never offered to provide any support. It is not the role of this Court to judge the credibility of the witnesses, and deference must be given to the trial court's credibility assessments given its unique opportunity to observe the witnesses and judge their truthfulness. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Further, respondent's testimony was limited to hostility that he experienced following his attempts to *see or contact* the child. He never testified that he was prevented from sending money or otherwise providing support for the child, or that petitioners refused to accept support.

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respondent is required to pay. As a result, the petitioners in that case were required to demonstrate that the respondent had the ability to pay child support. *Id*. at 55-56. It is noteworthy that the child's grandmother testified at the termination hearing that a child support order had not been entered in this case, but "[i]t was understood that [respondents] would provide support."

Additionally, it is significant to note that even if the guardianship order constituted a child support order despite the fact that it did not prescribe a specific sum of money, it is undisputed that respondent failed to comply with that order, as he expressly acknowledged that he provided no support.

Thus, the trial court did not clearly err in implicitly finding that respondent lacked good cause for his failure to provide any support.

In sum, given respondent's testimony, the trial court did not clearly err in concluding that respondent "ha[d] the ability to support or assist in supporting the minor" and "failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition." MCL 712A.19b(3)(f)(*i*). Likewise, in light of respondent's unequivocal admissions on the record, we reject respondent's claim that the trial court was required to make a separate inquiry into respondent's ability to pay support.

2. MCL 712A.19b(3)(f)(*ii*)

MCL 712A.19b(3)(f)(*ii*) considers whether respondent, having the ability to do so, failed, without good cause, to maintain a relationship by visiting, contacting, or otherwise communicating with the child for two or more years before the supplemental petition was filed. Because the terms "visit, contact, or communicate" are phrased in the disjunctive, petitioners only were required to prove that respondent had the ability to perform one of those acts, not all three. See *In re Hill*, 221 Mich App 683, 694; 562 NW2d 254 (1997) (interpreting substantially identical language to MCL 712A.19b(3)(f)(*ii*)).

The trial court found no dispute that respondent failed to maintain any relationship with the child in the two years before the filing of the supplemental petition in February 2015. It also recognized and considered that respondent sought legal advice regarding the expense and time involved in order to regain custody or secure parenting time with the child, but nonetheless determined that respondent made no effort to pursue any parenting time. The court concluded, "The point I'm making is . . . that there are opportunities out there whether you explore[d] them all or not[,] sir. Whether you decided to stop, the fact is you did stop."

The trial court's findings were not clearly erroneous. See *In re White*, 303 Mich App at 709. It is undisputed that respondent did not visit, contact, or otherwise communicate with the child between 2012 and the filing of the supplemental petition on February 10, 2015. The grandmother testified that respondent never contacted her regarding visitation with the minor child, never communicated with the child, and never established any contact through cards, letters, money, or gifts. Likewise, respondent testified that he did not initiate any contact with petitioners after October 2012 and never visited or established any contact or communication with the child after that time.

Respondent appears to assert, however, that petitioners' hostility and threats inhibited his ability to visit, contact, or communicate with the child, as he contends that he did not *fail* to maintain contact with the child given petitioners' hostility and threats, and that the trial court disregarded his testimony in so finding. See MCL 712A.19b(3)(f)(*ii*). He relies on *In re ALZ*, 247 Mich App 264, 273-274; 636 NW2d 284 (2001), a stepparent adoption case in which this Court held that a father, whose paternity had not been established, did not have the ability to visit, contact, or communicate with his child when the mother refused to allow visitation because the father did not have a legal right to visitation or communication—and, as a result, had no remedy through the courts—until his paternity was established. Under those circumstances, this Court found that the respondent's act of filing a complaint, which sought an order of filiation,

"constituted ongoing requests for contact with [the child], but [the] petitioner mother's resistance to these requests resulted in [the] respondent's inability to contact the child." *Id.* at 274.

The facts of the instant case are distinguishable from *In re ALZ*, 247 Mich App 264. There is no indication that respondent's paternity was ever disputed, and, therefore, he had a legal right and the ability to visit the child until that right was suspended or extinguished by court order. Cf. *In re Kaiser*, 222 Mich App 619, 624-626; 564 NW2d 174 (1997). This right was reflected in the guardianship order, which provided for "reasonable parenting and contact by the parent(s)." Even if petitioners did not want him to have contact with the child, there were avenues that respondent could have pursued if he wanted to maintain a relationship with the child. In particular, respondent could have sought relief from the court—such as by seeking enforcement of his right to parenting time under the guardianship order, see *In re SMNE*, 264 Mich App at 51—if he believed that petitioners were interfering with that right. There is nothing in the record indicating that respondent was precluded from accessing the courts, regardless of the advice that he allegedly received from attorneys. As such, petitioners' threats and hostility did not render respondent *unable* to visit, contact, or communicate with the child. See *id*.

Relatedly, respondent argues that petitioners, like the petitioners in *ALZ*, "should not be allowed to refuse respondent contact with [the child], then use his lack of contact against him to support [the] petition" for termination of his parental rights. *In re ALZ*, 247 Mich App at 277. See also *id*. ("To allow termination of the parental rights of a noncustodial parent who has attempted, although somewhat late in the game, to involve himself with the child and has been consistently rebuffed by the custodial parent would not be consistent with [the] purpose [of MCL 710.51]."). Unlike the father in *ALZ* who took action to secure parenting time within the applicable two-year period after experiencing opposition from the child's mother, see *id*. at 266-269, respondent made absolutely no effort to regain contact or communicate with the child in the two years immediately prior to the filing of the termination petition. Accordingly, he cannot attribute his failure to make *any* attempt to contact the child to petitioners' actions, as there is no evidence that he was prevented from visiting or communicating with the child during the applicable two-year period.

Furthermore, the threats and hostility that respondent experienced were in response to his requests to physically see the child or contact petitioners through Facebook. Personal visits and electronic communication are only some of the possible avenues for maintaining a parent-child relationship, see MCL 712A.19b(3)(f)(*ii*), and there is no indication that respondent has "good cause" for failing to further attempt to contact the child by mail or other means despite petitioners' hostile responses, or that other circumstances existed that prevented respondent from attempting to contact or communicate with the child.

Finally, respondent raises a series of claims related to a personal protection order ("PPO") against him, which was obtained by respondent-mother. He contends that "the existence of a PPO would certainly have created a serious obstacle for [him] to maintain contact with his daughter, who was placed in the care of the parents of his former partner." Respondent also raises numerous challenges to the grandmother's testimony at the termination hearing based on documentation related to the PPO, and argues that the existence of the PPO should lend credibility to his testimony that petitioners responded with hostility and threats when he

attempted to visit the child, such that they intentionally prevented him from maintaining contact with her.

Respondent expressly acknowledges that "[t]his information was not made known to the trial court at the time of the termination" proceedings, and proffers multiple exhibits on appeal concerning the PPO that were not before the trial court in this case. We decline to consider respondent's claims concerning the PPO because " '[t]his Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.' " *In re Harper*, 302 Mich App 349, 360; 839 NW2d 44 (2013), quoting *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Additionally, to the extent that respondent asks us to consider the documents related to the PPO in order to reassess the credibility of his testimony and the grandmother's testimony, we emphasize that it is not the role of this Court to judge the credibility of the witnesses, as deference must be given to the trial court's credibility assessments given its unique opportunity to observe the witnesses and judge their truthfulness. See *In re Miller*, 433 Mich at 337; *In re Fried*, 266 Mich App at 541.

Therefore, the trial court did not clearly err in concluding that petitioners had established, by clear and convincing evidence, that termination of respondent's parental rights was proper under MCL 712A.19b(3)(f). See *In re White*, 303 Mich App at 709. Because only one statutory ground must be established to support termination of a respondent's parental rights, *In re Foster*, 285 Mich App 630, 633; 776 NW2d 415 (2009), we need not address respondent's arguments regarding whether termination of his parental rights was proper under MCL 712A.19b(3)(a)(*ii*).

III. BEST-INTEREST DETERMINATION

Respondent contends that the trial court erred in finding that termination of his parental rights was in the best interests of the child. Respondent argues that the trial court erred in failing to apply the presumption under MCL 722.25 and consider his liberty interest in raising his child when making its best-interest determination. We disagree.

A. STANDARD OF REVIEW

This Court reviews for clear error a trial court's best-interest determination. *In re White*, 303 Mich App at 713, citing MCR 3.977(K). However, respondent failed to argue below that the trial court should apply the presumption under MCL 722.25 and related caselaw in this case. Thus, this claim is unpreserved, *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014), and reviewed for plain error affecting substantial rights, *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

B. ANALYSIS

Pursuant to MCL 712A.19b(5), "[t]he trial court must order the parent's rights terminated if the [petitioner] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests." *In re White*, 303 Mich App at 713 (footnotes omitted).

> To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "the child's

> bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*Id*. at 713-714 (footnotes omitted); see also *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).]

"[T]he fact that the children are in the care of a relative at the time of the termination hearing is an explicit factor to consider in determining whether termination was in the children's best interests." *In re Olive/Metts Minors*, 297 Mich App at 43 (quotation marks and citation omitted).

In this case, the trial court considered the best interests factors under MCL 722.23 of the Child Custody Act, MCL 722.21 *et seq*. Even though a trial court is not required to make findings on these factors in a termination proceeding, it is appropriate for a "court to consider many of the concerns underlying those best interests factors [under MCL 722.23] in deciding whether to terminate parental rights." *In re JS & SM*, 231 Mich App 92, 102; 585 NW2d 326 (1998), overruled on other grounds *In re Trejo*, 341 Mich 341, 353-354; 612 NW2d 407 (2000), abrogated in part by statute on other grounds as stated in *In re Moss*, 301 Mich App 76, 83 (2013). Here, the trial court found that the following factors weighed in favor of termination: (1) the lack of a relationship between the child and respondent; (2) respondent's lack of involvement with the child and the unlikelihood that this would change in the future; (3) petitioners' consistent support of the child and respondent's lack of support; (4) the stability that the four-year-old child had experienced in the care of petitioners for more than two years and the desirability of continuing that stability; (5) the permanence of petitioners' family unit; and (6) the fact that respondent had not cooperated with petitioners. The court concluded that other factors listed under MCL 722.23 were either neutral with regard to a termination proceeding or did not apply.

