STATE OF MICHIGAN

COURT OF APPEALS

In re K. D. RUTHERFORD, Minor.

UNPUBLISHED
December 22, 2016

No. 332582
Oakland Circuit Court
Family Division
LC No. 2015-833955-NA

Before: WILDER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Respondent father appeals as of right an order terminating his parental rights to the minor child, KDR, pursuant to MCL 712.19b(3)(*l*) (parent's rights to another child have been terminated). We reverse.

I. STATUTORY GROUNDS FOR TERMINATION

Respondent first argues that the trial court erred, in light of this Court's recent decision in *In re Gach*, ___ Mich App ___ ; ___ NW2d ___ (2016) (Docket No. 328714), when it relied solely on MCL 712A.19b(3)(*l*) as statutory grounds for termination. We agree.

A trial court may terminate a respondent's parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) termination is in the child's best interest. MCR 3.977(F); *In re Fried*, 266 Mich App 535, 540-541; 702 NW2d 192 (2005). We review for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). The interpretation and application of statutes and court rules are reviewed de novo. *Mason*, 486 Mich at 152. "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

In the instant case, petitioner sought termination of respondent's parental rights pursuant to statutory subsections 712A.19b(3)(g), (j), and (*l*). In relevant part, MCL 712A.19b(3) states:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

> (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.
>
> * * *
>
> (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.
>
> * * *
>
> (*l*) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state. [Footnote omitted.]

Although the trial court found that petitioner had failed to present clear and convincing evidence to support termination under subsections (g) or (j), the trial court found support for termination in statutory subsection (*l*).

On appeal, petitioner apparently concedes the impropriety of subsections (j) and (*l*), instead arguing that termination was appropriate under subsection (i), and, regardless of the trial court's conclusion, subsection (g). Generally, an appellee's failure to file a cross appeal precludes him from raising an issue not appealed by the appellant. *Kosmyna v Botsford Cmty Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). "However, an appellee need not file a cross appeal in order to argue an alternative basis for affirming the trial court's decision, even if that argument was considered and rejected by the trial court." *Id*.

On appeal, this Court grants a high degree of deference to the trial court's decision with regard to whether petitioner has established statutory grounds by clear and convincing evidence. Under, the clear error standard of review, there must be more than a possibility that the trial court was wrong; indeed, reversal is not permitted even if this Court thinks the trial court's decision was "probably wrong[.]" *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). We must give deference to the trial court's superior ability to assess the credibility of witnesses and the weight to accord their testimony, *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989), and affirm the trial court's decision unless definitely and firmly convinced that the trial court erred, *Ellis* 294 Mich App at 33. "Thus, under the clear-error standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderates in the opposite direction." *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 204; 848 NW2d 107 (2014).

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

Termination of a respondent's parental rights under MCL 712A.19b(3)(g) requires clear and convincing evidence that (1) respondent failed to provide the child with proper care and

custody and (2) there is no reasonable likelihood that respondent will be able to provide proper care and custody within a reasonable time. *In re Laster*, 303 Mich App 485, 493; 845 NW2d 540 (2013). We are not definitely and firmly convinced that the trial court erred when it determined that petitioner had failed to present clear and convincing evidence that respondent was incapable of providing proper care and custody for KDR. Indeed, a review of the petition filed in this case and the testimony presented during the statutory grounds hearing provides little evidence that respondent could not care for, at least, this child. Respondent had provided KDR, KDR's mother, and a child belonging to KDR's mother with consistent housing, either in his own apartment or his mother's home, from before KDR's birth. Although he was sometimes unemployed, respondent maintained several long periods of employment and worked "odd jobs" in between to support KDR and his other children. There was no evidence presented that KDR was neglected, abused, or even poorly cared for. On the contrary, respondent and KDR's mother both testified that respondent had been an attentive and involved father, and that KDR was adequately provided for. Other than the "tussle" leading to the termination petition in this case, there was no evidence that KDR, a seven-month-old, had been exposed to domestic violence.

On appeal, petitioner points to evidence presented during the best interest hearing that it claims supported termination under subsection (3)(g). However, the trial court's statutory grounds determination was made, appropriately, before it heard any testimony regarding KDR's best interests. Petitioner was aware that the proceedings would be bifurcated and did not request that the trial court hear evidence regarding both issues at the same time. Our consideration on appeal is therefore limited, as was the trial court's, to the evidence presented prior to the best interests determination. Additionally, contrary to what petitioner argues, the fact that the trial court later determined that termination was in KDR's best interests does not provide proof that the trial court should have found evidence to support termination under subsection (3)(g). The best interest determination need only be supported by a preponderance of the evidence, *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013), a much lower standard of proof than the clear and convincing evidence required to support a statutory ground, *In re Terry*, 240 Mich App 14, 21-22.; 610 NW2d 563 (2000). Petitioner's arguments in this regard simply fail.

