STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 25, 2013

In the Matter of J. MORSE, Minor.

No. 313196
Berrien Circuit Court
Family Division
LC No. 2011-000024-NA

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Respondents father and mother appeal as of right the order terminating their parental rights to the minor child under MCL 712A.19b(3)(c)(*i*) and (g). We affirm.

In March of 2011, respondents were arrested for conducting a criminal enterprise. The record supports that respondents were addicted to heroin at the time and would steal credit cards in order to obtain money for drugs. The child was present during the commission of the crimes. At the time of respondents' arrest, respondent-mother placed the child with the maternal grandparents. After about one month, the maternal grandparents informed Child Protective Services (CPS) that they could no longer care for the child. Respondents failed to obtain a proper placement for the child, and CPS placed her in non-relative foster care. Thereafter, respondent-father was sentenced to 2 to 20 years' imprisonment for conducting a criminal enterprise, and respondent-mother was sentenced to 3 o 20 years' imprisonment for conducting a criminal enterprise. In March of 2012, petitioner placed the child with her maternal aunt and uncle. The trial court terminated respondents' parental rights following the October 24, 2012, termination hearing.

On appeal, respondents argue that they were denied their right under MCR 2.004 to participate by telephone in each proceeding and, thus, termination was improper. We disagree. We review respondents' unpreserved claim for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008), citing *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Under the plain error rule, a respondent must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. In *In re Mason*, 486 Mich 142, 152-153; 782 NW2d 747 (2010), our Supreme Court addressed a respondent's right to participate by telephone under MCR 2.004:

> MCR 2.004 requires the court and the petitioning party to arrange for telephonic communication with incarcerated parents whose children are the subject of child protective actions. See MCR 2.004(A) to (C). The express

> purposes of the rule include ensuring "adequate notice . . . and . . . an opportunity to respond and to participate," in part by determining "how the incarcerated party can communicate with the court . . . during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional phone calls." MCR 2.004(E)(1) and (4).

"Thus, to comply with MCR 2.004, the moving party and the court must offer the parent 'the opportunity to participate in' each proceeding in a child protective action." *In re Mason*, 486 Mich at 154.

Here, neither respondent was available to attend the initial June 15, 2011, pretrial hearing, and the trial court adjourned the hearing to allow respondents to attend. Thereafter, both respondents appeared in person at the subsequent July 13, 2011, adjudication, at which the trial court took jurisdiction over the child. Following the July 13, 2011, trial, the trial court held seven subsequent hearings. Before each of the subsequent hearings, the trial court issued orders requesting that respondents' respective correctional facilities allow them to participate by telephone in the upcoming hearing. The record establishes that each of these orders included the date and time of the upcoming hearing and was delivered to the respective correctional facilities before the date of the hearing. Respondent-mother participated by telephone in six of the subsequent seven hearings, while respondent-father participated by telephone in four of the subsequent seven hearings. Neither respondent participated by telephone in the October 5, 2011, dispositional review hearing, and respondent-father also did not participate by telephone in the December 28, 2011, dispositional review hearing or the October 24, 2012, termination hearing. The record indicates that at each hearing in which a respondent failed to participate by telephone, the court made attempts to facilitate respondents' telephonic participation, and only proceeded with the approval of the respective respondent's counsel. MCR 2.004 does not require that petitioner or the court successfully procure the respondent's participation, but rather "offer the parent 'the opportunity to participate in' each proceeding in a child protective action." See MCR 2.004; *In re Mason*, 486 Mich at 154-155. We find that the court took great effort to offer respondents the opportunity to participate in each proceeding, and only proceeded in the absence of respondent-mother or respondent-father upon the approval of the respective respondent's counsel. Accordingly, respondents have not shown a violation of MCR 2.004.

Even if we were to find that the court or petitioner violated MCR 2.004, such a violation would not entitle respondents to relief in this case because they cannot demonstrate "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763. The trial court's orders following the October 5, 2011, and December 28, 2011, dispositional review hearings essentially maintained the status quo and continued the permanency goal of reunification. Both respondents participated by telephone in the next four dispositional review and permanency planning hearings. Further, although respondent-father's absence at the termination hearing is not taken lightly, his counsel was willing to proceed without respondent-father's participation, stating: "I have a power of attorney that [father] signed. [I]f that's admitted and if I make an offer of proof that that's what his plan is, is to give power of attorney over his child to his parents, . . . then we can proceed because that's all I would have him testify to." The hearing referee admitted the document, and the paternal grandfather testified that respondent-father granted such power of attorney in an effort to provide the child with proper care and custody. On appeal, neither respondent attempts to articulate with any specificity how

the outcome of the case would have been different had they participated by telephone at each proceeding. Accordingly, even if we were to find plain error, we do not find that such error "affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

Respondents do not raise a challenge to the statutory grounds in their statement of questions presented, and they do not discuss either subsection (c)(*i*) or (g) in the argument section of their brief on appeal.[1] Thus, any challenge to the trial court's findings as to statutory grounds are not properly presented and we decline to address them. *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). However, we would be remiss not to address respondents' argument that respondent-father sought to provide proper care and custody for the child during the pendency of the case by granting a power of attorney to the paternal grandparents, and that this should have been considered by the trial court. Petitioner conducted a home study of the paternal grandparents' home and denied their request for placement, citing the paternal grandmother's poor health and the grandparents' previous failure to recognize respondent-father's substance abuse. Thereafter, the trial court denied the paternal grandparents' guardianship petition, citing the paternal grandmother's poor health. Accordingly, the trial court considered whether respondent-father "could fulfill his duty to provide proper care and custody... by voluntarily granting legal custody to" the paternal grandparents, *In re Mason*, 486 Mich at 163, and determined that such placement would not provide the child with proper care and custody. Respondent-father thus did not provide proper care and custody by attempting to place the child with his parents.

Finally, the trial court did not clearly err by finding that termination of respondents' respective parental rights was in the child's best interests. MCL 712A.19b(5); *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). The child had been in foster placement for approximately 18 months at the time of termination, and the record supported that reunification with either respondent would not be possible for at least an additional year. The record supported that the child was bonded to her aunt and uncle, with whom she lived. They intended to adopt her. Ms. Whitfield and Mr. Channells each stated that termination was in the child's best interests given her need for permanence and respondents' inability to provide such permanence within a reasonable time. Thus, the trial court's best interest finding does not leave us "with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459. See *In re Trejo Minors*, 462 Mich 341, 364; 612 NW2d 407 (2000) ("[W]e cannot conclude that the court's assessment of the children's best interests was clearly erroneous. . . . The court did not clearly err by refusing to further delay permanency for the children, given the uncertain potential for success and extended duration of respondent's reunification plan."); *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011) (holding that "[t]he evidence clearly supported the trial court's finding that termination was in the children's best interests" where "[t]he children had been placed in a stable home where they were thriving and progressing and

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[1] Respondents' brief on appeal notes that the trial court terminated their respective parental rights under MCL 712A.19b(3)(c)(*i*) and (g). Yet, for reasons that are unclear, the only statutory subsection respondents discuss in the argument section of their brief is MCL 712A.19b(3)(h), which is entirely irrelevant.

that could provide them continued stability and permanency given the foster parents' desire to adopt them").

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto