STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 13, 2012

In the Matter of S. R. SCHWARZ, Minor.

No. 310139
Oakland Circuit Court
Family Division
LC No. 10-773706-NA

Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

The circuit court terminated the respondent-father's parental rights to his nine-year-old son, S, pursuant to MCL 712A.19b(3)(e) and (h) based on his complete failure to comply with a court-ordered reunification plan and his inability to repair the lost parent-child bond given his extended imprisonment. The circuit court properly accepted respondent's no-contest plea to two statutory grounds for termination and concluded that termination was in the child's best interests despite his placement with relatives. We affirm.

I. BACKGROUND

Respondent's wife died from a drug overdose in April 2009. At the time of her death, respondent's wife had a restraining order against him because he had been physically and emotionally abusive. Within days of his wife's death, respondent's in-laws came to Michigan and obtained custody of S pursuant to a court-ordered guardianship.[1] Six-year-old S was then overweight, needed dental care, had not been enrolled in school, and required intensive speech therapy. The maternal grandparents returned to their home in South Carolina with S.

As part of the guardianship arrangement, a circuit court ordered respondent to engage in a "court-structured plan," including anger management therapy, drug testing, and supervised parenting time.[2] Respondent did not comply with the therapy and drug-testing requirements.

[1] Pursuant to MCL 700.5204(1), "[a] person interested in the welfare of a minor . . . may petition for the appointment of a guardian for the minor."

[2] During a guardianship proceeding, the court may "[o]rder the parties to follow a court-structured plan designed to resolve the conditions" that prevent the parent from personally caring for the child. MCL 700.5207(3)(b)(*ii*)(B).

Respondent never visited S in South Carolina, claiming he was too busy. During his rare visits in Michigan, S was nervous and uncomfortable and respondent was unable to bond with his child. Respondent did telephone S approximately twice each week, when he remembered. Respondent told the child's grandfather when he forgot to call that an unidentified friend failed to remind him. S expressed that he did not enjoy the conversations with his father and his grandparents often had to intercede when respondent attempted to talk about the guardianship proceedings or when respondent's "language got out of hand."

In March 2010, respondent, who had a lengthy criminal history, was arrested for bank robbery. A circuit court convicted defendant of that offense and sentenced him to serve 5 to 20 years in prison. Respondent's earliest release date is March 17, 2015. Following respondent's conviction and sentencing, S's guardian-ad-litem (GAL) sought termination of respondent's parental rights pursuant to MCL 712A.19b(3)(e) ("The child has a guardian . . . and the parent has substantially failed, without good cause, to comply with a court-structured plan . . . regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship."). The GAL later filed supplemental petitions citing additional grounds to support termination: MCL 712A.19b(3)(g) ("The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."); (h) (the parent will be imprisoned for more than 2 years and has "not provided for the child's proper care and custody, 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"); and (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.").

The termination proceedings were delayed while the circuit court resolved whether it had jurisdiction to terminate a parent's rights to a child who was by then living in another state.[3] When the proceedings continued, respondent entered a no-contest plea, admitting that he did not comply with the reunification plan during the guardianship and that he would be imprisoned for a minimum five-year term, which would deprive S of a stable home until he was at least 12 years old. Because respondent conceded two statutory grounds for termination, (e) and (h), the court proceeded to a best-interest analysis.

The circuit court determined that termination of respondent's parental rights was in S's best interests. The court cited respondent's physical and emotional abuse of S's mother and evidence that S had been neglected prior to his maternal grandparents taking custody. While in his grandparents' care, S had received necessary medical and dental treatment and speech therapy, excelled in school, and participated in sports. S's grandfather and an attorney who had been named as S's "co-guardian" testified that S had no bond with respondent and actually preferred not to have contact with his father. Respondent would be unable to remediate the

[3] The circuit court actually dismissed the petition for a perceived lack of jurisdiction, but this Court reversed and remanded for continued proceedings. *In re Schwarz*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2011 (Docket No. 302750).

parent-child bond within a reasonable time given his imprisonment. Accordingly, the court terminated respondent's rights.[4]

II. STANDARD OF REVIEW

Pursuant to MCL 712A.19b(3), a trial 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. The petitioner bears the burden of proving that ground. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests," the court is required by law to order termination. MCL 712A.19b(5). This Court reviews for clear error the trial court's determination that a statutory ground for termination has been established and its determination that termination is in the children's best interests. MCR 3.977(K); *In re Archer*, 277 Mich App 71, 73; 744 NW2d 1 (2007). A decision "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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes us as more than just maybe or probably wrong. *Trejo*, 462 Mich at 356.

