

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 21, 2010

In the Matter of ROBERTS, Minors.

No. 295605
Ionia Circuit Court
Family Division
LC No. 08-000196-NA

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Respondent father appeals as of right from the order terminating his parental rights to the minor children pursuant to the statutory bases set forth in MCL 712A.19b(3)(c)(ii) and (g). This order also terminated the parental rights of the children’s mother, whose appeal was later withdrawn. We affirm.

A petition seeking the removal of the two children from respondent’s home was authorized in May 2008. The petition indicated that respondent had an “extensive criminal history,” setting forth the particulars of past crimes, that he had been diagnosed with “antisocial personality and intermittent explosive disorder,” that respondent had struck the children, that he had engaged in domestic violence, that he had a significant substance abuse history involving marijuana, cocaine, and alcohol, and that respondent and the children’s mother, both of whom were incarcerated, had left the children in the care of a man absent a power of attorney or guardianship. After a preliminary hearing was conducted, the court authorized the petition and removed the children. Subsequently, the trial court assumed jurisdiction over the children upon the basis of a plea entered by the children’s mother relative to the allegations in the petition pertaining to her.

At a dispositional hearing, respondent was ordered to comply with a parent-agency treatment agreement (“PATA”). The PATA required respondent to do as follows: submit to a substance abuse assessment and follow all of its recommendations; abstain from using substances; submit substance abuse screens as requested; obtain appropriate housing and ensure its affordability by maintaining employment and budgeting money; and obtain individual therapy that addressed domestic violence and other issues. Starting in February 2009, respondent was allowed unsupervised visitations with the children at the discretion of the Department of Human Services (“DHS”), and by May 2009, he was permitted unsupervised weekend visitations. However, a drug screen provided by respondent later that month tested positive for marijuana, resulting in the rescission of his unsupervised visitation and the cancellation of a planned reunification. A supplemental termination petition was subsequently filed, which repeated the

allegations in the initial petition and added that respondent did not have a stable home or job. Following termination hearings held in November and December of 2009, the trial court terminated respondent's parental rights.

Respondent's first argument concerns the following suggestion made by the trial court during the termination trial:

One other issue and I'm certainly not ordering it, I'm just throwing it out there, since substance abuse is an issue, has the Department asked either parent whether they would voluntarily submit to a drug test today? . . . I mean, it – that's a big issue. I mean, if there's – there's an opportunity to drug test them while they're here, it would certainly be beneficial.

Pursuant to this suggestion, respondent provided a drug screen, which tested positive. On appeal, respondent contends that the court's suggestion acted to bolster petitioner's case and, therefore, was unfair to respondent, violating his right to due process.

“Due process requires fundamental fairness, which is determined in a particular situation first by ‘considering any relevant precedents and then by assessing the several interests that are at stake.’” *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993) (citation omitted). It is arguable that respondent waived this issue, where the court stated that it was not ordering the testing, the DHS was asked to see if respondent would voluntarily submit to testing, and respondent acquiesced to being tested. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). However, we shall proceed, treating the issue as unreserved and forfeited; therefore, our review is limited to plain error that affected respondent's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error occurs at the trial court level if (1) error occurred, (2) that was clear or obvious, and (3) it prejudices the party, meaning that it affected the outcome of the lower court proceedings. *Id.* at 763. Because respondent does not claim that he was prejudiced by the trial court's alleged unfair treatment, we reject his argument. Furthermore, given the other evidence about respondent's ongoing marijuana use, including his admission to daily use after May of 2009, we find that there was no prejudice, assuming error.

Moreover, we find nothing unusual with respect to the court's suggestion that drug testing be conducted during the proceeding, considering that this was a parental rights case in which substance abuse had been an obstacle to reunification. There was nothing in the record to support respondent's claim that the court's intent was to strengthen petitioner's case or that the court was in doubt about the sufficiency of the evidence about respondent's drug screens. In fact, the court's phrasing made clear that its only purpose was to obtain accurate and timely information about the issue of substance abuse. Therefore, there was no indication that the trial court treated respondent unfairly.

With respect to due process, respondent also complains relative to testimony by a witness who conducted in-home drug testing on respondent, arguing that testing results were admitted over objection, that associated discovery requests had been made with no test results being forthcoming, and that the witness admitted making an error on the test results by mistyping information. As found by the trial court, respondent had undergone drug testing with the witness from the commencement of the case and the testing results were referenced throughout the

record in various reports; there were no surprises. Moreover, respondent himself testified to his extensive marijuana use. In regard to mistyping test results, the testimony cited by respondent pertains to the testing of the children's mother, not respondent. Reversal is unwarranted.

Respondent next argues that the evidence was insufficient to terminate his parental rights.¹ A trial court may terminate a parent's parental rights to a child if the court finds that the petitioner has proven one of the statutory grounds for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d 407 (2000). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "The clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights." MCR 3.977(J). The review for clear error applies to both the trial court's decision that a ground for termination of parental rights was proven by clear and convincing evidence and the court's ruling regarding the child's best interests. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). The trial court's determination to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake had been made on consideration of all the evidence. *Id.* at 209-210.

A review of the evidence shows that respondent's substance abuse and employment were identified as issues in the PATA and that neither problem was sufficiently rectified by the time of the termination hearing. Despite receiving counseling for three months, respondent used marijuana on New Year's Day in January 2009, used again in May 2009, and used on a daily basis thereafter. He did not follow-through on the caseworker's suggestions regarding relapse prevention and did not provide any drug screens from June 30, 2009, through October 6, 2009. In his testimony at the termination hearing, he admitted using drugs through the beginning of November 2009, but said that he had recently realized that he needed to re-start counseling and had been clean for 26 days. With respect to his employment, respondent entered the Michigan Works program at some point during the child protective proceeding but was terminated after failing to comply with certain requirements and, consequently, was unable to get funding from DHS. He also failed to provide verification of any employment until the termination hearing, where he provided a written statement from his employer about a part-time job that he had recently started. Respondent testified about the job, indicating that he worked a couple of days per week and was paid in cash.

This evidence establishes that the trial court did not clearly err when it found that the "other conditions" of substance abuse and employment problems existed that caused the children to come within the court's jurisdiction, that respondent received recommendations to rectify

¹ Because the trial court assumed jurisdiction over the children on the basis of their mother's plea, there was a lack of adjudication specifically relating to respondent, and any grounds for termination of his parental rights would have to be proven by clear and convincing legally admissible evidence. MCR 3.977(F)(1)(b); *In re CR*, 250 Mich App 185, 205-206; 646 NW2d 506 (2002) (while the DHS need not sustain the burden of proof at an adjudication with respect to every parent, it "must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication").

those conditions, and that the conditions were not rectified after respondent received notice and a hearing and was provided a reasonable opportunity to rectify those issues. MCL 712A.19b(3)(c)(ii). Further, given the length of this 18-month child protective proceeding and respondent's ongoing struggles with drug use and history of inconsistent employment, the court did not clearly err in finding that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages (five and four years old at the time of the termination hearing). *Id.*

The evidence about respondent's substance abuse and employment problems also clearly and convincingly established the statutory basis for termination set forth in MCL 712A.19b(3)(g). Respondent's relapse in May 2009 resulted in the rescission of his unsupervised visitations and also thwarted a planned reunification. In addition, respondent could not appropriately supervise the children while under the influence of marijuana or other substances, and his failure to comply with the PATA requirements concerning drug use was evidence of a failure to provide proper care.² Considering the evidence of defendant's drug abuse in conjunction with his inconsistent and questionable work history, reversal is unwarranted. The trial court did not clearly err in its findings that the evidence clearly and convincingly established that respondent, without regard to intent, failed in the past to provide proper care or custody for the children, and that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering the children's ages. MCL 712A.19b(3)(g).

Respondent argues that DHS failed to make reasonable efforts to help respondent rectify his substance abuse problem.³ Although it was true that the caseworker did not order an updated substance abuse assessment or pursue inpatient treatment for respondent, it was unlikely that respondent would have fared better under either of those options. DHS learned about respondent's positive test results for drug use in May of 2009, which was only five months after respondent completed a previous substance abuse assessment, and the available information indicated respondent would not qualify for inpatient treatment. During the months that ensued, respondent failed to follow-through on the caseworker's suggestions to participate in relapse prevention programs, although DHS continued to provide at-home drug screens and, on October 6, 2009, provided him with a drug screen at its offices. When respondent was asked on October 6, 2009, about other services that could be provided to him by DHS, he rebuffed the offer. Given this evidence, the trial court did not clearly err when it found that DHS made reasonable efforts to help respondent with his substance abuse problem.

² See *In re JK*, 468 Mich at 214 (failure to comply with treatment plan was evidence of a failure to provide proper care and custody for the child).

³ In general, when a child is removed from the custody of the parents, the agency is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan that is updated at 90-day intervals throughout the protective proceeding. MCL 712A.18f(1)-(5); *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). To successfully claim a lack of reasonable efforts, a respondent must establish that he would have fared better if the agency offered other services. *Id.* at 543.

Respondent argues that the trial court also clearly erred in its best interests determination. Respondent complains about petitioner's alleged failure to offer any specific testimony about the children's best interests. MCL 712A.19b(5) and MCR 3.977(F) and (G) merely require a trial court to find that termination of parental rights is in the best interests of a child; it does not require that there be specific best interests evidence. Rather, a child's best interests can be determined from examination and consideration of evidence "within the whole record." *In re Trejo*, 462 Mich at 356.

Respondent next protests the lack of guidance that governs best interests determinations. Respondent is correct in pointing out that the Michigan Legislature has not provided a definition of the "best interests of the child" in the Juvenile Code. However, guidance is provided by caselaw, which has found numerous factors to consider when evaluating a child's best interests, including a parent's past history, unfavorable psychological evaluations, inappropriate parenting techniques during parenting time, continued involvement with domestic violence, and a child's young age. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). Other considerations include the strength of the bond between the parent and the child, visitation history, compliance with treatment plans, a parent engaging in questionable relationships, the child's well being while under the care of guardians, the possibility of adoption, *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001), and a child's need for permanence, *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991). A court can also consider how long a child might have to wait for the parent to rectify the conditions, which requires consideration of a child's age and particular needs. *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991). In this case, the evidence demonstrated that respondent interacted appropriately with the children during visitations. However, other evidence indicated that the children were young and in special need of stability and permanence. The caseworker reported that the oldest child had exhibited confusion and experienced difficulties when he had not been reunified with respondent as expected, which reunification did not come to fruition due to respondent's choice to continue using drugs. Furthermore, the children had been in out-of-home care during the 18-month proceeding, during which time respondent had not progressed in managing his substance abuse and had regressed in terms of his financial situation. We also note that during the trial court's overall ruling, it made reference to the history of physical abuse between respondent and the children's mother. Based on the evidence, the trial court did not clearly err in its best interests determination.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray