STATE OF MICHIGAN

COURT OF APPEALS

In re HENDERSON/DIXON, Minors.

UNPUBLISHED
December 26, 2019

No. 348714
Wayne Circuit Court
Family Division
LC No. 15-519449-NA

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

The circuit court terminated respondent-mother's parental rights to her minor children, KMH, KAH, KRH, and KAD, pursuant to MCL 712A.19b(3)(g) and (j). We discern no reversible error in the termination proceedings relative to KAD and affirm as to that child. On this record, however, it appears that the Department of Health and Human Services (DHHS) may have pursued termination of the older children's guardianship to create a ground to take jurisdiction over those children and terminate respondent's parental rights. Accordingly, we reverse the termination order relative to KMH, KAH, and KRH and remand for further proceedings.

I. BACKGROUND

Respondent is the mother of seven children. Her oldest three children—KMH, KAH, and KRH—were placed in a guardianship with their paternal grandmother from 2012 through 2015. Respondent thereafter had three more children. In 2015 and 2016, the circuit court asserted jurisdiction over the latter three children and respondent participated in a court-ordered treatment plan. Respondent completed some requirements of the plan, but she continued to display erratic behavior and mental instability. The circuit court terminated respondent's parental rights in January 2018. This Court affirmed that decision. *In re Humphries/Dixon*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2018 (Docket No. 342232).

In the meantime, respondent's three oldest children remained in a guardianship. From 2015 through 2018, KAH and KRH moved in with their paternal great-grandmother and great aunt, who secured a guardianship, while KMH remained with her grandmother. By the summer of 2018, KAH and KRH were again living with their grandmother, but according to the DHHS, the grandmother's official guardianship had not been reinstated.

Respondent gave birth to KAD in June 2018. In July 2018, the DHHS filed a petition for jurisdiction over KAD and requested termination of respondent's parental rights at the initial disposition. The DHHS also filed a petition for authorization to terminate respondent's parental rights to KMH, KAH, and KRH, but the court denied the petition because these children were in a guardianship. Subsequent events are at issue in this appeal; respondent contends that the DHHS initiated a separate probate court action and successfully pursued termination of the guardianship in order to effectuate termination of respondent's parental rights. The DHHS asserts that respondent sought termination of the guardianship. At a July 20, 2018 preliminary hearing, Child Protective Services (CPS) worker Danielle Butler agreed with the DHHS's attorney "that there is some sort of hearing coming up on July [25] in which the mother has challenged those guardianships." Butler further agreed that "[i]f something happen[ed] to the guardianships," the DHHS intended "to include those three children" in a termination petition.

The probate court terminated the children's guardianship on July 25, 2018. The DHHS did not present into evidence in this case the probate court record in the guardianship action. We reviewed the register of actions available to the public on the Wayne County Probate Court website. This register indicates that respondent filed a petition to terminate or modify the guardianship on January 26, 2018. The probate court denied that petition on March 29. All pleadings related to the July 25 hearing are labeled "confidential," preventing this Court from ascertaining the identity of the moving party. Respondent's comments in a January 7, 2019 Clinic for Child Study report do not settle the record. Respondent admitted that she "went to terminate guardianship of" KMH, KAH, and KRH because the paternal grandmother had split the children up for several years when she ceded her guardianship to KAH and KRH. But respondent made no distinction between the petition she filed in January 2018 and denied in March 2018, and the events in the summer of 2018.

In any event, [o]nce the guardianship termination was complete, the circuit court permitted the DHHS to pursue its request for jurisdiction over KMH, KAH, and KRH, and termination of respondent's parental rights to these children, with a permanency plan of adoption by the children's initial guardian—their paternal grandmother. The DHHS sought termination at the initial disposition under MCL 712A.19b(3)(g) (parent unable to provide proper care and custody), (i) (parental rights to a child's sibling were previously terminated due to serious and chronic neglect or abuse, and the parent has not rectified those conditions), and (j) (child is reasonably likely to be harmed if returned to the parent's home).

Following a hearing on January 15, 2019, the circuit court took jurisdiction over the children and found termination supported by factors (g) and (j). In particular, the court found that respondent failed to benefit from the services provided in the prior proceeding, failed to further address her mental health and anger management issues, did not regularly visit the children under guardianship, and did not obtain prenatal care during her most recent pregnancy with KAD. The court also found that termination of respondent's parental rights was in the children's best interests.