III. NO CONTEST PLEA

Respondent challenges the circuit court's acceptance of his no-contest plea, claiming that the court violated MCR 3.971(C)(2). Respondent failed to preserve this issue for appellate review by raising it below. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Accordingly, our "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

A respondent in a child protective proceeding may enter a no-contest plea to allegations in the petition. MCR 3.971(A). Before accepting the plea, "the court must advise the respondent on the record or in writing" of the following:

> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,

[4] At the close of its best-interest analysis in the opinion and order, the circuit court indicated that termination of respondent's parental rights was also supported by factors (g) and (j). As respondent did not plead on those grounds and the court made no findings in that regard, we conclude that the court's later pronouncement was made in error.

(b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,

(c) have witnesses against the respondent appear and testify under oath at the trial,

(d) cross-examine witnesses, and

(e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

(4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent. [MCR 3.971(B).]

Further, the court must ensure that the plea is voluntary and accurate:

(1) Voluntary Plea. The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.

(2) Accurate Plea. The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate. [MCR 3.971(C).]

The court advised respondent of his rights as required by MCR 3.971(B). Respondent does not contend that his plea was involuntary or inaccurate and the record supports that the court adequately addressed those issues. The court did not expressly state "respondent's plea of no contest is appropriate" and explain why. However, the court rule does not require the use of such magic words. The record reveals that the court went beyond the call of duty to ensure that respondent was aware of and understood his rights and knowingly waived them. The court described the allegations to which respondent pleaded no contest and reviewed additional evidence supporting those grounds. Given the court's inquiry and resolution of these issues, it impliedly determined that the "plea of no contest [was] appropriate."

Even if there were error in this regard, we would find it harmless. *In re Egbert R Smith Trust*, 274 Mich App at 285 (a respondent must show that plain error affected his substantial rights). The court's failure to expressly state that the plea was appropriate does not affect the accuracy of its ultimate determination that statutory grounds for termination existed and termination was in the child's best interests.

IV. *IN RE MASON*

Relying on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), respondent argues that the evidence offered in support of his plea was insufficient to justify termination of his parental rights under factor (h) because imprisonment alone cannot support termination and under both factors because S was in the care of relatives. "The mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Id.* at 160. A parent may "provide for a child's care and custody" through placement with a relative; the care need not be provided by the parent personally. *Id.* at 161.

The circuit court did not terminate respondent's parental rights solely because he was imprisoned, however. Rather, respondent took no action to remedy the conditions that led to the guardianship in the first place. In *Mason*, the respondent-father personally sought out services to improve his parenting abilities despite being imprisoned and despite the Department of Human Services (DHS)'s dismissal of him as a viable future candidate for custody of his children. *Id.* at 162-163. The current respondent, on the other hand, completely failed to participate in therapy or submit to drug testing even before his incarceration. Respondent completely ended his limited contacts with his child after his arrest. Respondent had not provided proper care and custody for S in the past and showed no effort to provide for his child in the future.

Moreover, respondent did not seek to place S in the care of the child's maternal grandparents. It appears from the record that S was not even in respondent's care at the initiation of the guardianship. S had remained with his mother, who had secured a personal protection order against respondent. There is no reason to assume that respondent would have chosen to provide proper care and custody for S through these relatives if given the chance. Compare *id.* at 163-164 (when the children's mother lost custody, she requested that the children be placed with the imprisoned father's family—"presumably the very people with whom respondent would have voluntarily placed them" had he been asked). Accordingly, the circuit court had sufficient support to accept respondent's no-contest plea to termination of his parental rights.

V. BEST INTERESTS OF THE CHILD

Lastly, respondent contends that the circuit court erred in finding that termination of his parental rights was in S's best interests, claiming that it did not consider the child's placement with relatives as a factor weighing against termination.

As noted by respondent, "[a] trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best interests determination and requires reversal." *In re Olive/Metts*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306279, pub June 5, 2012), slip op at 4. This directive does not apply here. A child's placement with relatives is relevant to a best-interest analysis because MCL 712A.19a(6)(b) provides that "initiation of termination proceedings is not required when the children are 'being cared for by relatives.'" *Mason*, 486 Mich at 164. MCL 712A.19a only applies, however, when a child has been in foster care and the court determines that further efforts toward reunification are unnecessary and therefore proceeds toward a permanency planning hearing. S was never in foster care; a probate court granted S's maternal grandparents' request for guardianship over the child without DHS involvement. No court

determined that further reunification efforts would be useless; the GAL petitioned for termination on his own motion.

In any event, despite S's placement with relatives, termination of respondent's parental rights was in the child's best interests. Respondent completely failed to comply with a court-structured plan to regain custody of his child, showing a lack of interest in reunification. S's maternal grandfather testified that S never asked to see or talk to his father. In fact, S has had no contact with his father since his arrest. Given respondent's exhibited lack of interest, we discern no benefit to S from maintaining the parent-child relationship.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher