STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of WINDSOR/SUTTS, Minors.

UNPUBLISHED
July 22, 2014

No. 319104
Livingston Circuit Court
Family Division
LC No. 2007-011845-NA

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Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother, H. M. Windsor, and respondent-father, R. Sutts, each appeal as of right from the trial court's order terminating their parental rights to the minor children. The trial court terminated respondent-mother's parental rights to all six children and terminated respondent-father's parental rights to his three children pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

Respondent-mother had four children with a former husband, three of whom were at issue in this case. Respondent-mother later met respondent-father, who immediately moved into her home. They had three children during their relationship, which was marked with domestic violence. Since the parties met in 2008, respondent-mother has had three personal protection orders (PPO) against respondent-father and numerous police contacts. Respondent-mother and respondent-father also have a lengthy history with Children's Protective Services (CPS). Respondent-father has a criminal history that includes a conviction for physically abusing one of respondent-mother's children from her former marriage.

In October 2012, CPS received a referral that respondent-father was living with respondent-mother in violation of a PPO. Police investigated, and respondent-father was arrested for violating the PPO. Respondent-mother was also arrested for obstruction of justice after she lied to police about respondent-father living in the home and tried to stop police from

entering the home. The Department of Human Services (DHS) subsequently filed a petition for court jurisdiction over the children. Both respondents tendered no-contest pleas to allow the court to obtain jurisdiction over the children, following which they were ordered to participate in DHS services. The trial court also ordered that respondents were prohibited from having contact with each other. Throughout the next several months, the parties were seemingly participating in DHS services, although not fully compliant. However, in June 2013, respondent-mother informed police that respondent-father had been living with her and had sexually assaulted her twice. Respondent-father was arrested. DHS thereafter filed a supplemental petition to terminate respondents' parental rights. Following a hearing, the trial court terminated the parental rights of both respondents.

II. RIGHT TO COUNSEL

On appeal, respondent-father argues that the trial court's denial of his request for reappointment of counsel during the termination hearing violated his statutory right to counsel and deprived him of due process. Because respondent-father did not raise a constitutional due process claim in the trial court, the issue is not preserved and respondent-father has the burden of establishing a plain error affecting his substantial rights. *In re Williams,* 286 Mich App 253, 274; 779 NW2d 286 (2009).

A respondent's right to counsel in a child protection proceeding is protected by both the United States constitution and statute. *Id*. at 274-275; MCL 712A.17c(4); MCR 3.915(B). This Court has looked by analogy to principles developed in the criminal law context when considering the scope of the right to counsel. *In re CR,* 250 Mich App 185, 197-198; 646 NW2d 506 (2001), overruled in part on other grounds in *In re Sanders*, 495 Mich 394; ___ NW2d ___ (2014). The right to counsel may be waived. See *In re Cobb,* 130 Mich App 598, 600-601; 344 NW2d 12 (1983). A defendant may waive his right to counsel, but the waiver must be knowingly, intelligently, and voluntarily made. *People v Williams*, 470 Mich 634, 640-642; 683 NW2d 597 (2004). Once a respondent makes a valid waiver of the right to counsel, there is no absolute right to withdraw from self-representation. A court should consider whether there is a legitimate reason for the change and whether substitution would "not result in unwarranted disruption prejudicial to the orderly progress of the case." *In re Cobb,* 130 Mich App at 600-601, quoting *People v Eddington,* 77 Mich App 177, 188; 258 NW2d 183 (1977).

On the first day of the termination hearing, the trial court granted respondent-father's request to represent himself, but allowed appointed counsel to continue to serve as advisory counsel. On the second day of the hearing, the trial court gave respondent-father an opportunity to withdraw his election for self-representation, but respondent-father decided to continue his self-representation. The trial court specifically told respondent-father that he would not be permitted to change his mind later in the proceeding. On the third day of the hearing, respondent-father requested that the court reappoint advisory counsel. Considering that the trial court repeatedly warned respondent-father of the risks of self-representation, previously gave him an opportunity to withdraw from self-representation, offered to reappoint advisory counsel on the second day of the hearing, and the trial court's legitimate concerns regarding the disruptive impact of allowing respondent-father to "flip flop," we conclude that respondent-father has failed to establish plain error.

We also reject respondent-father's contention that he was entitled to withdraw from self-representation at any time pursuant to MCL 712A.17c(4)(c). That statute requires a court to advise a respondent at his or her first court appearance that "[i]f the respondent is not represented by an attorney, the [respondent has the] right to request and receive a court-appointed attorney at a later proceeding." However, the statute also recognizes that a respondent may waive his or her right to an attorney. MCL 712A.17c(6). The applicable court rule contains similar provisions. See MCR 3.915(B). Respondent-father does not dispute that he waived his right to counsel at the hearing, but asserts that he should have been permitted to reassert his right and proceed with counsel. We do not agree that MCL 712A.17c(4)(c) or MCR 3.915(B) provide respondent-father with the right to withdraw from self-representation and reassert his right to counsel at any point in the middle of a trial, especially considering that both MCL 712A.17c(6) and MCR 3.915(B) expressly allow a waiver of counsel. Moreover, respondent-father was not entitled to use the waiver as both a sword and a shield to achieve a desired outcome. *People v Kevorkian,* 248 Mich App 373, 419; 639 NW2d 291 (2001). Therefore, we conclude that respondent-father has not established that he was entitled to have advisory counsel reappointed on the third day of the hearing.

III. STATUTORY GROUNDS FOR TERMINATION

Both respondents argue that the trial court clearly erred in finding a statutory ground for termination pursuant to MCL 712A.19b(3). The trial court is required to find at least one statutory ground for termination by clear and convincing evidence. *In re JK,* 468 Mich 202, 210; 661 NW2d 216 (2003); *In re Fried,* 266 Mich App 535, 540-541; 702 NW2d 192 (2005). We review the trial court's findings of fact for clear error, giving deference to the trial court's superior opportunity to judge the weight of evidence and the credibility of witnesses who appear before it. MCR 3.977(K); *In re JK,* 468 Mich at 209; *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989). Clear error exists if, after a review of the entire record, the Court "is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich at 209-210.

A. RESPONDENT-MOTHER

The trial court terminated respondent-mother's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondent-mother argues that the trial court clearly erred in finding that the statutory grounds were proven by clear and convincing evidence. We disagree.

We find no clear error in the trial court's finding that MCL 712A.19b(3)(c)(*i*) was established by clear and convincing evidence. The trial court found that the circumstances that existed at the time of adjudication continued to exist at the time of the termination hearing, and there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages. See MCL 712A.19b(3)(c)(*i*). There is a lengthy history of domestic violence by respondent-father against respondent-mother. The case against respondents was initiated in October 2012 after both parties were arrested. At the time, respondent-father was living in respondent-mother's home despite the existence of a PPO, and respondent-mother was arrested after she attempted to stop police from entering the home. The children were removed, and respondent-mother was ordered to complete a domestic violence program and not to have contact with respondent-father. According to respondent-mother, respondent-father moved back in with respondent-mother in February 2013. Respondent-father

did not leave until June 2013, when respondent-mother contacted the police because respondent-father had sexually assaulted her twice. Respondent-father was once again incarcerated. In July 2013, DHS filed a supplemental petition to terminate respondent-mother's parental rights because no progress had been made by respondent-mother and she had continued to have contact with respondent-father in violation of the court's order. In addition, the University of Michigan Family Assessment Clinic conducted an evaluation of the family. The assessment stated that respondent-mother could not safely parent her children and did not take responsibility for the circumstances that led to the children's removal. Both parents saw their relationship as more important than the safety of the children. Additionally, based on the parties' ages, these patterns of behavior seemed entrenched and were unlikely to change. The assessment stated that reunification was not in the children's best interests. There was also evidence presented that the children had special needs that had been neglected by respondent-mother, and that the children needed permanency, stability, and a safe home. Considering the evidence as a whole and giving appropriate deference to the trial court's superior opportunity to determine the weight of the evidence and the credibility of the witnesses, the trial court did not clearly err in finding that MCL 712A.19b(3)(c)(*i*) was established by clear and convincing evidence.

Respondent-mother asserts that by the time of the termination hearing, she had made sufficient progress to show that her parental rights should not be terminated. She ended her relationship with respondent-father in June 2013 and was committed to cooperating with DHS and the court. She had also sought independent mental health services and was being treated for depression. She had appropriate interactions with the children at the University of Michigan Family Assessment Clinic,[1] and her parenting coach, a social worker, recommended she have an additional six months to comply with her DHS case service plan. We are not convinced that respondent-mother's belated actions were sufficient to show clear error. Respondent-mother was required to demonstrate both her participation in services and show that she benefited from the services sufficiently for the trial court to find that she could provide a home in which the children would no longer be at risk of harm. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005), superseded by MCL 712A.19b(5) on other grounds as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009). We are not persuaded that the trial court clearly erred in refusing to give weight to her untimely efforts to more actively participate in her service plan.