II. TERMINATION OF PARENTAL RIGHTS TO KMH, KAH, AND KRH

Respondent argues that the DHHS violated her due-process rights by obtaining termination of the guardianships for KMH, KAH, and KRH in order to create a statutory ground

for jurisdiction over these children for the purpose of enabling the circuit court to then terminate her parental rights. We agree that respondent's substantive due-process rights may have been violated if petitioner manufactured the circumstances that enabled the trial court to exercise jurisdiction over KMH, KAH, and KRH. Although respondent argued below that the DHHS failed to establish grounds for jurisdiction and termination because the guardianships were unnecessarily terminated, she did not argue that this tactic violated her right to due process. Accordingly, our review is limited to plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

" 'Both the Michigan Constitution and the United States Constitution preclude the government from depriving a person of life, liberty, or property without due process of law.' " *In re Beck*, 287 Mich App 400, 401; 788 NW2d 697 (2010), aff'd 488 Mich 6 (2010), quoting *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Parents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). "There are two types of due process: procedural and substantive." *Beck*, 287 Mich App at 401. " '[T]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests.' " *Id*. at 402, quoting *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 201; 761 NW2d 293 (2008). "A person claiming a deprivation of substantive due process 'must show that the action was so arbitrary (in the constitutional sense) as to shock the conscience.' " *Beck*, 287 Mich App at 402, quoting *Mettler Walloon*, 281 Mich App at 200.

The DHHS did not adequately develop the record in this child protective action to explain the termination of the guardianship. The DHHS did not present into evidence the probate court file from the guardianship action. It is true that in January 2018, respondent petitioned the probate court to terminate or modify the guardianships for KMH, KAH, and KRH, but the probate court denied that motion three months later. We cannot ascertain on this record or the record made available to the public by the probate court the events that occurred between the March 2018 denial of respondent's petition and the July 25 guardianship termination. At a minimum, the timing of the guardianship termination is suspicious as the respondent's motion had already been denied and the guardianship termination occurred only five days after the circuit court initially refused to authorize the DHHS's supplemental petition requesting jurisdiction and termination of respondent's parental rights at the initial disposition. We simply cannot resolve the important procedural and substantive issues now raised by respondent on the record before us.

Respondent relies on *In re B & J*, 279 Mich App 12; 756 NW2d 234 (2008), in which the petitioner notified United States Immigration and Customs Enforcement (ICE) officials that the respondent parents were not legally in the United States. ICE agents detained the respondents and deported them to Guatemala. *Id*. at 15. The circuit court terminated the respondents' parental rights under MCL 712A.19b(3)(g) because their deportation left them unable to provide proper care for the children. *Id*. at 19. This Court reversed the order terminating parental rights, holding that "[p]etitioner was not entitled to seek termination of respondents' parental rights under § 19b(3)(g) in this case because petitioner, itself, intentionally set out to create that very ground for termination." *Id*. The current matter is distinguishable because the DHHS did not cause respondent to become unable to provide proper care and custody for purposes of § 19b(3)(g). Moreover, a guardianship does not immunize a parent from termination of parental

rights. MCL 712A.19b(3)(f) provides a statutory ground to terminate parental rights where a child has a guardian and the parent fails to provide regular and substantial support and fails to regularly and substantially visit, contact, or communicate with the child for two years.[1]

Although *B & J* is inapplicable, respondent has persuasively argued that the circuit court may not have properly taken jurisdiction over KMH, KAH, and KRH, and therefore could not proceed to termination at the initial disposition. The circuit court asserted jurisdiction pursuant to MCR 712A.2(b)(1), which provides, in pertinent part that jurisdiction may be taken over a minor when a parent leaves a child "without proper custody or guardianship," which is defined in MCL 712A.2(b)(1)(C) as follows:

> "Without proper custody or guardianship" does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance.