Consistent with the trial court's findings, the evidence in the record reveals that the child, who was four years old at the time of the termination hearing, had lived with petitioners for the majority of her life. Respondent had not seen or communicated with the child since 2012, and there is no indication that he shared a bond with the child, who had been removed from his care at the age of one. The grandmother confirmed that the child did not have a relationship with respondent, and that respondent did not have any involvement in providing love, affection, or religious guidance. On the other hand, the record clearly shows that the child had a relationship with petitioners and viewed them as her parents. Additionally, regarding the permanency and stability of petitioners' home, the testimony showed that petitioners had been married for 36 years and had a strong relationship. Further, petitioners had been the exclusive source of the child's support since 2012. Given this testimony, the trial court did not clearly err in finding, by a preponderance of evidence on the whole record, that termination of respondent's parental rights was in the child's best interests. See *In re White*, 303 Mich App at 713.

Respondent contends that the trial court should have considered his fundamental right to parent his child and applied the constitutionally-based presumption in MCL 722.25(1), which provides that a court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing

evidence, in a child-custody dispute between a parent and an agency or third person. MCL 722.25 is not applicable here, however, because it is a section of the Child Custody Act, MCL 722.21 *et seq*., and does not apply to termination proceedings under the Juvenile Code. *In re Barlow,* 404 Mich 216, 235-236; 273 NW2d 35 (1978) ("By its terms, the Custody Act applies to circuit court custody disputes. It does not apply to termination proceedings[,] . . . which focus not on seeking to maximize a child's interest by deciding which of two competing parties should be awarded custody, but rather on the circumstances of a parent, the termination of whose rights is sought." [Citation and footnote omitted.]). Additionally, a parent has "a significant interest in the companionship, care, custody, and management of [his] children," which "has been characterized as an element of 'liberty' to be protected by due process." *In re Brock,* 442 Mich 101, 109; 499 NW2d 752 (1993). See also *Hunter v Hunter*, 484 Mich 247, 257-258; 771 NW2d 694 (2009). However, once the petitioner presents clear and convincing evidence that a statutory basis for termination exists under MCL 712A.19b(3), the parent's liberty interest in the custody and control of his children is eliminated. *In re Trejo,* 462 Mich at 355-356. Thus, respondent's reliance on the presumption in MCL 722.25 and his liberty interest in raising his child is misplaced.

Respondent raises numerous other challenges to the trial court's findings, arguing that the trial court misapplied particular factors under MCL 722.23 or made findings that were not supported by the evidence. We have reviewed all of these claims and concluded that none of respondent's arguments render the trial court's best-interest determination clearly erroneous given the evidence presented at the termination hearing. We note, again, that it is not the role of this Court to judge the credibility of the witnesses, as it must give deference to the trial court's credibility determinations. See *In re Miller*, 433 Mich at 337; *In re Fried*, 266 Mich App at 541. Additionally, the focus of the best-interests determination is on the best interests of the child, not the best interests of the parent. Respondent's stated desire and willingness to care for the child in the future is not enough, on its own, to establish that termination was not in the best interests of the *child*; it is more of a reflection of his own interests than the child's interests. See *In re Trejo,* 462 Mich at 356 (the "primary beneficiary" of the best-interests determination "is intended to be the child").

Additionally, to the extent that respondent contests the trial court's finding regarding the parties' willingness to facilitate and encourage a parent-child relationship under MCL 722.23(j), we conclude that this factor is not relevant in a termination case, as reunification with the parent and an ongoing parent-child relationship are not the goals of such a proceeding, unlike a child custody dispute between parents or third parties. Compare MCL 722.23(j) (considering "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents"), with *In re Sanders*, 495 Mich at 407 ("Ultimately, the dispositional phase ends with a permanency planning hearing, which results in either the dismissal of the original petition *and family reunification* or the court's ordering the DHS to file a petition for the *termination of parental rights*." [Emphasis added.]). Thus, there is no indication that the trial court's finding on this factor rendered its best-interest determination clearly erroneous.

Finally, respondent asserts that the trial court should have considered additional factors under MCL 722.23(*l*), which respondent did not raise in the trial court. However, even in considering the best interest factors under MCL 722.23, the trial court was not *required* to

consider these additional "factors" asserted by respondent, especially given that subsection (*l*) permits the consideration of "[a]ny other factor *considered by the court to be relevant*," not any factor considered relevant by respondent on appeal. MCL 722.23(*l*). Cf. *In re White*, 303 Mich App at 713-714 ("To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that *may* include . . . .").

IV. CONCLUSION

Respondent has failed to demonstrate that the trial court clearly erred in finding a statutory basis for termination of his parental rights. Likewise, the trial court did not clearly err in finding that termination was in the best interests of the child.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark T. Boonstra
/s/ Michael J. Riordan