Respondent-mother also asserts that DHS's efforts to reunify the family were inadequate. "In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried,* 266 Mich App at 542, citing MCL 712A.18f(1), (2), and (4). DHS's failure

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[1]We note that in her brief on appeal, respondent-mother states that her interactions with the children in March 2013 at the University of Michigan Family Assessment Clinic were much improved because she had started counseling and was taking appropriate medication. However, the record reveals that respondent-mother did not start mental health treatment until May 2013. Moreover, despite the improvement in respondent-mother's interaction with the children in March 2013, the University of Michigan Family Assessment Clinic ultimately opined that respondent-mother could not provide a safe home for her children.

to provide reasonable services may affect the sufficiency of the evidence in support of a statutory ground for termination. *Id*. at 541. While respondent-mother contends that DHS did not provide her with an opportunity for parenting time as part of its services, DHS and the trial court had sufficient justification to suspend respondent-mother's parenting time throughout the proceedings because of the harmful effect on the children. MCL 712A.18f(3)(e); see also *In re Laster,* 303 Mich App 485, 487-489; 845 NW2d 540 (2013). Respondent-mother's parenting time was suspended by the court in January 2013; respondent-mother admits that from February until June 2013, she lived with respondent-father. The volatile and violent relationship between the parties created an unsafe environment for the children. Respondent-mother also argues DHS did not provide her with adequate mental health services. However, the case service plan provided respondent-mother with an opportunity to identify mental health needs through evaluations. The record indicates that respondent-mother was initially resistant to mental health services. The fact that respondent-mother later initiated mental health services without DHS's assistance does not establish that DHS's efforts were insufficient. See *In re Fried,* 266 Mich App at 542. Accordingly, respondent-mother has not established that DHS's reunification efforts were unreasonable.

We also reject respondent-mother's arguments concerning MCL 712A.19b(3)(g) and (j) for the same reasons articulated above. There was sufficient evidence to show that respondent-mother failed to provide care or custody for the children and there was no reasonable expectation that she would be able to do so within a reasonable time. In addition, respondent-mother did not establish any deficiency in DHS's services that preclude the trial court from finding that MCL 712A.19b(3)(g) was established. Further, given respondent-mother's conduct, the trial court did not clearly err in finding that the children were reasonably likely to be harmed if they were returned home. Thus, termination was also justified under MCL 712A.19b(3)(j). Moreover, the trial court need only find one statutory ground to justify termination. *In re JK,* 468 Mich at 210.

B. RESPONDENT-FATHER

The trial court terminated respondent-father's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). Respondent-father argues that the trial court clearly erred in finding that the statutory grounds were proven by clear and convincing evidence. We disagree. The domestic violence in the home and respondent-father's abuse of one of respondent-mother's children from her prior marriage led to the adjudication. At the time of termination, respondent-father was incarcerated because he had once again been living with respondent-mother in violation of a no-contact order. Clearly, respondent-father did not understand the negative effect that his relationship with respondent-mother had on the children, illustrated further by the University of Michigan Family Assessment Clinic evaluation, which opined that respondent-father saw his relationship with respondent-mother as more important than his children's safety. Moreover, respondent-father had not fully complied with his case service plan with DHS. Therefore, the reasons leading to the adjudication continued to exist at the time of the termination hearing, and there was no reasonable likelihood the conditions would be rectified within a reasonable time. For the same reasons, the trial court did not err in finding that MCL 712A.19b(3)(g) and (j) were each established by clear and convincing evidence.

IV. BEST INTERESTS

Under MCL 712A.19b(5), once the trial court finds that a statutory ground for termination has been established, it shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" A trial court may consider the entire record in evaluating a child's best interests. *In re Trejo Minors,* 462 Mich 341, 356; 612 NW2d 407 (2000). It may consider a variety of factors, including the bond between the child and the parent, the parent's parenting abilities, the advantages of a child's foster-care placement, and the child's need for permanency, stability, and finality. *In re Olive/Metts Minors,* 297 Mich App 35, 41-42; 823 NW2d 144 (2012). "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." *In re White,* 303 Mich App 701, 714; 846 NW2d 61 (2014). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013).

Respondent-mother argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. However, she merely restates her earlier arguments regarding the statutory grounds for termination, which we have already rejected. And while the trial court found that the older children were bonded with respondent-mother, it gave more weight to other issues in the case, including the special needs of each child that were being addressed in their foster-care placements and the children's need for permanency, stability, and finality. The trial court did not clearly err in finding that termination of respondent-mother's parental rights was in the best interests of each child.

Respondent-father merely argues that the trial court's best interest determination must be set aside if a statutory ground for termination was not established. Having determined that the trial court did not clearly err in finding each of the statutory grounds for termination, we reject this claim of error. Respondent-father has not established any basis for disturbing the trial court's decision to terminate his parental rights.

Affirmed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood