

STATE OF MICHIGAN
COURT OF APPEALS

In re BUCHOLTZ, Minors.

UNPUBLISHED
July 30, 2019

No. 347250
Huron Circuit Court
Family Division
LC No. 17-004550-NA

Before: GADOLA, P.J., and SERVITTO and REDFORD, JJ.

PER CURIAM.

Respondent appeals as of right the order of the trial court terminating her parental rights to her two minor children under MCL 712A.19b(3)(c)(i) (conditions leading to adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent). We affirm.

I. FACTS

On December 28, 2016, respondent and the father of the children drove to Detroit with the children, then ages five and two, where they obtained heroin. While traveling back from Detroit, they stopped at a fast-food restaurant where respondent injected heroin. Respondent and the children’s father were arrested upon returning to a friend’s apartment, and respondent was charged with possession of heroin. Petitioner, the Department of Health and Human Services (DHHS), thereafter filed a petition seeking jurisdiction over the children and removal of the children from the parents’ care.¹ The petition alleged that respondent was under the influence of heroin in the presence of the children, that she had been injecting heroin twice daily for the previous six months, and that she was incarcerated as a result of her December 2016 arrest. Respondent admitted the allegations of the petition, and the trial court assumed jurisdiction of the children.

¹ The children’s father testified that prior to their arrests, he and respondent did not live together; he and the children lived with his mother, and he took the children to visit respondent.

Respondent was permitted to serve her incarceration in an in-patient drug rehabilitation facility. While at the facility, respondent sought visitation with the children. Before the trial court, the foster care worker testified that DHHS does not recommend that children visit at a rehabilitation center so that the parent can focus on recovery. Respondent's in-patient counselor at the rehabilitation facility, however, testified that visits with the children would serve to motivate respondent. Counsel for DHHS and the children's guardian ad litem (GAL) maintained that it was in the best interests of the children for respondent to focus on her treatment before visitation commenced. After respondent was taken to a crisis center three times because she reported being suicidal, the foster care worker opined that she did not believe that respondent was stable enough for visitation. She also testified that the oldest child's therapist reported that the child was exhibiting symptoms of extreme trauma.

The trial court initially determined that visitation was contingent upon an assessment by an independent children's therapist, but when the assessment was not performed, the trial court ordered that respondent could begin supervised visitation with the children after complying with the treatment plan for 30 days. Respondent began supervised visitation with the children on July 31, 2017. Thereafter, the GAL moved to suspend visitation because of increased negative behaviors displayed by the children, and based upon the recommendation of the oldest child's therapist. The trial court denied the motion to suspend visitation, ordered a trauma assessment for the children, and gave DHHS discretion to move to increase supervised or unsupervised parenting time.

Both parents substantially complied with the terms of their parent-agency treatment plans, and established housing together. The children were reunified with both parents on February 14, 2018, at which time they all began to reside together. DHHS continued to monitor the home, and Family Reunification Program services were provided in the home.

On March 12, 2018, respondent reportedly had a mental breakdown; she moved out of the family home, leaving the children in the care of their father. The next day, she was taken by ambulance to the hospital after she threatened suicide; at the hospital, she tested positive for opioids. Over the course of the next eight months, respondent failed to comply with court-ordered mental health counseling and drug testing, precluding her from visiting with the children. In May 2018, she was taken to a crisis center three times due to suicidal ideations, and she attempted suicide on September 19, 2018, by taking Vicodin and Morphine. She again tested positive for opioids when she reported to jail after violating her probation. In October 2018, she was admitted to a psychiatric facility because of suicidal ideation.

At the time of the termination hearing, respondent had not visited with the children for eight months, was unemployed, and did not have independent housing. She was living with the mother of her boyfriend; the boyfriend was a known substance abuser with whom the trial court had ordered respondent to have no contact. After leaving the home in March 2018, respondent was offered 61 drug screens, 19 of which were negative, three of which were positive, and 39 of which she failed to attend. The trial court found that the statutory grounds for termination had been established, and also found that it was in the best interests of the children to terminate respondent's parental rights because she had demonstrated that she was not able to meet the children's needs. Respondent now appeals from the trial court's order.

II. DISCUSSION

A. MCL 712A.18(1)(n)

Respondent argues for the first time on appeal that the trial court created a barrier to her regaining custody of her children and violated MCL 712A.18(1)(n) when it precluded her from visiting with the children from February 24, 2017 to July 31, 2017, while she was an in-patient at a drug rehabilitation facility. Respondent argues that under MCL 712A.18(1)(n), the trial court was required to permit weekly visits with the children unless the trial court found that parenting time would be harmful to the children. We review this unpreserved issue for plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). An error affects substantial rights if it causes prejudice, meaning that the error affected the outcome of the proceedings. *Id.* at 9.

MCL 712A.18(1)(n) provides:

In a proceeding under section 2(b) or (c) of this chapter, if a juvenile is removed from the parent's custody at any time, the court shall permit the juvenile's parent to have regular and frequent parenting time with the juvenile. Parenting time between the juvenile and his or her parent shall not be less than 1 time every 7 days unless the court determines either that exigent circumstances require less frequent parenting time or that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being. If the court determines that the parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being, the court may suspend parenting time until the risk of harm no longer exists. The court may order the juvenile to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of the parenting time.

In this case, the children were removed from the care of respondent and the father in December 2016. In lieu of incarceration, respondent was serving her sentence for heroin possession in a drug rehabilitation facility. The trial court initially expressed reluctance to order parenting time at the rehabilitation facility until an independent counselor could evaluate the children. Although the record indicates that the trial court was concerned that visitation might be harmful to the children, the trial court does not appear to have made that specific finding. After respondent demonstrated sobriety and compliance with the treatment plan, the trial court ordered supervised visitation with the children beginning July 31, 2017. Seven months later, on February 14, 2018, respondent was reunited with the children and they were returned to her home. Contrary to respondent's argument that the delay in visitation created a barrier to reunification, the children were, in fact, returned to her care following the period in which parenting time was suspended. The gap in parenting time therefore did not create a barrier to reunification, and respondent has failed to demonstrate that the argued error affected the outcome of the proceedings.

B. COURT-ORDERED DRUG TESTING

Respondent also contends for the first time on appeal that after she left the children in the care of their father in March 2018, the trial court created a barrier to a second reunification by suspending parenting time with the children until respondent complied with court-ordered drug testing and produced negative drug screens. Again, we review this unpreserved issue for plain error affecting respondent's substantial rights, meaning that the error affected the outcome of the proceedings. *Id.*

MCL 712A.18(1)(n) provides that the court may suspend parenting time if it determines that parenting time, even if supervised, "may be harmful to the juvenile's life, physical health, or mental well-being." Here, after respondent threatened suicide on March 13, 2018, she was taken to the hospital, where she tested positive for opioids. The trial court heard evidence of respondent's positive drug test for opioids, her continued association with individuals who were known to abuse substances, her threats of suicide, and her missed mental health counseling sessions after the children were returned to the home. The trial court also heard evidence that a trauma assessment of the oldest child indicated that observing her parents abuse substances caused her mental harm. The trial court thereafter conditioned respondent's visitation upon twice-weekly drug tests and gave DHHS discretion to allow supervised or unsupervised visitation as long as the drug screens were negative. Respondent failed to comply with the drug testing in March, April, and May of 2018. On May 21, the trial court suspended respondent's visitation until respondent could demonstrate a 21-day consistent pattern of drug testing with negative results. Respondent failed to do so. The evidence thus supports a finding of potential harm if visitation had been permitted. Respondent has failed to show that the trial court plainly erred by suspending visitation until respondent complied with court-ordered drug testing with negative results.

C. DUE PROCESS

Respondent next contends for the first time on appeal that she was denied due process because petitioner did not file a new petition in March 2018 seeking to remove the children from her custody. She argues that the children's father was never specifically found to be the father of the children and that she was therefore the only person to whom the children were validly returned in February 2018. She reasons that when she left the family home in March 2018, leaving the children in the custody of the father, and the children were then placed in the father's care, petitioner essentially removed the children from her care without filing a new petition. Respondent argues that she was therefore blindsided by this "removal" of the children without proper notice.

We disagree with this characterization of the record. Before the trial court, both respondent and the father testified that he was, in fact, the biological and legal father of the children. A party may not take a position in the trial court, then seek redress in this Court based upon a contrary position. See *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 737; 832 NW2d 401 (2013). Further, petitioner did not "blindsided" respondent by seeking to remove the children from her care in March 2018; she left them. In February 2018, the children were placed in the custody of respondent and their father, who were residing together. In March 2018, respondent left that home, leaving the children with their father. She

thereafter used opioids, had episodes requiring psychiatric care, and was incarcerated for violating her probation. Petitioner encouraged her to re-engage in services. After respondent failed to re-engage in services, petitioner filed a supplemental petition with the trial court, seeking termination of respondent's parental rights. Respondent's departure from the family home in March 2018 and her failure to make any efforts to maintain custody of her children thereafter cannot now be recharacterized as a wrongful removal without adequate notice. Moreover, respondent has again failed to demonstrate plain error affecting respondent's substantial rights. The outcome of the proceedings instead was dictated by respondent's failure to comply with the case service plan and to make any effort to make herself able and available to parent her children.

D. STATUTORY GROUNDS

Respondent next contends that the trial court erred by finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree. To terminate parental rights, the trial court must find that at least one statutory ground for termination under MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). We review for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. MCR 3.977(K); *In re LaFrance Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014). A trial court's findings of fact are clearly erroneous if this Court is definitely and firmly convinced that the trial court has made a mistake, *id.*, deferring to the special ability of the trial court to determine the credibility of witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

In this case, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). The relevant portions of that statute provide:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g)² The parent, although, in the court's discretion, financially able to do so, 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.

² MCL 712A.19b(3)(g) was amended effective June 12, 2018, before the termination of respondent's parental rights. See 2018 PA 58.

* * *

(j) There 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. [MCL 712A.19b(3)(c)(i), (g), (j).]

It is sufficient for termination that one statutory ground is established by clear and convincing evidence. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). In this case, the trial court found that clear and convincing evidence had been presented that more than 182 days had elapsed since the trial court's initial dispositional order, and that the conditions that led to the adjudication continued to exist and would likely continue to exist. The record supports this finding. More than a year and a half elapsed after the initial dispositional order before respondent's parental rights were terminated. The trial court assumed jurisdiction over the children because of respondent's substance abuse and the consequent criminality. At the time of the termination hearing, respondent continued to use opioids and to violate probation. Although respondent regained custody of the children temporarily by complying with her service plan for 13 months, shortly after the children were returned to her care, respondent threatened suicide and, upon admission to a psychiatric hospital, tested positive for opioids. Several months later, she again tested positive for opioids at a hospital following an alleged suicide attempt, and again when she reported for incarceration related to a probation violation.

Respondent's failure to resolve her drug use, mental health issues, and criminal behavior leading to incarceration in the lengthy period of time the children were in care support the trial court's conclusion that she would not be able to parent the children in a reasonable time. Accordingly, the trial court did not clearly err in finding that termination was warranted under subsection (3)(c)(i). Because establishing one statutory ground by clear and convincing evidence is sufficient to terminate a parent's parental rights, we decline to address the additional grounds for termination.

III. BEST INTERESTS

Respondent also contends that the trial court clearly erred in finding that it was in the best interests of the children to terminate respondent's parental rights. Again, we disagree.

Once a statutory ground for termination has been demonstrated, the trial court must find that termination is in the best interests of the child before it may terminate parental rights. See *In re Moss*, 301 Mich App at 88. If the trial court finds that a preponderance of the evidence establishes that termination is in the best interests of the child, the trial court is required to terminate the parent's parental rights. MCL 712A.19b(5); *In re Moss*, 301 Mich App at 90. This Court reviews a trial court's decision regarding a child's best interests for clear error. *In re Medina*, 317 Mich App 219, 226; 894 NW2d 653 (2016).

To determine whether the termination of a parent's rights is in the child's best interests, the trial court should weigh all of the available evidence. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The trial court may consider a variety of factors including the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, the advantages of a foster home over the parent's home, the parent's compliance with

the service plan, the parent's visitation history with the child, the child's well-being in the foster home, and the possibility of adoption. *Id.* At this stage, the interest of the child in a stable home is superior to any interest of the parent. *Medina*, 317 Mich App at 237.

In this case, the trial court did not clearly err when it found that termination of respondent's parental rights was in the children's best interests. The children had been in care for over one year before they were returned to respondent. One month later, respondent left the children and the home, resumed using opioids, and refused to participate in drug testing and other services aimed at reunification. Respondent failed to establish housing suitable for the children, and shortly before the termination hearing was still associating with an individual whom the court had ordered her to avoid. Respondent had not seen the children in eight months at the time of the termination hearing. The foster care worker testified that the children needed stability in their lives and that they would not have that stability if respondent was in and out of their lives because of substance abuse, threats and attempts of suicide, and hospital admissions. The children had stability in the home of their father and were doing well. Under these circumstances, the trial court did not clearly err in finding that it was in the best interests of the children to terminate respondent's parental rights.

Affirmed.

/s/ Michael F. Gadola
/s/ Deborah A. Servitto
/s/ James Robert Redford