

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of IVA MAE PASCOE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KEVIN MATTHEW MINARD,

Respondent-Appellant.

UNPUBLISHED

February 3, 2005

No. 255885

Kalkaska Circuit Court

Family Division

LC No. 01-003355-NA

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Respondent appeals by delayed leave granted the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(i) and/or (ii), (g), and (j). We affirm.

Respondent first argues that the trial court clearly erred in finding that petitioner established at least one of the statutory grounds for termination under MCL 712A.19b(3) by clear and convincing evidence. MCR 3.977(J); *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). We disagree. “Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child’s best interests.” *In re Trejo Minors*, 462 Mich 341, 354; 612 NW2d 407 (2000); MCL 712A.19b(5). We review for clear error the trial court’s decision that a ground for termination has been proven by clear and convincing evidence and its decision regarding the child’s best interest. *Trejo, supra* at 356-357.

The evidence adduced at trial demonstrated that the minor child was very difficult to parent, was highly immature, learning impaired, had emotional problems and, throughout the proceedings, exhibited problematic behavior, including lying, manipulation, physically aggressive conduct, and inappropriate sexual behavior. As a result, the minor child required constant supervision and monitoring by her caretakers. Extensive testimony by the caseworker, therapist, and evaluating psychologist consistently showed that, despite his good intentions, respondent did not develop the capacity or ability to appropriately parent the minor child, and was unable to enhance his understanding of the minor child’s emotional needs and behaviors to the degree necessary to effectively address those needs and behaviors. Testimony by the therapist further indicated that if the minor child were returned to respondent’s custody she would likely suffer harm in that her behavioral problems would escalate. MCL 712A.19b(3)(j).

We find that the testimony clearly established that there was no reasonable likelihood that respondent had the capacity or the ability to improve his parenting deficiencies to enable him to properly parent the child within a reasonable time, if ever. MCL 712A.19b(3)(g). The evidence also showed that respondent failed to substantially comply with other aspects of his parent-agency agreement by failing to adequately address his substance abuse issue, which could further impede his already limited parenting ability, and by failing to maintain employment for six months, which hinders his ability to provide for the minor child's physical needs. MCL 712A.19b(3)(c)(ii). A parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child, *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003); MCL 712A.19b(3)(g), and evidence that the child would likely be harmed if returned to his care. *Trejo, supra* at 346 n 3; MCR 3.976(E)(1); MCL 712A.19b(3)(j). The trial court did not clearly err in its determination that a statutory ground for termination had been established by clear and convincing evidence.

Further, although the evidence established that respondent had a bond with the minor child, that he wanted to care for her, and that the minor child wanted to be in his custody, given the evidence concerning his lack of parenting ability and the special needs of the minor child, we find no clear error in the trial court's determination that termination was not contrary to the minor child's best interests. Moreover, the minor child's behavioral problems had significantly subsided since her placement in foster care. Respondent's lack of ability or capacity to properly care for the minor child would likely result in a potentially harmful environment, create a lack of permanency and stability, and cause the child to regress.

Respondent argues that the trial court improperly relied on "expert" opinion testimony and failed to consider contradictory testimony. While testimony from the child's current foster mother and respondent's brother somewhat contradicted testimony from the caseworker, evaluating psychologist, and therapist, we must give regard to the special opportunity of the trial court to assess the credibility of the witnesses who appear before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In light of the conflicting testimony concerning the ability of respondent to appropriately parent the child, we find that the trial court did not clearly err in relying on the "expert" testimony to reach its conclusion that there is no reason to believe that respondent would be able to effectively parent the minor child in the near future. Respondent also argues that the trial court improperly relied on the psychological examination because it was completed one year before the termination trial. However, we find nothing in the record to indicate that respondent even marginally improved his parenting ability following the psychological evaluation to warrant negating the psychologist's prognosis.

Respondent next claims that the trial court did not have jurisdiction over this matter because termination proceedings were initiated more than forty-two days after the permanency planning hearing, in violation of MCL 712A.19a(7). Respondent failed to raise this issue below; therefore, it is not preserved for review. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). Accordingly, our review is limited to plain error affecting respondent's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW3d 838 (2000). Respondent does not contend that he was prejudiced by the three-day delay in this case, *Jackson, supra* at 29, and has therefore failed to demonstrate that his substantial rights were affected. *Kern, supra* at 336. Further, this Court has previously considered this issue and concluded that the failure to meet the forty-two-day requirement does not divest the trial court of jurisdiction.

In re Kirkwood, 187 Mich App 542, 546; 468 NW2d 280 (1991). And because neither the statute nor the court rule provide any sanction for such a violation, this Court has declined to add any sanction which the Legislature and the Supreme Court declined to provide. *Id.* at 545-546.

Finally, respondent argues that he was denied due process of law because he did not receive a fair and impartial hearing. Respondent failed to raise this issue below; therefore, it is unpreserved, *Camden, supra* at 400 n 2, and our review is limited to plain error affecting substantial rights. *Kern, supra* at 336. We fail to find any such error because respondent did not present any convincing evidence to support the allegations that his parental rights were terminated because of the trial court's bias and prejudice. See *Michigan Intra-State Motor Tariff Bureau, Inc v Pub Service Comm*, 200 Mich App 381, 391-392; 504 NW2d 677 (1993). Instead, respondent merely alleges that he was denied a fair and impartial trial because the trial judge conducted both the permanency planning hearing and the termination hearing, ordered petitioner to file a petition to terminate respondent's parental rights, and directed petitioner to produce additional witnesses to substantiate its case during the termination trial. Such conduct does not rise to the level of the requisite "deep-seated favoritism or antagonism" that would prevent a fair and impartial judgment. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996), quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Respondent's claim is purely speculative and unsupported by any evidence, and he has failed to demonstrate any actual bias or prejudice on the part of the trial court.

We affirm.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Richard A. Bandstra