There is no evidence that KMH, KAH, and KRH lacked proper custody and guardianship with their guardian. Indeed, the DHHS's permanency plan for the children was adoption by the paternal grandmother, the children's initial guardian. Although the paternal grandmother expressed her willingness to adopt, no one asked on the record whether she would be unwilling to continue to care for the children in a guardianship capacity. Instead, as the record stands, we have no evidence to refute or confirm respondent's contention that the DHHS violated her due-process rights by seeking termination of the guardianship purposely to leave the children "[w]ithout proper custody or guardianship." The termination of respondent's parental rights to KMH, KAH, and KRH cannot stand on this record and we reverse.

On remand, the circuit court may allow the DHHS to augment the record in the child protective proceeding with the record in the probate court guardianship proceeding to prove that independent grounds existed to terminate the guardianship. The DHHS could question the

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[1] MCL 712A.19b(3)(f) provides grounds for termination where:

> The child has a guardian under the estates and protected individuals code, . . . MCL 700.1101 to 700.8206, and both of the following have occurred:
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> (*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.

guardian about whether she is willing to continue the guardianship. However, the DHHS may not support its termination petition and the circuit court may not take jurisdiction and terminate respondent's parental rights by contriving the means to reach that result.

III. TERMINATION OF PARENTAL RIGHTS TO KAD

Respondent's youngest child, KAD, was not subject to a former guardianship. The DHHS removed KAD from respondent's custody shortly after his birth. Respondent argues that the circuit court erred by finding that the DHHS established grounds to terminate her parental rights to KAD under MCL 712A.19b(3)(g) and (j), and also erred by finding that termination of her parental rights was in KAD's best interests.

A. STATUTORY GROUNDS

Pursuant to MCL 712A.19b(3), a circuit court "may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence" that at least one statutory ground has been proven by the DHHS. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). When termination is sought at the initial dispositional hearing, the court's decision must be support by legally admissible evidence. MCR 3.977(E)(3). We review for clear error a circuit court's factual finding that a statutory termination ground has been established. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "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." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (cleaned up).[2] "Clear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

The court supported termination of respondent's parental rights to KAD under MCL 712A.19b(3)(g) and (j) which provide:

> (g) The parent, although, in the court's discretion, financially able to do so, 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.
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> * * *
>
> (j) There 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.

[2] This opinion uses the new parenthetical (cleaned up) to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, Cleaning Up Quotations, 18 J App Pract & Process 143 (2017).

Initially, we note that the circuit court quoted a prior version of § 19b(3)(g). That subsection was amended by 2018 PA 58, effective June 12, 2018. Because respondent's parental rights were terminated in January 2019, approximately seven months after the statute was amended, the court should have applied the amended version of the statute.[3] Section 19b(3)(g), as amended, now requires the trial court to consider a respondent's financial ability to provide proper care and custody.

The court could have supported its termination decision based on its review of the evidence under the prior version of factor (g). In her history with KAD's six older siblings, respondent consistently failed to parent and provide for them. The three oldest children have been in a guardianship together since 2012. Although respondent testified that she visited them regularly, the guardian testified that the visits were always sporadic. The circuit court found that respondent did not visit regularly and we accord deference to its assessment of the witnesses' credibility. Moreover, the DHHS subsequently removed three more children from respondent's custody because of neglect. The DHHS offered a number of services to respondent, but she failed to benefit and the court ultimately terminated respondent's parental rights to those children. KAD was born only six months after the culmination of respondent's last round of services and six years after respondent ceded custody of her oldest three children. Respondent's inability to overcome her obstacles despite this span of time and the provision of services was evidence that she would be unable to provide a safe home and proper care and custody for newborn KAD.

However, the court did not consider the additional required element to support termination under factor (g)—whether respondent failed to provide proper care and custody for KAD despite being financially able to do so. If the court relied on factor (g) alone, we would be required to reverse the court's termination decision as to KAD and remand for further proceedings. MCL 712A.19b(3) requires only one statutory ground to support termination. As termination was properly supported under factor (j), respondent is not entitled to relief.

