

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 26, 2012

In the Matter of POPE, Minors.

No. 306605
Wayne Circuit Court
Family Division
LC No. 10-497431-NA

In the Matter of POPE, Minors.

No. 306610
Wayne Circuit Court
Family Division
LC No. 10-497431-NA

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

In these consolidated appeals, respondents C. Pope and R. Overton each appeal as of right from a circuit court order terminating their parental rights to their minor children. In Docket No. 306605, respondent Pope appeals the trial court’s decision terminating her parental rights to DP and RP pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), and (g). In Docket No. 306610, respondent Overton appeals the trial court’s decision terminating his parental rights to RP pursuant to MCL 712A.19b(3)(b)(i) and (n)(i). We vacate the trial court’s order and remand for further proceedings.

The trial court’s finding that a statutory ground for termination under MCL 712A.19b(3) has been proven by clear and convincing evidence is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K). The trial court’s decision regarding the child’s best interests, MCL 712A.19b(5), is also reviewed for clear error. *In re Trejo*, 462 Mich at 356-357. “A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court is required to “state on the record or in writing its findings of fact and conclusions of law.” MCR 3.977(I)(1). “Brief, definite, and pertinent findings and conclusions on contested matters are sufficient.” *Id.* The purpose of this rule is to facilitate appellate review

by giving this Court a clear understanding of the grounds for the decision so it can properly exercise and not exceed its power of review. Cf. *Commercial Constr Co v Elsmar Enterprises, Inc*, 22 Mich App 238, 240; 177 NW2d 447 (1970); *Nicpon v Nicpon*, 9 Mich App 373, 378; 157 NW2d 464 (1968) (discussing former GCR 1963, 517.1). The trial court's factual findings are sufficient as long as it appears that the court was aware of the issues in the case and correctly applied the law, and appellate review would not be facilitated by requiring further explanation. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

The trial court's factual findings are insufficient to enable this Court to exercise its power of review regarding the statutory grounds for termination with respect to both respondents. Although the trial court stated that there was evidence of sexual abuse and a failure to protect, the court failed to make any factual findings that would support a conclusion that either child was likely to be injured or abused if returned to a parent's home, §§ 19b(3)(b)(i) and (b)(ii), that respondent Pope had an opportunity to prevent injury or abuse to DP, § 19b(3)(b)(ii), that respondent Pope was unlikely to be able to provide proper care and custody within a reasonable time considering the children's ages, § 19b(3)(g), or that continuation of the parent-child relationship between respondent Overton and RP would be harmful to the child such that termination was in the child's best interests, § 19b(3)(n)(i). Therefore, remand for additional factual findings regarding the statutory grounds for termination is necessary.

The trial court also failed to make any factual findings regarding the children's best interests relative to both respondents. In addition, the trial court made an error of law in its statement of the legal standard for evaluating the children's best interests. The court stated that the evidence did not support a finding that termination was clearly not in the children's best interests rather than affirmatively finding that termination was in the children's best interests. See MCL 712A.19b(5), as amended by 2008 PA 199; MCR 3.977(E)(4).¹ Further, although the record indicates that each child was in relative placement at the time of the termination hearing, nothing in the record indicates that the trial court considered that placement when evaluating the children's best interests. See *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010); see also *In re Mays*, 490 Mich 993, 994; 807 NW2d 307 (2012); *In re Mays*, 490 Mich 997; 807 NW2d 304 (2012). Accordingly, remand for further findings of fact and reconsideration of the children's best interests in accordance with current MCL 712A.19b(5) and in light of the children's relative placement is necessary.

¹ The court appeared to apply the standard set forth in MCL 712A.19b(5) before the statute was amended by 2008 PA 199. The prior version of the statute provided that once a statutory ground for termination had been established, "the court shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." The amended statute now requires that the court affirmatively find that termination of parental rights is in the child's best interests before the court may terminate parental rights.

We reject respondent Overton's claim of ineffective assistance of counsel. "[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings." *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled on other grounds *In re Trejo*, 462 Mich at 353 n 10.

Because this issue was not raised below, our review is limited to errors apparent from the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, respondent Overton must "show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted). Counsel is presumed to have provided effective assistance, and respondent Overton must overcome a strong presumption that counsel's assistance was sound trial strategy. *Id.*

Respondent Overton first contends that counsel was ineffective for failing to introduce evidence of his good record as a police officer. Evidence of respondent's job performance would have been admissible only if relevant. MRE 402. Respondent has not explained how his performance as an officer was relevant to any fact in issue. It was not admissible character evidence because it did not relate to respondent's character for truthfulness, MRE 608(a), and respondent's veracity was not at issue because he did not testify. Therefore, respondent has not shown that counsel's failure to offer such evidence was objectively unreasonable or affected the outcome of the proceedings.

Respondent Overton next contends that counsel was ineffective for failing to object to the portions of his presentence report which contained DP's hearsay statements regarding the alleged abuse. Assuming that the information was inadmissible, respondent has not shown that counsel's failure to object affected the outcome of the proceedings. The substance of DP's allegations was introduced by admissible evidence in the form of respondent's admissions to the Children's Protective Services worker, which were not hearsay. MRE 801(d)(2)(A). The failure to object to the admission of evidence that was cumulative to other properly admitted evidence does not constitute ineffective assistance of counsel. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

Finally, respondent Overton contends that counsel should have called several witnesses to testify about his parenting ability, his bond with RP, and his criminal conviction and appeal. However, the record is silent regarding the identity of these witnesses and what testimony they could have provided. Respondent's representations concerning the testimony the witnesses would have offered is not sufficient to show that the witnesses exist, or that their testimony would have benefited respondent had they been called. There are no errors apparent on the record. Therefore, respondent has not established that he was denied the effective assistance of counsel. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Although respondent Overton submitted several affidavits from the proposed witnesses with his motion to

remand,² they cannot be considered here because review is limited to the existing record, the affidavits are not part of that record, and respondent Overton cannot expand the record on appeal. *People v Seals*, 285 Mich App 1, 20-21; 776 NW2d 314 (2009); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

In sum, we vacate the trial court's order terminating respondents' parental rights and remand the case to the trial court for further findings of fact and reconsideration of the children's best interests in accordance with this opinion.³

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause

² This Court denied that motion. *In re Pope*, unpublished order of the Court of Appeals, entered April 4, 2012 (Docket No. 306610).

³ Respondent Pope also asserts that she should have been provided with rehabilitative services. However, she did not preserve this issue by raising it below. Therefore, she has the burden of demonstrating a plain error affecting her substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008); *In re Egbert R Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008). Apart from asserting her entitlement to services, respondent Pope provides no analysis of this issue and does not cite authority in support of her position. Accordingly, she has not satisfied her burden of demonstrating a plain error affecting her substantial rights with respect to this matter.