

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 9, 2012

In re E. SNYDER, Minor.

No. 308926
Houghton Circuit Court
Family Division
LC No. 2010-000010-NA

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Respondent-father LaBeau appeals as of right the trial court's order terminating his parental rights to his minor daughter under MCL 712A.19b(3)(g) and (j) and its determination that terminating his parental rights was in his daughter's best interests. The trial court also terminated the parental rights of Snyder, the daughter's mother, but she is not a party to this appeal. We affirm.

I. FACTS

A. BACKGROUNDS FACTS

In April 2010, the daughter was admitted to a hospital and diagnosed with aspiration pneumonia and failure to thrive syndrome. The Department of Human Services (the Department) filed a petition to remove the daughter from Snyder's care because the hospital suspected that Snyder was force-feeding her. Snyder pleaded to the allegations in the petition. At the dispositional hearing, the trial court granted LaBeau supervised visitation in accordance with a previous custody order, which granted Snyder full custody of the daughter, and granted LaBeau supervised visitation for three hours once a week.

The trial court moved the daughter's placement three times because her foster homes could not handle the behavior difficulties caused by her mental health issues, which included harming herself and hoarding food. In her third foster home, the daughter's behavior improved.

Through July 2011, the trial court found that LaBeau substantially complied with his service plan, although it characterized his progress as limited. The daughter's foster mother testified that LaBeau would call often and was very involved. Erin Bohto, LaBeau's case worker, testified that LaBeau's service plan required him to participate in counseling. However, he attended only two sessions, and his psychologist reported that he was "unable to identify needs or goals." Bohto testified that LaBeau attended parenting classes, but resisted

implementing what he learned in the classes. Leslie Griffith, the daughter's mental health therapist, testified that LaBeau participated in but resisted her services as well, and benefitted only "slightly."

Griffith testified that initially, LaBeau was receptive to her suggestions to deal with his daughter's behavior. However, he stopped play-therapy with his daughter in November 2010. And in July 2011, LaBeau became frustrated and hostile, and his daughter began to say that she did not want to be near him or participate in activities with him.

When asked why he had stopped participating in services in July 2011, LaBeau testified that he had struggled with a tooth that was paining him, and that he struggled to balance his schedule between his daughter and his stepson. He testified that he disagreed with Griffith on parenting tactics, and admitted that he was using marijuana at that time.

In October 2011, the trial court initiated proceedings to terminate LaBeau's parental rights. At the termination hearing, Kaitlin Voigt, LaBeau's case manager, testified that LaBeau would occasionally fail to supervise his daughter, and that she was concerned for his daughter's safety because she could be a danger to herself. Bohto testified that LaBeau's progress was inconsistent after two years of services, and that his daughter needed a consistent parent to because of her mental health and behavioral problems. Ginny Freeborn, LaBeau's psychologist, testified that nothing precluded LaBeau from working to gain custody of his daughter, but that she was concerned about his ability to learn consistent parenting skills. Freeborn believed that LaBeau would not improve in "six more months or another year," because he had made no progress up to that point. She testified that she did not think his daughter could wait for him to develop the necessary parenting skills, because she needed permanency as soon as possible.

B. THE TRIAL COURT'S OPINION

In its written opinion, the trial court made extensive findings of fact. It found that LaBeau made progress until July 2011. At that time, the trial court granted LaBeau unsupervised visitation. However, against the instructions of his daughter's mental health specialist, LaBeau did not attempt to visit his daughter alone. Instead, LaBeau acknowledged that he decided to stop complying with Griffith's recommendations, and willfully determined to introduce new people to his visits with his daughter, even though Griffith told him it would not be good for her. As a result, his daughter's progress deteriorated.

The trial court found that LaBeau substantially complied with his service plan, but that he did not benefit from it, reasoning that his attempts to implement parenting techniques were "inconsistent and sporadic." It found that the daughter's parental visitation had only served to cause her further emotional difficulties. It found credible Griffith's opinion that the daughter would act out more in her foster home, where she felt safe, than in LaBeau's home; it found that LaBeau did not accept that his daughter's poor behavior was his responsibility, even though it did not occur in his home. It also found that LaBeau was unable to balance his daughter's needs with the needs of his new family.