The DHHS presented evidence that because of respondent's longstanding history of erratic behavior, mental instability, and inconsistent care of her children, KAD would be at risk of harm if returned to respondent's care. In the earlier proceeding to terminate respondent's parental rights to her fourth through sixth children, the circuit court observed that the DHHS had provided two years of services geared toward addressing respondent's mental health issues. In January 2018, the court determined that respondent had not benefited from those services. Only six months elapsed since the January 2018 termination and KAD's birth and one year between the two termination proceedings. The DHHS presented evidence that respondent had not participated in mental health services in the meantime and therefore still had not addressed the

[3] As quoted by the circuit court, MCL 712A.19b(3)(g) previously provided:

> 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.

conditions that rendered her home an unsafe place for a child. Respondent countered with evidence of nominal efforts to participate in therapy. Contrary to respondent's contention, the circuit court did not shift the burden onto her to prove that her circumstances had changed since the prior proceeding. Rather, the court relied on evidence offered by the DHHS regarding the circumstances that led to the prior termination, as well as additional evidence that there had been no material change in respondent's circumstances since then. It was not clear error for the circuit court to weigh the evidence and find the DHHS's evidence more convincing.

Respondent also suggests that by declining to terminate her parental rights under factor (i), the court revealed the impropriety of relying under factor (j) on her failure to benefit from services and improve her mental health since the prior termination. MCL 712A.19b(3)(i) permits termination when "[p]arental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and *the parent has failed to rectify the conditions that led to the prior termination of parental rights*." (Emphasis added.) The circuit court logically could have cited factor (i) in favor of termination, because its factual findings seem to satisfy the "failed to rectify" requirement. But the failure to cite this ground is not fatal. The court was not required to compile as many statutory grounds to support termination as possible; the statute requires only one. And the court did not clearly err in finding termination supported under factor (j).

B. BEST INTERESTS

Respondent also argues that the circuit court erred by finding that termination of her parental rights was in KAD's best interests. Once a statutory ground for termination is established, the circuit court must order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). We review for clear error the court's best-interest determination. *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 637; 853 NW2d 459 (2014). Whether termination of parental rights is in a child's best interests need only be established by a preponderance of the evidence. *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). "The trial court should weigh all the evidence available to determine [a child's] best interests." *In re White*, 303 Mich App 701, 713-714; 846 NW2d 61 (2014).

The record evidence supports the circuit court's best-interest determination in this case. Respondent had a longstanding history of failing to provide proper care for her children. Three children had been in long-term guardianships, and respondent lost her parental rights to three other children. She was previously offered services, but failed to show benefit and her circumstances had not materially changed since then. Respondent did not receive prenatal care during her pregnancy with KAD. Respondent did not have a strong bond with KAD, who was removed from respondent's custody shortly after birth. Termination of respondent's parental rights allowed KAD to be permanently placed in an adoptive home, sparing him from the adverse effects of respondent's long history of instability. On this record, we discern no grounds for relief as to KAD.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher

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MURRAY, C. J. (*concurring in part and dissenting in part*).

I concur with the majority opinion's decision to affirm the termination of respondent mother's rights to KAD, but dissent from its decision to reverse the termination of respondent's parental rights to KMH, KAH, and KRH. Instead, I would affirm the termination of respondent's parental rights to each of these children.

My principal disagreement with the majority opinion comes down to the simple fact that respondent's arguments regarding a deprivation of her substantive due-process rights is an issue which, as the majority notes, is unpreserved. Because it is unpreserved, respondent's argument is subject to plain error review. See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). The majority also recognizes this fact. But where we depart is in the conclusion that, because respondent has not provided any facts upon which a conclusion can be made that petitioner sought the termination of guardianships for the three older children, or did so improperly, a reversal and remand for further findings is necessary. I would, instead, conclude that respondent has failed to meet her burden of establishing plain error because without the requisite evidence (and no one has suggested that respondent has come forward with any evidence),[1] plaintiff has simply failed to meet her burden of proving that an error occurred. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). It is, after all, respondent's burden to establish all three requirements for proving plain error, and the acknowledgment by the majority that there is no

[1] Respondent cites only two pages of the transcript from the July 20, 2018 hearing to support the argument that petitioner sought termination of the guardianships. But the pages cited contain no testimony regarding who sought termination of these children's guardianships.

evidence that petitioner filed the petition in the probate court to end the guardianships precludes appellate relief. It was incumbent upon respondent to produce some type of evidence—and not just mere conjecture—to prove that an error occurred, i.e., that the State was the petitioner seeking to end the guardianships over the three older children for the sole purpose of seeking to terminate respondent's parental rights. But as the majority recognizes, respondent has not done so. For this reason, I would simply affirm the trial court's order.

/s/ Christopher M. Murray