

STATE OF MICHIGAN
COURT OF APPEALS

In re K. L. A. MAES, Minor.

UNPUBLISHED
December 10, 2015

No. 325919
Ingham Circuit Court
Family Division
LC No. 14-000065-NA

Before: SAAD, P.J., and STEPHENS and O'BRIEN, JJ.

PER CURIAM.

Respondent-father appeals from the trial court's order that terminated his parental rights to the child at issue, KM, under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and MCL 712A.19b(3)(j) (reasonable likelihood of harm). For the reasons provided below, we affirm.

This case represents the end of a series of proceedings involving KM. In 2007, KM was removed from his mother and respondent after testing positive for marijuana, opiates, and benzodiazepines when he was born. Respondent participated in and appeared to benefit from services, and KM was returned to him. In 2008, domestic issues between respondent and KM's mother led to another removal. The case was eventually dismissed, and KM was returned to respondent.

The present case was initiated in January 2014, after MM, son of respondent and his girlfriend, tested positive for amphetamines when he was born. The girlfriend admitted that she had used methamphetamine during the pregnancy. Respondent claimed that he had been unaware of his girlfriend's drug use. KM was removed from the home, and defendant was offered various services. He generally participated in and appeared to benefit from these services. However, a psychologist who performed an evaluation of respondent in March 2014 recommended against returning KM to him. The psychologist concluded that respondent had a "personality disorder NOS [not otherwise specified] with antisocial and narcissistic features." She explained that "[a]ntisocial means he really won't take other people's feelings into regard. He doesn't have a lot of empathy. He doesn't think twice about breaking the law." Nonetheless, given respondent's apparent improvement, KM was returned to respondent in June 2014.

But the return was short lived. On July 7, respondent committed domestic violence against his girlfriend; there was testimony that he had brandished a knife. He later admitted that he had been drinking. KM was again removed from the home, and a petition to terminate respondent's parental rights was filed. Respondent sought out services and again showed

apparent improvement. He admitted for the first time that he abused alcohol and he had begun treatment to address it. But at the conclusion of the termination hearing, the court found that statutory grounds for termination had been established and that termination was in KM's best interests. The court cited the cycle of removal-return-removal that respondent had caused in KM's life. The court concluded that respondent was wholly lacking in credibility and that any assertions that he was prepared to be a better parent were consequently suspect.

I. REASONABLE EFFORTS

Respondent contends that petitioner did not make reasonable efforts to reunify KM with him. Respondent says that he preserved this issue at the termination hearing, citing his trial counsel's closing argument. But "[t]he time for asserting the need for accommodation in services is when the court adopts a service plan, not at the time of a dispositional hearing to terminate parental rights." *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). Therefore, this issue is unpreserved. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). We review unpreserved issues for plain error affecting substantial rights. *In re HRC*, 286 Mich App 444, 450; 781 NW2d 105 (2009).

"In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005), citing MCL 712A.18f(1), (2), and (4). But "there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App at 248.

As previously noted, respondent generally participated in services after KM was first removed and appeared to have benefited from them, as evidenced by the fact that KM was eventually returned to him briefly. Respondent argues that petitioner was aware of his psychological diagnosis and failed to offer any services to address it. Arguably, reasonable efforts by petitioner should have included services to address his personality disorder. But even assuming that petitioner should have provided such services, respondent has not shown that the court erred in ruling that reasonable efforts had been made to rectify the conditions that lead to the court's assumption of jurisdiction. The psychologist that performed the psychological evaluation of respondent explained that respondent's "narcissistic features" are expressed in his belief that "he's special and unique and sort of above other people, that rules don't always apply to him." The psychologist further testified that after the first removal, respondent's inability to self-assess meant that he felt that he did not have any functioning problems and that "he strongly believes that he doesn't need to have to change the way he raises his children or interacts with people." The psychologist also testified that when asked on one projective test whether respondent thought he needed "to be in counseling or therapy," respondent answered "no." In light of respondent's rejection of the need for treatment, there is no reason to conclude that treatment for the diagnosed personality disorder would have been successful, particularly in light of respondent's grandiose sense of self, lack of empathy, and inability to put KM's needs above his own.

And in any event, assuming that respondent finally reached a point where he fully acknowledged and accepted the need for treatment, the psychologist indicated it would take "12 to 18 months of intensive psychotherapy to address those issues." Given the length of

respondent's involvement with petitioner, and under these circumstances, petitioner's efforts toward reunification were not unreasonable.

Additionally, respondent's suggestion that petitioner should have offered services to address his substance abuse issues is without merit. Respondent admitted that he was not honest about his alcohol abuse until after KM was removed in July.

Respondent also argues that after KM was removed in July 2014, petitioner recommended services for him but failed to facilitate respondent's involvement in them. Even taking these assertions as true, petitioner "is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App at 463. Therefore, respondent was not entitled to be offered services by petitioner after the second removal.

II. JUDICIAL NOTICE

At the termination hearing, the trial court, at petitioner's request, took "judicial notice of the prior filings in this matter as well as all reports that are contained therein regarding the prior filings." Respondent specifically challenges the court's reference to a psychological evaluation occurring before March 2014. Because respondent failed to object at the termination hearing to the court's action, our review of this unpreserved issue is for plain error affecting substantial rights. *Id.* at 450.

MRE 201(b) states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." It is well settled that "a circuit court may take judicial notice of the files and records of the court in which it sits." *Snider v Dunn*, 33 Mich App 619, 625; 190 NW2d 299 (1971), citing *Knowlton v City of Port Huron*, 355 Mich 448; 94 NW2d 824 (1959).

Respondent contends that it was unclear what cases the court took judicial notice of and what psychological evaluation the court referred to. Both contentions are without merit. First, it is clear from the proceedings that respondent had been involved in two prior child protective cases involving KM: first, from 2007 until 2008, and second, from 2008 until 2011. Respondent notes that the trial court stated it took judicial notice of respondent's prior court cases, but argued he was prejudiced because the court never specified *which* case. Clearly, the court did not specify a singular case because it took judicial notice of *both* when it used the plural term "filings." Second, the trial court specifically identified the psychological report and said that it was "a prior psychological evaluation of [respondent] and that was back on March 13 of 2007 and that was by Mr. Van Goethem." Under these circumstances, we find it completely unreasonable that respondent was unaware of what cases and report the court referenced.

Respondent also argues that the court's "extensive comparing and contrasting of information" on the record with information *outside* the record in making its findings was inappropriate. The record is clear that the court relied on the pattern of removal and return that KM had been subjected to in order to find that respondent's purported improvement following the July 2014 removal was illusory. To buttress the conclusion that respondent lacked

credibility, the court compared respondent's self-reported personal history with respect to the 2014 psychological evaluation to the personal history that respondent had given Van Goethem in 2007, finding that the similarities and differences in that history coupled with Van Goethem's similar diagnosis further supported its determination.

Respondent reasons that he had no opportunity to challenge Van Goethem's report. But he certainly would have had an opportunity to do so in the 2007 case. Moreover, he does not indicate what would have been gained by challenging the Van Goethem report. With respect to how the court here used it, respondent does not even argue that his reported history in the Van Goethem report was not in accord with what he had told Van Goethem. Accordingly, respondent has not established any plain error.

III. STATUTORY GROUNDS

Respondent contends that the court erred in finding that statutory grounds for termination were established. A trial court's determination that the statutory grounds for termination have been established by clear and convincing evidence is reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "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).

A trial court must terminate a respondent's parental rights if it finds that a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and that termination is in the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014); see also MCL 712A.19b(5). Here, the trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(j) and (g).

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

MCL 712A.19b(3)(j) provides that a respondent's parental rights may be terminated if "[t]here 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." Respondent argues that the trial court relied on respondent's credibility (or lack thereof) to terminate his parental rights, and that a lack of credibility, standing alone, did not show that KM would be harmed if he was returned to respondent's home. The premise of respondent's argument—that the trial court terminated respondent's parental rights under MCL 712A.19b(3)(j) because he was not credible—is erroneous. The court found that, given the cycle of removal-return-removal for which respondent was responsible, respondent's purported "improvement" following this latest removal was illusory because he lacked credibility. Respondent's lack of credibility is simply part of the context through which respondent's actions were evaluated.

Respondent also maintains that the court overlooked the fact that KM was removed in the previous cases because of the actions of KM's mother and MM's mother. In particular, respondent argues that it was their drug problems that led to the previous removals. But this argument ignores the trial court's finding that respondent, contrary to his assertions, must have known about their drug use. This Court must "give deference to the trial court's special

opportunity to judge the credibility of the witnesses.” *In re HRC*, 286 Mich App at 459. The trial court was rightfully incredulous of respondent’s assertion that he was unaware that KM’s mother and MM’s mother were drug users.

Respondent further asserts that the 2014 diagnosis—that respondent had a personality disorder with antisocial and narcissistic features—did not necessitate the conclusion that respondent would harm KM if he returned home. Again, respondent is cherry picking from the court’s reasoning and mischaracterizing the basis of the court’s ruling. The court did not rely on the diagnosis in itself to find that respondent would harm KM. Rather, it noted that the features of respondent’s personality disorder were evidenced in his behavior, which left the court skeptical of respondent’s purported improvement following the July 2014 removal. And in light of the characteristics of the disorder, as evidenced in respondent’s behaviors, the conclusion that there is a reasonable likelihood of harm if KM were return to respondent is not clearly erroneous.

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

MCL 712A.19b(3)(g) provides that a respondent’s parental rights may be terminated if “[t]he 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.” This subsection contains a retrospective and a prospective element. First, the trial court must find that the parent failed to provide proper care or custody for the child in the past. Second, the trial court must determine if there is a reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age. See *In re Rood*, 483 Mich at 114.

The court’s findings on MCL 712A.19b(3)(g) were not as expansive as its findings on MCL 712A.19b(3)(j), but they were nonetheless sufficient. The court concluded that respondent had “failed to provide proper care and custody for KM on numerous occasions.” “Numerous occasions” may have included the incidents documented in the 2007 and 2008 cases, but it undoubtedly also encompassed the circumstances of the present case. Indeed, the trial court specifically referred to the facts that led to this case—that MM’s mother was using drugs in the home. The court found that respondent must have known about the mother’s drug use, yet did nothing about it. The court did not clearly err in finding that respondent had failed to provide proper care or custody for KM in this case.

Respondent avers that the court relied on his credibility to determine that there was not a reasonable expectation that he would be able to provide proper care and custody for KM within a reasonable time. He also argues that the court improperly focused on his alcohol use because he was addressing it. He further contends that the trial court found that KM had been under the jurisdiction of the court for more than half his life, although this case had lasted only one year and the previous cases were caused by the mothers of KM and MM. In the same vein, he argues that taking jurisdiction over a child is not the same as a ground for termination.

Respondent’s arguments are without merit. The court was not required to ignore KM’s history in child protective proceedings, and the court found that respondent was aware of the drug use by the mothers of KM and MM, which had given rise to the prior proceedings. Moreover, even in the abstract, the court was justified in noting the length of time the State had

been involved with KM given the court's mandated focus on what was in KM's best interests. And as already discussed, the court did not base the decision to terminate on respondent's lack of credibility. And the issue of credibility was properly considered when evaluating respondent's abuse of alcohol and his purported attempt to deal with the problem, particularly in light of his diagnosed personality disorder. Given these considerations, the court did not clearly err in determining that there was no reasonable expectation that respondent would be able to provide proper care or custody for KM in a reasonable time.

IV. BEST INTERESTS

Respondent maintains that the trial court erred in finding that termination was in KM's best interest. We review a trial court's best interests decision for clear error. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). "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). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).¹

"In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144, lv 492 Mich 859 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. Additionally, the trial court may also consider a respondent's unfavorable psychological evaluation and the children's ages. See *In re Jones*, 286 Mich App at 131.

Respondent contends that the trial court's conclusion that his parenting ability was "incredibly suspect" was not supported by the evidence. He argues that the trial court relied on his credibility, which is not indicative of parenting ability. He adds that the court ignored his positive parenting-time evaluations. He also argues that the court's finding that respondent may not have appropriately dealt with the possibility that a family friend was sexually abusing KM was not proper given that the allegation had not been substantiated.

The trial court's conclusions regarding respondent's parenting ability are not clearly erroneous. Although the court referred to the unsubstantiated allegations that KM had been

¹ Respondent also invites us to reject this Court's holding in *In re Moss* that the preponderance-of-the-evidence standard applies to the best-interest determination under MCL 712A.16b(5). *In re Moss*, 301 Mich App at 90. We decline the invitation.

sexually abused, respondent misses the court's point. The court relied on how respondent acted once he suspected that KM was being abused, not on whether any abuse actually took place. The court deemed that respondent's failure to "appropriately" address his own concerns was problematic. In any event, the court's scrutiny of respondent's parenting ability focused on other matters. For example, although respondent received positive parenting-time evaluations, the trial court aptly noted that respondent lacked insight on how his behavior affected KM and how respondent lacked empathy in saying that the kids were resilient and would be fine going to foster care. Further, the court found that respondent must have been aware that MM's mother was using drugs while KM was in the home. Given these considerations, the trial court did not clearly err when it concluded that respondent's parenting ability was suspect.

Respondent also argues that the court's conclusion that respondent could not provide KM with permanency and stability was not supported by the evidence. He argues that the court relied on the previous proceedings involving KM although he had not been the cause of those proceedings. The trial court's conclusion regarding respondent's inability to provide permanency and stability is not erroneous. Although drug use by KM's and MM's mothers was the root cause of much of the proceedings involving KM, the trial court concluded that respondent was aware of their drug use. Indeed, both KM and MM tested positive for drugs at birth. And, in testifying at the adjudication that he had cleaned out the garage items used to make methamphetamine, respondent admitted that such materials (and the danger they posed) had been present in the vicinity of KM.

Further, despite the reasons underlying the cycle of removal-return-removal that characterized KM's life with respondent, this history speaks both to KM's need for permanency, stability, and finality, and respondent's inability to provide it. Again, it is the best interests of KM that guide this action, and where respondent is unable to put the child's needs above his own, it was proper for the court to do so.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Colleen A. O'Brien