

STATE OF MICHIGAN
COURT OF APPEALS

In re Z. E. T. HIGGINS, also known as Z. E. HIGGINS, Minor.

UNPUBLISHED
August 19, 2021

No. 355174
Oakland Circuit Court
Family Division
LC No. 2019-872602-NA

Before: CAVANAGH, P.J., MURRAY, C.J., and REDFORD, JJ.

PER CURIAM.

Respondent-mother appeals as of right an order terminating her parental rights to her minor child, ZEH, under MCL 712A.19b(3)(c)(i) (conditions that led to the adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood child will be harmed if returned to parent). On appeal respondent does not challenge the statutory grounds for termination, only the ruling on the child’s best interests. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In April 2019, petitioner sought to remove ZEH from respondent’s care and custody on the ground that respondent failed to comply with guardianship proceedings for ZEH which resulted in termination of the guardianship.¹ The petition further alleged that respondent failed to maintain stable employment and housing, and failed to provide financial or physical means to care for ZEH. Petitioner asserted respondent had not regularly visited ZEH since his guardianship placement, and failed to maintain contact with ZEH since January 2019. Additionally, petitioner contended respondent had prior contact with Child Protective Services (CPS), since 2016, because of

¹ In 2018, respondent’s sister and ZEH’s aunt, C. Munson, filed for and obtained a guardianship of ZEH after discovering bed bug bites and bruises on ZEH’s forehead. As part of the guardianship, respondent was required to complete random drug testing, obtain stable housing, maintain stable employment and a working phone, and complete parenting classes; however, because respondent failed to comply with the trial court’s order, or appear at the guardianship hearing, the guardianship was terminated.

substance-abuse and physical neglect² allegations. As a result, petitioner's investigation suggested it was contrary to ZEH's welfare to remain in respondent's care and custody.

At the preliminary hearing regarding the petition, Kelsey Chaudoin, a CPS specialist, testified as to the above facts, and noted testimony from the guardianship hearing that respondent intentionally chose not to attend. Chaudoin testified that throughout the guardianship, respondent failed to comply with court-ordered drug testing—after testing positive for marijuana and cocaine in April 2018—and failed to consistently attend visitation, which partially resulted in its suspension in December 2018. The referee found the evidence fell within MCL 712A.2(b)(1), noting ZEH was left without proper care and custody when the guardianship was terminated. The referee also found there was anticipatory neglect, under MCL 712A.2(b)(2), because of respondent's significant lack of compliance with drug testing, her drug use, and contacts with petitioner. As a result, the referee authorized the petition, ordered that ZEH's removal from respondent's care and custody was appropriate, and ordered respondent to complete random drug testing and attend visitation. Respondent pleaded no-contest to the allegations in the petition. The trial court imposed a parent and agency treatment plan (PATP) as a path for respondent's reunification with ZEH, requiring respondent to maintain contact with her CPS caseworker, engage in services, obtain appropriate housing and employment, abstain from drug use and alcohol, submit to drug screens, and complete a substance-abuse assessment and mental health evaluation. The trial court also ordered that ZEH remain in his guardianship placement with his aunt, C. Munson.

At the August 2019 review hearing, a CPS caseworker reported that respondent was not consistently attending twice-weekly visitation, cancelling one "every other week or so," nor was respondent consistently completing her weekly random drug screens. In July, respondent tested positive for marijuana and a cocaine metabolite. The caseworker further stated respondent would not provide her address until a week before the hearing, refused to attend the court-ordered parenting classes, and was not presently employed. Respondent denied missing visitation, but indicated some visits were cancelled because she or ZEH were ill or the caseworker was late. Respondent admitted to "slacking" on her drug screens, explaining her focus was on making sure she had somewhere to sleep at night. The trial court concluded that respondent was not compliant with the PATP.

At the November 2019 review hearing, Guiding Hope caseworker, Jacquelyn Hansen, reported that respondent was more consistent with visitation but had missed three visits since the previous hearing. Hansen also reported that respondent failed to call in for any of her drug screens. And in October, respondent was arrested for aggravated felony assault and robbery, but no charges were filed. Respondent admitted she was arrested after a verbal altercation with her boyfriend, but was released the next day. The referee found respondent was not compliant with the PATP, and suspended her visitation until she completed two consecutive negative drug screens.

In April 2020, the referee held a permanency planning hearing following petitioner's recommendation that the goal be changed from reunification to adoption because of respondent's

² In 2018, CPS received a report that respondent physically neglected her two other minor children, SM and CM, which resulted in their father obtaining custody.

continued noncompliance with the court-ordered drug screens and failure to keep in contact with her caseworker; the referee agreed. A supplemental petition was filed to terminate respondent's parental rights to ZEH under MCL 712A.19b(3)(c)(i), (g), and (j). Petitioner alleged respondent failed to complete or benefit from her court-ordered services. Specifically, respondent did not complete a substance-abuse assessment, consistently call in to determine when she was required to complete a drug screen, complete drug screens, obtain appropriate and documented housing and employment, attend parenting classes, or consistently attend visitation with ZEH. As a result, petitioner requested that respondent's parental rights be terminated.

At the July 2020 review hearing, respondent stated that she had moved to Niagara Falls, New York, and requested signed court orders to participate in drug screening services and parenting classes in New York. Respondent's caseworker, Kennede Fischer, reported that she was in contact with respondent, and indicated she would assist respondent in finding a facility that does substance-abuse assessments. The referee continued ZEH's placement with Munson and scheduled the hearing regarding the statutory grounds and best-interests.

In August 2020, the trial court held the hearing. Hansen testified she was respondent's caseworker from April 2019 to early December 2019. The PATP required respondent to consistently attend visitations with ZEH, submit to random weekly drug screens, complete a substance-abuse evaluation, find adequate housing and employment, complete parenting classes, and stay in contact with her caseworker; however, respondent's level of compliance "was very low[.]" Specifically, Hansen stated respondent was unwilling to participate in parenting classes because she previously completed a parenting class. As an alternative, Hansen referred respondent for infant mental health services to meet the requirement; however, by the time respondent was able to get in for services, her visitation was suspended until she completed two consecutive negative drug screens. Additionally, Hansen stated that respondent failed to complete any of the random weekly drug screens while Hansen was on the case, or provide a reason why she was not participating in the drug screens. Hansen observed positive interactions between respondent and ZEH during visitation; however, it was unclear if ZEH knew respondent was his mother, nor did he exhibit any reaction when the visitations were suspended. Hansen believed adoption by Munson was in ZEH's best interests, as the person who provided care and support for him since he was one year old.

Next, Fischer testified as respondent's current caseworker since March 2020. Respondent failed to maintain contact with her former caseworker, Tamara Page, between December 2019 and late January 2020. After contacting respondent, Page conducted a home assessment, which revealed respondent did not have a bed for ZEH. Fischer also stated that respondent told Page, in January 2020, she was having trouble with the telephone number for her drug screens. After the issue was resolved, respondent still did not participate in the drug screens. After January, there was no contact with respondent until May 1, 2020. Because of the COVID-19 pandemic, drug testing was discontinued between March 2020 and June 2020; however, when drug testing resumed, on June 1, 2020, respondent did not participate. Fischer testified that respondent informed her, in May 2020, about the move to New York. While a meeting was scheduled to discuss the move, respondent did not attend but was advised via e-mail that she would have to obtain services, including drug screens, substance-abuse assessments, and parenting classes, on her own in New York, and respondent agreed. Fischer maintained contact with respondent since the July 2020 review hearing, however, respondent had not completed any of the requirements in

the PATP. Fischer believed there was a risk of harm to ZEH if returned to respondent, and it was in ZEH's best interests that respondent's parental rights be terminated because the reasons that ZEH entered into foster care had not been rectified, respondent failed to comply with the PATP, and there was no bond between respondent and ZEH.

Respondent testified that she completed drug screens during the guardianship proceedings, maintained employment and housing "for nearly a year," had five or six home visits with the lawyer-guardian ad litem, and had "clean drug screens." Respondent admitted that her first drug screen, in July 2019, came back positive for marijuana, but every subsequent drug screen came back negative, which was why she was granted visitation. However, respondent denied ingesting cocaine, suggesting the substance may have unknowingly been contained in the marijuana that she ingested with a "group of people." Respondent was "unsure" why the guardianship was terminated since she was fully compliant with the guardianship order, suggesting it may have been terminated because she was temporarily unemployed. Respondent now lives with her grandfather, B. Hamilton, Sr., in New York, and indicated that ZEH would have a bedroom if placed with her.

Moreover, respondent testified, in January, she was unknowingly calling the wrong telephone number to determine whether she was supposed to drug test. Despite not testing, respondent stated she was not using any unlawful substances or marijuana during this period. Respondent did not attend any drug screens from January 2020 to March 2020 because she had trouble getting there. While drug testing resumed in June 2020, respondent admitted she still did not submit to drug screens but stated that she was scheduled to begin drug screens and parenting classes after the statutory bases and best-interest hearing. Respondent also denied that ZEH tested positive for marijuana when he was born but admitted she had tested positive for marijuana while pregnant with ZEH. Respondent obtained employment in Niagara Falls, but did not have a start date yet. Respondent acknowledged she had not seen ZEH since November 2019, stating she was unable to meet the two-negative-drug screen requirement because she had limited resources and "was going through a lot at that moment." Respondent denied she was provided services to comply with the PATP beyond being given a list of services for housing and sheltering.

Hamilton testified respondent was currently living with him and his disabled son. Hamilton was currently financially supporting respondent while she was trying to get a job and he does not require a caretaker. In response to whether respondent was allowed to live with him indefinitely, Hamilton testified "I got [to] think—as I would at some point she might want to move—might want to move on to establish her own household and that," but indicated he would "always be [t]here to provide any care that she or her child" needed.

The trial court terminated respondent's parental rights, finding statutory grounds under MCL 712A.19b(3)(c)(i), (g), and (j) were established by clear and convincing evidence and termination was in ZEH's best interests. Even disregarding the time between March 2020 and June 2020 for the COVID-19 pandemic, and the entirety of the guardianship proceeding, the trial court concluded that respondent failed to comply with any step of the PATP in a timely fashion. Specific to the stable housing requirement, the trial court reasoned that up until she moved to New York, respondent had failed to obtain appropriate housing that was safe and accessible to respondent. However, even considering respondent's housing with Hamilton, the trial court was concerned that respondent's continued residence with Hamilton "appear[ed] solely conditioned on his goodwill and generosity[.]" and "demonstrative of an unfit environment as Z[E]H and

[respondent] could be ejected with little to no warning.” As for the substance-abuse requirements, the trial court stated it was unclear why respondent failed to complete a substance-abuse assessment, even after resolving the contact issues, and waited to schedule her first drug screen until after the termination hearing. The trial court was also concerned with respondent’s “implicit representation that she did not knowingly ingest cocaine while smoking marijuana with a group of people[,]” noting that respondent’s “willingness to ingest substances of questionable composition leads the court to question her assertions of being drug free since her single drug test during the pendency of this case.” As for the requirement that respondent maintain contact with her caseworker, the trial court reasoned that while “the transition between caseworkers could have been handled better,” the agency’s telephone number never changed and respondent provided no reason why she could not have reached out to her former caseworker. As for employment, the trial court stated respondent presented “a haphazard and lackadaisical approach to obtaining employment” and produced no evidence regarding her efforts, in Michigan or New York, to obtain employment. Because of the instability in respondent’s housing and employment, the trial court concluded it was “wholly unreasonable to provide more time for her to establish a solid footing on which she can provide Z[E]H with proper care and custody.”

The trial court also found that termination was in ZEH’s best interests. Specifically, the trial court reasoned that respondent missed approximately nine visitations during the child protective proceeding, took no steps to reinstate her visitations with ZEH, and refused to submit to all but one drug screen. The trial court noted that ZEH refers to Munson as his mother and respondent as his “friend from the library[,]” and ZEH has maintained stability with Munson for years. Even if placement with respondent was in ZEH’s best interests, the trial court stated that it was undisputable that ZEH “would be shifted not only from his longstanding and consistent home, but he would be moved hundreds of miles away where he has no connection to the community beyond seemingly three members of his family.” The trial court further noted its concern with respondent’s arrest for a domestic violence incident and noncompliance with the PATP. While the trial court found that ZEH was “thriving” in Munson’s care and Munson expressed an interest in adopting ZEH, it acknowledged that such relative placement, under MCL 712A.13a(1)(j), weighed against termination. However, “based on the [its] analysis, and by a preponderance of the evidence,” the trial court found that the factors weighed substantially in favor of termination of respondent’s parental rights and was in ZEH’s best interests. As a result, the trial court entered an order terminating respondent’s parental rights.

II. ANALYSIS

Respondent argues the trial court clearly erred in terminating respondent’s parental rights, finding that termination was in the best interests of ZEH. We disagree.

“This Court reviews for clear error a trial court’s factual findings following a termination hearing.” *In re Gonzales/Martinez*, 310 Mich App 426, 430; 871 NW2d 868 (2015). Likewise, this Court reviews for clear error “the trial court’s determination regarding the children’s best interests.” *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). “A finding is clearly erroneous if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *In re Gonzales/Martinez*, 310 Mich App at 430-431 (quotation marks and citation omitted). “However, this Court . . . reviews de novo whether the trial court

properly selected, interpreted, and applied a statute.” *Id.* at 431 (quotation marks and citation omitted).

To start, we highlight that respondent has not challenged on appeal the trial court’s findings regarding the statutory grounds for terminating her parental rights under MCL 712A.19b(3). Accordingly, any issue respondent might have regarding the statutory grounds is abandoned. See *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008).

“Once a statutory basis for termination has been shown by clear and convincing evidence, the court must determine whether termination is in the child’s best interests.” *In re LaFrance*, 306 Mich App 713, 732-733; 858 NW2d 143 (2014), citing MCL 712A.19b(5). “ ‘The focus at the best-interest stage has always been on the child, not the parent.’ ” *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 63; 874 NW2d 205 (2015) (brackets omitted), quoting *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). “Best interests are determined on the basis of the preponderance of the evidence.” *In re LaFrance*, 306 Mich App at 733. In considering the issue of whether termination is in the best interests of the minor child, the trial court is permitted to consider “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.” *In re White*, 303 Mich App at 713 (quotation marks and citations omitted). “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 714.

The trial court did not clearly err in finding it was in ZEH’s best interests to terminate respondent’s parental rights. The trial court’s decision was in reliance on respondent’s unwillingness to comply with the PATP, which was designed to help respondent safely and successfully care for ZEH, and respondent’s failure to establish and maintain a relationship with ZEH. In its determination, the trial court concluded that the lack of a bond with ZEH, ZEH’s need for permanency and stability, respondent’s visitation history, ZEH’s current placement versus placement with respondent, respondent’s domestic violence history, respondent’s noncompliance with the PATP, ZEH’s well-being in Munson’s care, and the possibility of adoption weighed in favor of termination of respondent’s parental rights. Although the trial court acknowledged that ZEH’s placement with Munson weighed against termination as a relative placement, the trial court determined that a preponderance of the evidence weighed in favor of termination.

Respondent primarily argues the trial court’s suspension of visitation for a failure to comply with the drug screens infringed on her right to parent and maintain her bond with ZEH. “Generally, the state has no interest in the care, custody, and control of the child and has no business interfering in the parent-child relationship.” *In re AP*, 283 Mich App 574, 591; 770 NW2d 403 (2009). “Rather, it is the parent’s duty, and fundamental right, to do what the state cannot—direct a child’s upbringing and education and prepare that child for future obligations.” *Id.* Likewise, “a child has a right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his health, morals, or well-being” *Id.* (quotation marks and citations omitted). However, the state may become involved in certain limited circumstances when the child’s welfare is affected. *Id.* at 592. The trial court obtains jurisdiction over the matter and the child, once an authorized petition has been filed, an adjudication on the merits of the allegations in the petition occurs, and the trial court finds by a preponderance of the

evidence that there is factual support for permitting judicial intervention. *Id.* at 592-593. “Subsequently, the court can hold dispositional review hearings and permanency planning hearings and enter orders governing the child’s care and custody[.]” with the goal being to reunify the family unit. *Id.* at 593. While MCL 712A.13a(13) generally requires the trial court allow a parent to have “regular and frequent parenting time” with their child after removal:

If the court determines that parenting time, even if supervised, may be harmful to the juvenile’s life, physical health, or mental well-being, the court may suspend parenting time until the risk of harm no longer exists. The court may order the juvenile to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. [MCL 712A.13a(13).]

Likewise, after a petition to terminate parental rights to a child is filed, the trial court may suspend visitation between the parent and child. MCL 712A.19b(4); MCR 3.977(D).

Although the trial court did not order psychological evaluations or counseling when respondent’s visitation was suspended, there was an appropriate basis to suspend parenting time, and any statutory violation was harmless and did not impact the subsequent order of termination. By the November 2019 hearing, respondent had failed to complete or comply with any portion of the PATP since its implementation, beyond visitation with ZEH. As a result, to encourage compliance with the PATP, a temporary suspension of respondent’s visitation was ordered until respondent could partially comply with the drug screen requirement, which merely required respondent to provide two consecutive negative drug screens. Because the suspension was issued after the trial court obtained jurisdiction over ZEH, the conditional suspension did not infringe on respondent’s rights. See *In re AP*, 283 Mich App at 593. Respondent essentially held the keys to her visitation with ZEH and, arguably, could have restored her visitation within days of the suspension. However, respondent continued to not comply with the drug screens.

Even if the trial court wrongly suspended respondent’s visitation, there is a lack of evidence demonstrating the suspension interfered with the parent-child bond. A review of the record indicates that before the suspension, respondent did not consistently attend visitation. Additionally, Hansen and Fischer testified that respondent had virtually no bond with ZEH, stating he referred to respondent as “his friend from the library” and did not display any reaction or ask about respondent after visitation was suspended in November 2019. Moreover, Hansen and Fischer testified ZEH is doing very well in Munson’s care without contact with respondent. Accordingly, the suspension of respondent’s visitation with ZEH did not amount to clear error.

In addition, respondent argues there was no evidence that her substance use impacted her ability to act appropriately during visitation. Respondent also highlights that recreational marijuana use is now legal in Michigan as support for her argument against termination. However, respondent’s ability to maintain a period free of substance use to demonstrate that she could provide a drug-free environment for ZEH was imperative in determining whether ZEH would have permanency, stability, and hope for the future in respondent’s care and custody. A review of the record indicates that respondent has a long history of drug use and instability. Although the record reveals respondent only tested positive for marijuana and cocaine once during the protective proceeding, respondent refused or failed to complete court-ordered drug screens despite knowing the trial court’s concern and prohibition of drug use and CPS’s scrutiny. Moreover, “although marijuana is now legal for recreational use, the fact remains that neither [cocaine nor marijuana]

are healthy to use in the presence of children.” *In re O’Brien/Cudney*, unpublished opinion of the Court of Appeals, issued September 10, 2020 (Docket No. 350245), slip op at 5.³ The trial court’s concern placed on respondent’s drug use was not inappropriate. Respondent’s positive drug test throughout this proceeding and the guardianship proceeding, admission of drug use, refusal to complete the court-ordered drugs screens, and unwillingness undergo a substance-abuse assessment to determine whether she could benefit from additional services raises serious concerns for ZEH’s safety in respondent’s care. We further highlight respondent’s denial of knowingly ingesting cocaine, suggesting that she unknowingly consumed it with marijuana. This response and respondent’s willingness to ingest substances of questionable composition is concerning for respondent’s ability to maintain a drug-free environment for ZEH. Accordingly, the trial court’s decision to suspend respondent’s visitation with ZEH was not an abuse of discretion, and the trial court’s factual determination that ZEH might be harmed by visits with respondent did not amount to clear error. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Moreover, respondent briefly suggests that petitioner failed to make reasonable efforts to reunify respondent and ZEH before the termination of her parental rights. However, while petitioner “has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered.” *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). Notably, any failure by petitioner to provide reasonable services affects the sufficiency of the evidence in support of a statutory ground for termination. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). As stated, respondent has not challenged the statutory grounds for termination of her parental rights; therefore, the reasonableness of petitioner’s efforts to reunify respondent and ZEH are not relevant to this appeal regarding the trial court’s best-interest analysis. Regardless, we note that respondent’s caseworkers testified extensively as to the services offered to respondent to preserve her parental rights but respondent failed to either participate or demonstrate that she sufficiently benefited from any of the services provided. In addition, on appeal respondent fails to identify any services which she requested but was denied, or that should have been provided.

Further, respondent argues that there was no harm in allowing her additional time to demonstrate that she could comply with the PATP because ZEH resided with Munson, a relative placement. “A child’s placement with relatives is a factor that the trial court is required to consider” when making its best-interests determination. *In re Gonzales/Martinez*, 310 Mich App at 434. While “a child’s placement with relatives weighs against termination,” *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010), a “trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child’s best interests[.]” *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012). Beyond broadly stating that the trial court should have delayed the termination proceedings to allow respondent additional time to comply with the PATP, respondent cites no caselaw or authority requiring the trial court to delay

³ We acknowledge that unpublished opinions lack precedential value but they may be considered instructive. See *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

the proceeding. Regardless of ZEH's placement, a delay in the termination proceeding was not warranted.

A review of the record demonstrates that petitioner provided respondent with reunification services, over a 14-month period, but respondent failed to attend parenting classes, participate in a substance-abuse assessment, or obtain stable employment or housing. As a result of respondent's failure to complete or benefit from such services, there was no reasonable expectation that respondent would progress sufficiently to properly care for ZEH within a reasonable time. Further, ZEH has been in care for an extended time period and is doing well. The trial court was in the better position to assess the credibility and ability of respondent to maintain any progress, and "[i]t is not for this Court to displace the trial court's credibility determination." *In re HRC*, 286 Mich App 444, 460; 781 NW2d 105 (2009). In fact, the trial court recognized ZEH's relative placement and weighed it against termination. Therefore, given the totality of the evidence in the record regarding respondent's ability to provide a safe and supportive environment for ZEH, ZEH's need for permanence and stability, the stability of Munson's care, respondent's lack of or inconsistent compliance with the PATP, respondent's visitation history, and the ZEH's well-being in Munson's care, the trial court did not err in finding by a preponderance of the evidence that termination of respondent's parental rights was in ZEH's best interests. See *In re LaFrance*, 306 Mich App at 733.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Christopher M. Murray
/s/ James Robert Redford