In contesting the trial court's finding on this ground, petitioner relies exclusively on conduct of respondent which led to a termination of his parental rights to two other children, and prompted petitioner to seek termination of respondent's parental rights to an additional child two years prior to its petition for custody of KDR. While this conduct may be relevant, especially with regard to the trial court's best interest determination, it is respondent's conduct with regard to KDR that is most relevant in this case. While a parent's failure to comply with a parent agency agreement can be evidence of the parent's inability to provide proper care and custody, *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), respondent's failure to comply with his previous plans is not evidence that he could not provide for KDR, and he was not offered the opportunity to comply with a treatment plan in this case. It is understandable, therefore, that the trial court would give greater consideration to respondent's more recent conduct. Ultimately, the challenges raised by petitioner speak to the weight to be placed on respondent's testimony. Given the deference this Court gives to the trial court's determinations, we cannot conclude that the trial court erred with respect to MCL 712A.19b(3)(g).

B. MCL 712A.19B(3)(*l*)

Clear and convincing evidence was presented to support termination of respondent's parental rights under subsection (*l*), which requires only that a respondent's parental rights to one or more of the child's siblings have been terminated pursuant to proceedings initiated under MCL 712A.2(b). *In re Jones*, 286 Mich App 126, 127-128; 777 NW2d 728 (2009). However, as petitioner concedes, termination is no longer appropriately supported by this subsection, which was ruled unconstitutional in a recent opinion by this Court. See *Gach*, ___ Mich App at ___; slip op at 8. In *Gach*, this Court explained that in cases where there has been an earlier termination, if it is not clearly and convincingly proved that the parent failed to remedy the earlier abuse or neglect that led to the earlier termination, such as necessary under subsection (3)(i), "application of statutory ground (3)(*l*) disdains present realities in deference to past formalities" and simply "forecloses the determinative issues of competence and care." *Id*. "MCL 712A.19b(3)(*l*) thus fails to comport with due process in light of the fundamental liberty interest at stake." *Id*.

Although this Court is not bound by *Gach*, which was decided 18 days after the trial court entered its order terminating respondent's parental rights to KDR, we find the reasoning in that opinion persuasive. Not only is *Gach* directly on point, it involves the due process right of respondent to parent, and is a likely candidate for either full or limited retroactivity.

"The general rule in Michigan is that appellate court decisions are to be given full retroactivity unless limited retroactivity is justified." *Jahner v Dep't of Corrections*, 197 Mich App 111, 113; 495 NW2d 168 (1992) (internal quotation and citation omitted). "[W]here injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect," such as when settled precedent is overruled or cases decide an issue of first impression. *In re Kanjia*, 308 Mich App 660, 671-672; 866 NW2d 862 (2014), quoting *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997), superceded by statute on other grounds by MCL 700.2121 *et seq*. "In deciding whether to give retroactive application, 'there are three key factors to be considered: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.' " *Jahner*, 197 Mich App at 114, quoting *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). Decisions that are given limited retroactivity apply to pending cases, such as the present case, where the issue was raised and preserved. *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 95 n 7; 795 NW2d 205 (2010).

After reviewing these factors, we believe that full retroactivity of the rule in *Gach* is justified. With regard to the first factor, the purpose of ruling subsection (*l*) unconstitutionally deficient is to safeguard the due process rights of parents, and to ensure that the state shows that a child's parent is unfit before interfering with parental rights. *Gach*, ___ Mich App at ___; slip op at 7 (stating that subsection (*l*) "provides constitutionally deficient protection to a respondent's due process interest in raising his or her children.") Proper protection of the right to parent "constitutes a substantial and weighty purpose." *Kanjia*, 308 Mich App at 672. Turning to the second factor, we note that reliance on subsection (*l*) as the sole statutory ground for termination of parental rights has not been frequent. As we explained in *Gach*:

> MCL 712A.19b(3)(*l*) has been rarely referenced in published caselaw. In a *few* cases before this Court, we have affirmed terminations under statutory ground (3)(*l*); but we have never before considered a due process challenge to that statutory subsection. [*Gach*, ___ Mich App at ___; slip op at 7-8 (emphasis added).]

The second factor therefore also weighs in favor of retroactivity. Finally, although retroactive application might place a burden on the state with additional procedures in cases where termination was based solely on subsection (*l*), these cases, as mentioned, are few. Any such burden is not sufficient to outweigh the interests of justice and fairness provided by retroactive application. See *Kanjia*, 308 Mich App at 673. Moreover, the *Gach* decision rested, in large part, on the due process guarantee of the United States Constitution:

> The United States Supreme Court has decreed that " 'a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.' " As written, MCL 712A.19b(3)(*l*) provides no way to rebut this presumption of unfitness, assuming the fact of the prior involuntary termination. [*Gach*, ___ Mich App at ___; slip op at 7. (internal citations omitted)]

"[W]here federal law is concerned, full retroactivity is the rule." *Kanjia*, 308 Mich App at 673, citing *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993). Therefore, we give *Gach* full retroactive effect.

C. MCL 712A.19B(3)(i)

Petitioner asks this Court to determine that termination of respondent's parental rights was appropriately supported by MCL 712A.19b(3)(i), a statutory ground not listed in the termination petition, which requires clear and convincing evidence that (1) the parent had a prior termination for "serious and chronic neglect or physical or sexual abuse," and (2) previous attempts at rehabilitation have failed. MCL 712A.19b(3)(i). Because petitioner "would have" brought this subsection as grounds for termination if it had known subsection (*l*) would be ruled unconstitutional, and because respondent "should have known" that, in light of his history of domestic violence, he would need to defend against subsection (i), petitioner asserts that it would be appropriate for this Court to take the decision from the trial court, find clear and convincing evidence to support termination under this subsection, and find that any error in the trial court's determination of whether any other statutory grounds had been proven was therefore "harmless." We decline to do so.

Petitioner was not limited in the statutory grounds it alleged in its petition, and its decision to include subsection (*l*) without subsection (i) was its own. Regardless of what petitioner asserts on appeal, respondent did not have notice that he would need to defend against termination under subsection (i) when it was not a ground for termination listed on the petition or even mentioned at any point during the lower court proceedings. In any case, petitioner raises the issue of termination under subsection (i) for the first time in its appellate brief, and this Court typically does not address issues raised for the first time on appeal. *In re RFF*, 242 Mich App 188, 204; 617 NW2d 745 (2000). It bears repeating that this Court affords great deference to the

trial court's factual determinations. That deference includes allowing the trial court the opportunity to make factual determinations on an issue before it can be considered on appeal. Indeed, this Court considers unpreserved issues only when all the necessary facts are before it. See *id*. at 204. Because we lack the necessary facts, we decline the request to make a legal determination regarding this unpreserved issue on appeal.

II. BEST INTERESTS

Next, respondent argues that the trial court erred when it found that termination of his parental rights was in KDR's best interests. We agree.

This Court reviews a trial court's decision for clear error regarding whether termination is in the child's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000), superceded in part by statute on other grounds in MCL 712A.19b(5). Whether termination of parental rights is in the child's best interest must be proven by a preponderance of the evidence. *Moss*, 301 Mich App at 90.

Once a statutory ground has been proven, the trial court must find that termination is in the child's best interest before it can terminate parental rights. MCL 712A.19b(5); MCR 3.977. However, at least one statutory ground must be proven *before* the trial court may consider whether termination of a respondent's parental rights is in the best interests of the child. Because no statutory grounds support termination in this case, consideration of the trial court's best interest determination is unnecessary. However, we note that even assuming statutory grounds for termination had been proven in respondent's case, the trial court's best interest determination was in error because it neglected to consider KDR's relative placement.

In considering whether termination of parental rights is in the best interests of the child, all available evidence on a wide variety of factors should be considered. *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). These factors include a parent's history of domestic violence, the existence of a bond between the child and the parent, the parent's ability to parent, the child's need for permanency and stability, the advantages of a foster home over the parent's home, the parent's compliance with his or her service plan, the parent's visitation history with the child, the child's well-being, and the possibility of adoption. *Id*. at 713-714. "[A] child's placement with relatives weighs against termination under MCL 712A.19a(6)(a)." *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012) (citation omitted). If a child is living with relatives when the termination hearing occurs, the trial court must consider that as an "explicit factor" in determining if termination is in the child's best interests. *Id*. (citation omitted).

We cannot say that we are "definitely and firmly convinced" that the trial court made a mistake when it found, *based on the evidence it considered*, that termination of respondent's parental rights was in KDR's best interest. The referee read over 20 pages of factual findings into the record before rendering its oral determination, indicating that he had considered a broad array of evidence, including the testimony of a court psychologist, who offered the opinion that respondent would not be able to care for KDR "in the foreseeable future," the allegations raised with regard to respondent's prior terminations, respondent's inconsistent compliance with prior treatment plans, and respondent's alleged prior incidents of domestic violence. However, the

referee was less detailed in his application of those facts in making his best interests determination, and failed to clearly articulate his consideration of a number of the best interest factors.

The referee's failure to provide explicit detail regarding each best interest factor would not normally render his ultimate conclusion erroneous. However, in the referee's 25-page opinion, the fact that KDR was placed with his mother, a relative, was not mentioned a single time. "A trial court's failure to explicitly address whether termination is appropriate in light of the [child's] placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Olive/Metts*, 297 Mich App at 43 (citation omitted). Thus, because the trial court failed to consider KDR's relative placement, reversal is required, regardless of the failure of statutory grounds previously discussed.

Reversed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto