STATE OF MICHIGAN

COURT OF APPEALS

In re BENSON, Minors.

UNPUBLISHED
November 24, 2020

No. 353168
Ingham Circuit Court
Family Division
LC No. 18-000293-NA

Before: JANSEN, P.J., and FORT HOOD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-father appeals as of right the order appointing a juvenile guardian over respondent's two minor children. Respondent's parental rights were not terminated. We affirm the January 15, 2020 order appointing a juvenile guardian over the minor children, but vacate the April 22, 2020 order terminating the trial court's jurisdiction, and remand for further proceedings consistent with this opinion. We retain jurisdiction.

I. FACTUAL BACKGROUND

The minor children came under the trial court's jurisdiction in early 2018 following allegations of respondent's substance abuse and criminal involvement, as well as allegations of improper supervision and threatened harm. The triggering event was a drug raid on respondent's home for which one of the minor children was present. Forensic interviews revealed that both minor children had witnessed their father and his friends doing drugs in the home and knew that their father had weapons in the home and where those weapons were kept. The petition to terminate respondent's parental rights further detailed respondent's extensive criminal history, and the fact that he had fathered 11 known children with 10 women, of which respondent had custody of none.

The minor children were removed from respondent's care and placed with their paternal aunt, who was willing to provide the minor children with a long-term placement. Respondent agreed to undergo family team meetings, supervised parenting time, random drug screens, a psychological evaluation, parenting classes, and substance abuse assessment. Respondent would also be required to obtain legal employment and suitable, stable housing. In exchange for

petitioner withdrawing its termination petition, responded pleaded to certain allegations in the petition to come under the trial court's jurisdiction.

Over the course of 22 months, respondent did maintain employment and suitable housing. Respondent also enjoyed supervised parenting time with the minor children. However, respondent continued to struggle with substance abuse which manifested in multiple positive drug screens and missed drug screens. Moreover, respondent consistently failed to take accountability for positive screens, blaming them on false positives or claiming that he had spent time with people who had done drugs, and their usage affected his drug screens.

On January 15, 2020, the trial court held a dispositional review hearing, at which time the Lawyer Guardian Ad Litem recommended the permanency planning goal be changed from reunification to guardianship, and that the minor children's paternal aunt be appointed as their juvenile guardian. The trial court agreed, finding:

> Now, I do find reasonable efforts have been made, including the substance abuse treatment, parenting time, random drops. Um, there was some progress, because we continue to go to our treatment, and continue to make a lot of our drops, but not all of them. Uh, continued placements [are] necessary and appropriate.
>
> Uh, the – I do believe that an appointment of a juvenile guardian is in the chi – these children's best interest. Um, I – I find that, uh, based on the home study, that the home study is appropriate. And I think that the, um, children have done very well in this home. And are well connected and well bonded to the guardian. Um, you know, these – these children have been there for quite some time. And, uh, over that period of time, they – they have stability and permanency there.
>
> The, uh – in particular the children have been the moth – in the – in the guardian's home with [their aunt] since March of 2018. Um, the, uh, she – you know, she doesn't have any kind of substance abuse problem. And, certainly, are in the position to provide the care and necessary, uh, for these children. Did not have any mental health concerns that would prohibit her from providing care. Um, she has sufficient, uh, resources in order to provide that care. And is highly motivated. Uh, taking responsibility seriously as the – as the, um, as a potential guardian.
>
> She's willing to cooperate with the [c]ourt and provide ongoing care consistent with ensuring that both children regularly attend school, medical appointments, mental health appointments when necessary, and, uh, affording [respondent] parenting time. She's capable of providing long term care for both children. And she's had placement sine, I said, March of 2018.
>
> So, it's time to give these children, you know, in my estimation, some since of permanency. And I think the juvenile guardianship will do that.

The trial court indicated that it would issue an order appointing a juvenile guardian, and that it was "obligated to hold one review hearing since the, uh, since the appointment of the – of the guardianship."

The trial court did enter an order appointing the minor children's paternal aunt as their juvenile guardian on January 15, 2020. A review hearing was scheduled for April 8, 2020. Respondent timely filed this appeal from that order. On April 3, 2020, respondent was given notice that the hearing was rescheduled to June 17, 2020. However, that hearing never took place. On April 17, 2020, the Lawyer Guardian Ad Litem filed a request to terminate the trial court's jurisdiction in this case. On April 22, 2020, the trial court granted that request, and ordered that "the jurisdiction of this court is terminated[.]"

II. APPOINTMENT OF JUVENILE GUARDIAN

Respondent first argues that the trial court abused its discretion by appointing a juvenile guardian, as the appointment of same was not in the minor children's best interests. Rather, respondent argues, the minor children should have been returned to his care. We disagree.

"A trial court's factual findings are reviewed for clear error and its decision to appoint a guardian is reviewed for an abuse of discretion." *In re TK*, 306 Mich App 698, 709; 859 NW2d 208 (2014). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Foster v Foster*, 505 Mich 151, ___; 949 NW2d 102, 109 (2020) (footnote omitted).

MCL 712A.19a(1) provides, in relevant part, that

> if a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing within 12 months after the child was removed from his or her home.

Generally, when a child has been removed from his or her home, the child is either returned to his or her parent, assuming that the return of the child would not cause a substantial risk of harm, MCL 712A.19a(7), or the trial court may order the petitioner to initiate termination proceedings. MCL 712A.19a(8). However, another option exists under MCL 712A.19a(9)(c), which is what occurred in this case. MCL 712A.19a(9)(c) provides, in relevant part:

> (9) If the agency demonstrates under subsection (8) that initiating termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child under subsection (8), the court shall order 1 or more of the following alterative placement plans:
>
> * * *

> (c) Subject to subsection (11), if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated. [MCL 712A.19a(9)(c).][1]

"[T]he appointment of a guardian is only appropriate after the court has made a finding that the child cannot be safely returned to the home, yet initiating termination of parental rights ic clearly not in the child's best interests. Then, the court must find that it is in the child's best interests to appoint a guardian." *In re* TK, 306 Mich App at 707 (citation omitted). In essence, "the appointment of a guardian is done in an effort to avoid termination of parental rights." *Id*. at 705. It "allows the child to keep a relationship with the parent when placement with the parent is not possible." *Id*.

In regards to whether a guardianship is in the best interests of a minor child, MCL 712A.19a(9) does not

> direct a court to apply certain factors or otherwise limit a court's method for determining the child's best interests, [therefore] the statute grants the court discretion regarding how to determine what is in the child's best interests depending on the case-specific circumstances. See *Easton Sch Dist No. 4 v Snell*, 24 Mich 350, 353 (1872) (holding that when a statute grants a power "in general terms," the statue "leaves the details to the sound discretion" of the entity to whom the power is granted). [*In re COH, ERH, JRG & KBH*, 495 Mich 184, 202; 848 NW2d 107 (2014).]

Thus, the trial court "may consider the best-interest factors from the Child Custody Act, the Adoption Code, or any other factors that may be relevant under the circumstances of a particular case." *Id*. at 208.

In this case, when evaluating whether appointing a guardian was in the best interests of the minor children, the trial court acknowledged that respondent had made some progress. Respondent was able to secure housing and employment, and attended some therapy and substance abuse counseling. However, the trial court also considered that respondent continued to suffer with drug abuse. Although defendant had not had a positive drug test in the three-month period before a guardian was appointed, he had completely missed two drug screens during that time. Given respondent's extensive history of drug abuse and his failure to take accountability for past positive screens, the trial court admitted that it did not trust respondent's "sobriety" and surmised that respondent had missed those drug screens because he would have tested positive for something.

The trial court further considered that during the nearly two-year period that the minor children had been out of respondent's care, they had been placed with their paternal aunt. The minor children's aunt was willing to be a guardian to the minor children: the minor children shared

[1] MCL 712A.19a(11) is nearly identical to MCR 3.979(A)(1) and provides that if a guardian is appointed, the trial court shall order the Department of Health and Human Services to conduct a criminal record and central registry check within 7 days and perform a home study within 28 days. See MCL 712A.19a(11)(a)-(c); MCR 3.979(A)(1)(a)-(b).

a strong bond with their aunt and were thriving under her care. Their aunt was able to provide the minor children a sense of permanency, finality, and stability that respondent could not. Moreover, she was willing to continue to facilitate a relationship between the minor children and respondent while the minor children were in her care.

In light of the foregoing, we conclude that the trial court did not abuse its discretion by appointing the minor children's paternal aunt as their juvenile guardian, and that the appointment of a guardian was in the minor children's best interests.

III. FAILURE TO HOLD A HEARING UNDER MCL 712A.19A(12) AND MCR 3.979(C)(1)(A)

Respondent also argues on appeal that he was denied procedural due process where the trial court failed to conduct a hearing after appointing a guardian for the minor children under MCR 3.975 as is required by MCL 712A.19a(12) and MCR 3.979(1)(a). Respondent argues that the juvenile guardianship should therefore be set aside. While we agree that the trial court's failure to conduct the review hearing precluded the trial court from properly terminating its jurisdiction and we remand on that limited basis, we disagree with respondent that he is entitled to set aside the guardianship as a result.

"In general, issues that are raised, addressed and decided by the trial court are preserved for appeal." *In re TK*, 306 Mich App at 703. Although a hearing had been scheduled, that hearing was cancelled, and the trial court terminated its jurisdiction in this case without any objection from respondent. Thus, this issue is unpreserved. Generally, "whether child protective proceedings complied with a respondent's substantive and procedural due process rights is a question of law that this Court reviews de novo." *In re TK*, 306 Mich App at 703. However, because this issue is unpreserved, this Court reviews this issue for "plain error affecting substantial rights." *Id*. at 703.

We conclude that the trial court plainly erred by terminating its jurisdiction without a hearing under MCR 3.975 as prescribed by MCL 712A.19a(12) and MCR 3.979(C)(1)(a). MCL 712A.19a(12) provides that "[t]he court's jurisdiction over a juvenile under section 2(b) of this chapter must be terminated after the court appoints a guardian under this section and conducts a review hearing under section 19 of this chapter, unless the juvenile is released sooner by the court." Likewise, MCR 3.979(C)(1)(a) provides:

> (1) *Jurisdiction*
>
> > (a) Except as otherwise provided in this rule, the court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 of 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to a child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated.

MCR 3.979(C)(2) goes on to provide:

> (2) *Review Hearings.* The review hearing following appointment of the juvenile guardian must be conducted within 91 days or the most recent review hearing if it has been one year or less from the date the child was last removed from the home, or within 182 days of the most recent review hearing if it has been more than one year from the date the child was last removed from the home.

It is undisputed that under MCL 712A.19a(12) and MCR 3.979(C)(1)(a), the trial court, having appointed a juvenile guardian over the minor children, was required to hold a review hearing before terminating its jurisdiction. A review hearing had been initially scheduled for April 8, 2020, but was postponed to June 17, 2020. That hearing never took place. The Lawyer Guardian Ad Litem in this case filed a request to terminate the trial court's jurisdiction, and that request was granted by the trial court. Indeed, the trial court terminated its jurisdiction in this case, before holding a review hearing under MCR 3.975 as prescribed by MCL 712A.19a(12) and MCR 3.979(C)(1)(a), in an order dated April 22, 2020. This constituted plain error by the trial court, and that plain error affected respondent's procedural due-process rights. Thus, we remand this matter back to the trial court for the limited purpose of conducting a review hearing under MCR 3.975, at which point the trial court could properly terminate its jurisdiction.

We affirm the January 15, 2020 order appointing a juvenile guardian over the minor children, but vacate the April 22, 2020 order terminating the trial court's jurisdiction, and remand for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause

Court of Appeals, State of Michigan

ORDER

In Re Benson Minors

Docket No. 353168

LC No. 18-000293-NA

Kathleen Jansen
Presiding Judge

Karen M. Fort Hood

Amy Ronayne Krause
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 28 days of the Clerk's certification of this order, and they shall be given priority on remand and concluded within 56 days of the Clerk's certification of this order. As stated in the accompanying opinion, the trial court's April 22, 2020 order terminating its jurisdiction is vacated and this matter is remanded for the trial court to hold a review hearing under MCR 3.975 as prescribed by MCL 712A.19a(12) and MCR 3.979(C)(1)(a). The proceedings on remand are limited to this issue.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 24, 2020
Date

Chief Clerk