The trial court noted that the daughter's circumstances were "dire." It found credible Griffith's assertion that if the daughter did not find a stable environment soon, she could suffer

from poor mental health for the rest of her life. It found that the daughter “desperately needs permanency,” but that LaBeau had proved unable to provide her with that permanency. It noted that, were it not dealing with a child with his daughter’s mental health difficulties and needs, it would afford LaBeau more time, but because of her needs and LaBeau’s decreased commitment to the service plan, it was in his daughter’s best interests to terminate his parental rights.

II. PARENTING TIME

A. STANDARD OF REVIEW AND WAIVER

We review for clear error whether a trial court engaged in reasonable efforts to reunify a child with his or her parent.¹

B. LEGAL STANDARD

The trial court must make reasonable efforts to reunify a child with his or her family.² Unless parenting time would be harmful to the child, the parent shall have parenting time no less than once every seven days.³

C. APPLYING THE STANDARD

LaBeau argues that one visit a week was not legally adequate to constitute reasonable efforts to reunify him with his family, and generally argues that the courts do not afford parents involved in child protective proceedings with adequate parenting time. However, one visit a week is legally adequate under Michigan law. Further, it is not this Court’s function to determine public policy; it is the function of the Legislature.⁴ LaBeau has not shown that the trial court clearly erred in granting him parenting time once a week.

LaBeau further argues that one visit a week was not enough time to preserve the child-parent bond necessary to reunify him with his daughter. The trial court here initially awarded LaBeau parenting time in accordance with his custody order, and indicated that it “hope[d] we can progress beyond that as soon as possible[,]” if LaBeau demonstrated that he could comply with his service plan. In February 2011, the trial court expanded LaBeau’s parenting time to two visits a week.

However, in April 2011, the trial court became concerned that the daughter was not adjusting well to changes in her routine, including increased parenting time. Through counsel, LaBeau suggested that the trial court reduce both parents’ visitations to once a week, but for a

¹ *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010).

² MCL 712A.19a(2).

³ MCL 712A.18f(3)(e).

⁴ *Muskegon Area Rental Ass’n v City of Muskegon*, 465 Mich 456, 466-467; 636 NW2d 751 (2001).

longer time period; the trial court agreed. Finally, witnesses testified that LaBeau and his daughter had an appropriate father-daughter bond, and the trial court did not consider a lack of bond between LaBeau and his daughter in its determination to terminate his parental rights. Thus, we conclude that LaBeau has not shown that the trial court failed to engage in reasonable efforts to reunify him with his daughter.

III. SERVICE OF PROCESS

A. STANDARD OF REVIEW AND WAIVER

This Court reviews de novo the interpretation and application of court rules.⁵ When a parent appears at a termination hearing and fails to claim a defect in service of process, the parent has waived this issue.⁶ When a person waives a right, he or she generally may not seek appellate review of that right.⁷

B. APPLICATION

LaBeau argues that the trial court did not serve him in accordance with Michigan Court Rules. Generally, the Department must personally serve a parent or the parent's attorney with notice of a hearing to terminate parental rights 14 days before the hearing on the petition.⁸

Even had the trial court not complied with this court rule, LaBeau appeared at the termination hearing and did not challenge any defect in service of process, and thus LaBeau has waived this issue. However, we will briefly consider it.

The Department filed the petition to terminate LaBeau's parental rights on November 22, 2011, filed proof of service of the petition on LaBeau's attorney on December 5, 2011, and filed proof of personal service of the petition on LaBeau on December 7, 2011. The trial court rescheduled the termination hearing to January 23, 2012, at the request of LaBeau's counsel. We conclude that LaBeau has not shown that the trial court did not comply with MCR 3.920(B), because the Department personally served him with a copy of the petition more than 14 days before the termination hearing.

IV. DISCOVERY IN CHILD PROTECTIVE PROCEEDINGS

A. STANDARDS FOR MOOT ISSUES

⁵ *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

⁶ *In re Gillespie*, 197 Mich App 440, 446; 496 NW2d 309 (1992).

⁷ *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

⁸ MCR 3.920(B)(5)(a)(i).

An issue is moot if it presents nothing more than an abstract legal question that does not rest on existing facts, or there is no actual controversy.⁹ “[A] court will not decide moot issues.”¹⁰

B. APPLICATION

LaBeau asks us to

determine that the Michigan Court Rules do not limit discovery in a matter as vital as parental rights to documents in the possession of the Prosecutor, but rather that the trial court may order reasonable efforts to produce copies for counsel of notes, reports, records, diaries, or similar materials maintained by witnesses in the course of their employment.

The Michigan Court Rules clearly indicate that discovery is not so limited. A party in a child protective proceeding may discover as of right “the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition” if it requests the materials no more than 21 days before trial.¹¹ A party may also request discovery of other materials:

On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable as of right under subrule (A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery.^{12]}

Thus, there is no controversy whether a party *may* request other materials and whether the trial court *may* grant such a request. We note that LaBeau does not ask us to review whether the trial court abused its discretion in this particular case in his questions presented, and presents no authority to support such a position. Therefore, we decline to address these potential issues.¹³ We conclude that this issue, as presented in LaBeau’s statement of questions presented and argument, is moot.

V. STATUTORY GROUNDS FOR TERMINATION

⁹ *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010).

¹⁰ *Id.*

¹¹ MCR 3.922(A)(1)(f).

¹² MCR 3.922(A)(2).

¹³ MCR 7.212(C)(5), (7); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

A. STANDARD OF REVIEW

To terminate a parent's parental rights, the trial court must find that the Department has proved at least one of the statutory grounds for termination by clear and convincing evidence.¹⁴ This Court reviews for clear error a trial court's decision to terminate a parent's parental rights.¹⁵ A finding is clearly erroneous when there is evidence to support it, but after reviewing the record, we are definitely and firmly convinced that the trial court made a mistake.¹⁶

B. MCL 712A.19b(3)(g)

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's rights if

[t]he 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.

A parent's failure to comply with a service plan is evidence that that parent will not be able to provide a child with proper care and custody.¹⁷ Courts may consider a parent's failure to demonstrate significant progress with a service as evidence that a parent will not be able to provide proper care and custody.¹⁸

C. MCL 712A.19b(3)(j)

MCL 712A.19b(3)(j) provides that the trial court may terminate a parent's rights if

[t]here 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.

D. APPLYING THE STANDARDS

LaBeau argues that the trial court's findings of fact are insufficient if the trial court does not lay out its findings of fact in such a manner that each finding is tied to a specific conclusion of law. LaBeau does not provide any authority for his position, and we consider this argument abandoned.¹⁹ Further, we note that, while we would prefer that trial courts arrange their findings

¹⁴ MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

¹⁵ *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

¹⁶ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

¹⁷ *In re JK*, 468 Mich at 214.

¹⁸ *In re Trejo Minors*, 462 Mich at 363.

¹⁹ *Mettler Walloon, LLC*, 281 Mich App at 221.

of fact issue-by-issue, we are not confused by the trial court's decision to lay out its findings of fact in the order of the testimony presented at trial.

LaBeau also argues that the trial court improperly considered evidence that his daughter did better in her foster home when it determined that statutory grounds supported terminating his parental rights. Though the trial court may not consider the advantage of a foster home in determining whether it has statutory grounds to terminate a parent's parental rights, after the statutory grounds are met, the trial court may consider the advantages of a foster home placement to determine the child's best interests.²⁰ We are not convinced that the trial court impermissibly considered the advantages of the foster home when considering the statutory grounds to terminate LaBeau's parental rights, because the trial court clearly tied those facts into its best interests determination.

LaBeau also argues that the trial court clearly erred when it determined that he failed to provide his daughter with proper care and custody, and that she would be at a risk of harm if returned to his care. After a careful review of the record, we are not convinced that the trial court's findings of fact and ultimate determination on these issues are erroneous.

Bohto testified that the trial court ordered LaBeau to comply with and benefit from services in his service plan, and that he did initially participate in services, but did not benefit from them. Several witnesses, including Griffith and Freeborn, testified that LaBeau was resistant to services and not successful at implementing what he was supposed to learn from Griffith and parenting classes. Further, starting in July 2011, LaBeau stopped participating in services. He admitted that he decided to engage in actions against the recommendations of Griffith, his daughter's mental health specialist. His daughter's foster mother testified that as a result, she saw a marked increase in the daughter's behavior problems, including her self-harming behavior. LaBeau testified that his daughter behaved appropriately in his care, but Griffith testified that children with the daughter's disorder tend to act out more in a "safe place" and that his daughter considered her foster home her safe place. Thus, the trial court did not clearly err when it determined that LaBeau decided not to implement the parenting techniques and to act against Griffith's recommendations, and that the daughter's regression was a result of his decisions.

Finally, LaBeau argues that there was no evidence to support terminating his parental rights under MCL 712A.19b(3)(j) because he did not put his daughter at a physical risk of harm. We note that the trial court did not find that LaBeau was a physical risk to his daughter. However, its conclusion that the evidence supported termination under this ground was not clearly erroneous. The trial court may consider the potential psychological harm to the child caused by the parent's conduct or capacity.²¹ There was evidence that when his daughter's psychological needs were not met, she would engage in self-harming behaviors and "danger seeking." Though she made progress, she began to again engage in these serious behaviors

²⁰ *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009).

²¹ *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

immediately after the trial court granted LaBeau unsupervised visitation, and she regressed during the entire period. Given the evidence that LaBeau was not able to meet her psychological needs, and that his decision to act against Griffith's recommendations negatively affected her mental health, we conclude the trial court did not clearly err when it found that there was a reasonable likelihood that—because of LaBeau's *conduct or capacity*—the daughter would be harmed if returned to his care.

VI. BEST INTERESTS OF THE CHILD

A. STANDARD OF REVIEW

The trial court must order the parent's rights terminated if the Department has established a statutory ground for termination by clear and convincing evidence, and the trial court finds from evidence on the whole record that termination is in the child's best interests.²² We review for clear error the trial court's determination regarding the child's best interests.²³

B. LEGAL STANDARDS

To determine whether termination of a parent's parental rights is in a child's best interests, "the court may 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."²⁴

C. APPLYING THE STANDARDS

LaBeau argues that he disputed the testimony of Griffith and Bohto concerning his daughter's mental health. However, we will defer to the special ability of the trial court to judge the credibility of witnesses.²⁵ There was evidence to support the trial court's finding that LaBeau's daughter had special mental health needs for permanency and stability, and we are not convinced that the trial court made a mistake.

We conclude that the trial court did not clearly err when it determined that terminating LaBeau's parental rights was in his daughter's best interest. Griffith testified that further contact with LaBeau would only serve to traumatize her further, and that she was in desperate need of permanency. She testified that if the trial court intervened immediately and provided her with permanency, her mental health difficulties would probably take six years to resolve; but if the trial court did not intervene very soon, her problems would likely become permanent. Further,

²² MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich at 351.

²³ *Id.* at 356-357.

²⁴ *In re Olive/Metts*, ___ Mich App ___, slip op p 3; ___ NW2d ___ (2012) (internal quotations omitted).

²⁵ *In re Miller*, 433 Mich at 337.

there was evidence that LaBeau would not be able to provide his daughter with her unique stability and parenting needs within a reasonable time. Freeborn testified that because LaBeau had not shown progress or the ability to implement consistent parenting techniques, it was unlikely he would be able to do so within the next six months to one year. She also testified that she did not think that his daughter could wait that long.

Finally, the trial court appropriately weighed and considered his daughter's unique mental health needs for permanency and stability. The trial court noted that the daughter's circumstances were "dire." It found credible Griffith's assertion that if the daughter did not find stability soon, she could suffer from poor mental health for the rest of her life. It found that she "desperately needs permanency," and that LaBeau had proved unable to provide her with that permanency. It noted that, were it not dealing with a child that had his daughter's mental health difficulties and needs, it would afford him more time; but given her needs and LaBeau's decreased commitment to the service plan, it could not find it was in his daughter's best interests not to terminate his parental rights. After our review of the record, we are not convinced that the trial court made a mistake in its findings and determination of the daughter's best interests.

VII. CONCLUSION

We conclude that the trial court did not clearly err when it determined that MCL 712A.19b(3)(g) and (j) supported terminating LaBeau's parental rights, and that termination of his parental rights was in his daughter's best interests. Further, none of LaBeau's procedural arguments raise errors that warrant reversal.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly