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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

In the Matter of Chaselyn Marie PRESTON and Gavin Ray Preston, Minors.
Department of Human Services, Petitioner–Appellee,
v.
Sonja Marie Preston, Respondent–Appellant,
and
Christopher Paul Preston, Respondent.
In the Matter of Chaselyn Marie Preston and Gavin Ray Preston, Minors.
Department of Human Services, Petitioner–Appellee,
v.
Christopher Paul Preston, Respondent–Appellant,
and
Sonja Marie Preston, Respondent.

Docket Nos. 288390, 288474. | May 19, 2009.

Branch Circuit Court, Family Division; LC No. 07–003804–NA.

Before: K.F. KELLY, P.J., and CAVANAGH and BECKERING, JJ.

Opinion

PER CURIAM.

***1** In these consolidated appeals, respondents appeal as of right the trial court order terminating their parental rights to the minor children. We affirm.

I

Respondent father argues that there was insufficient evidence to establish a statutory ground for termination. To terminate parental rights, the trial court must find that the petitioner has proven at least one of the statutory grounds for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich. 341, 355, 612 N.W.2d 407 (2000). We review a trial court's decision terminating parental rights for clear error. MCR 3.977(J); *In re Trejo, supra* at 356–357, 612 N.W.2d 407. A finding is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been made, giving due regard to the trial court's special opportunity to observe and judge the credibility of the witnesses. MCR 2.613(C); *In re Miller*, 433 Mich. 331, 337, 445 N.W.2d 161 (1989).

Respondents' parental rights were terminated pursuant to MCL 712A. 1 *9b(3)(c)(i), (c)(ii),* and (j), which 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.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
>
> (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.

The conditions that led to the initial adjudication primarily related to respondents' substance abuse. Other conditions were emotional harm to the children and poor school attendance by respondents' daughter. Following disposition on November 27, 2007, respondents were ordered to comply with a case service plan (CSP) requiring individual therapy, random drug screens, substance abuse treatment, and visitations. Respondents were in the process of divorce, and each was required to obtain and maintain a stable home. Over the next nine months, compliance with the CSP

was sporadic at best. Respondents both continued to use drugs and either refused or "no-showed" for drug screens. Respondent mother tested positive for cocaine in October and December 2007 and March, April, and May 2008, and admitted using. At the termination hearing on September 8, 2008, she testified that she had last used cocaine on May 28. But, immediately following her testimony on September 8, she tested positive for cocaine. Additionally, at the time of the hearing, respondent mother's nursing license was suspended and she was unemployed because of substance abuse, she had no transportation, and her home was in foreclosure. Respondent father tested positive for alcohol and opiates or benzodiazepines in February 2008. He tested positive for cocaine in March, April, and May 2008. In July he was positive for opiates. After the September 8 hearing, he again tested positive for cocaine. Respondent father also missed numerous therapy sessions and visitations, and harassed respondent mother. In July, he was arrested for breaking into respondent mother's home, assaulting her, and violating a personal protection order. Accordingly, the trial court did not err in concluding that subsection 19b(3)(c)(*i*) was established by clear and convincing evidence.

***2** With regard to subsection 19b(3)(c)(*ii*), the trial court found that respondents repeatedly tampered with their drug patches, demonstrating a complete disregard for the court's orders. The court explained,

> I've got two people here over a period of almost a year now have shown me the only thing that they are concerned about is their own selfish interest....
>
> * * *
>
> To put it more simply, over the course of time there's been a lack of trust develop, because these two parents have been more inclined to mess with the patch or do this or do that or whatever, which is another condition that's been established. Parents have been told repeatedly by me to not do that.

Although respondents' substance abuse was the primary condition leading to the initial adjudication, the court did not order that respondents be fitted with drug patches until April 2008. As the court indicated, both respondents either tampered with or completely removed their patches more than once, even after being warned not to do so. Respondents repeatedly violated the trial court's orders in this regard. Violating court orders was not one of the original grounds for adjudication. Thus, the court did not clearly err in finding that "other conditions" existed under subsection 19b(3)(c)(*ii*).

The trial court additionally found, under subsection 19b(3)(j), that there was a reasonable likelihood that the children would be emotionally harmed if returned to respondents' care. We agree. There was clear and convincing evidence that the children were negatively affected by respondents' substance abuse, the discord in their relationship, and respondent father's violent behavior. The children's counselor, Michelle Croce, LLP, testified that respondents' daughter was upset about the conflict between her parents, and break-ins and yelling at the family home. She feared anger or disapproval from respondents if she showed her own anger, made limited progress in therapy, and took on the role of "protector" in the family. Respondents' son reported their drinking, drug use, and fighting. He feared respondent father breaking into the house and yelling. Croce was concerned that the children were hearing inappropriate information, that they were preoccupied about it, and that it was disruptive and harmful. As indicated, respondent father was arrested in July 2008 for breaking into respondent mother's home, assaulting her, and violating a personal protection order. There was also evidence, although the trial court did not consider it, that respondent father was charged in September 2008 with open murder. On September 30, 2008, the second day of the termination hearing, the trial court stated:

> So, that the record is clear, following the termination hearing [the September 8 hearing] ... an incident occurred which resulted in the father of these children being incarcerated on an open charge of murder. He allegedly beat ... a friend of the mother's.... Mr. McConnell. And Mr. McConnell died after some days of lingering.... That is not part of this hearing, and I have intentionally not mentioned it. I think it's important that it be present for the record. I have no idea of what's going to happen in that criminal case.... This case is about the continued drug use of parents.

***3** Respondent father asserts that the trial court's comments regarding the open murder charge were improper. But, the court clearly stated that it would not consider the evidence and there is no indication that the evidence affected the court's decision. Further, even if the court had considered it, the rules of evidence generally do not apply during termination proceedings, as long as the evidence is relevant and material.

MCR 3.977(G)(2). Regardless, there was more than enough evidence, apart from the open murder charge, to find a reasonable probability that the children would be harmed if returned to respondents' care.

The trial court did not clearly err in finding that a statutory ground for termination was established by clear and convincing evidence.

II

Respondent mother argues that the trial court clearly erred in failing to explicitly state its findings of fact and conclusions of law with regard to the children's best interests. MCL 712A. 19b(5) was recently amended such that a trial court must find that termination of parental rights is in the child's best interests. 2008 PA 199. The court is required to "state on the record or in writing its findings of fact and conclusions of law." MCR 3.977(H)(1); see also MCL 712A. 19(b)(1). "Brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(H)(1). The sufficiency of a trial court's findings must be reviewed in the context of the specific legal and factual issues raised by the parties and the evidence. *People v. Rushlow*, 179 Mich.App. 172, 177, 445 N.W.2d 222 (1989), aff'd 437 Mich. 149, 468 N.W.2d 487 (1991). Findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v. Armstrong*, 175 Mich.App. 181, 184–185, 437 N.W.2d 343 (1989); *DeVoe v. C.A. Hull, Inc.*, 169 Mich.App. 569, 576, 426 N.W.2d 709 (1988).

At the conclusion of the hearing on September 8, the trial court stated that it was aware of the recent amendment to MCL 712A. 19b(5). The court then indicated that under the facts of this case, it was difficult to make a best interests determination. It noted that the children were "well cared for" and "doing well" under their grandparents' care, but that they could be exposed to more fighting, violence, and substance abuse if respondents remained active in their lives and continued to use drugs. Ultimately, the court found that there was insufficient evidence to find that termination was in the children's best interests. The court further stated, however:

> But don't misunderstand. Hearings in this sort of case are continuing in nature. I've just made the finding that the statutory criteria has been met. If there's one more positive drug screen or one more drug patch messed with or one more drug drop that's supposed to be made that's not there, I'll find it's not in the best interest of these kids.
>
> ... [C]hildren need permanence in their lives. They need to know where they're going to fit Right now they're in limbo and that's unfair to them. And I won't leave them there long.
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> * * *
>
> ***4** I'll set the matter for review hearing in 60 days. We'll find out where mother is. We'll find out where father is. I want them both to basically stay drug free.... If you mess with your patch, you're lying to me, you're telling me, please, terminate my parental rights because I don't love my kids enough. That's what I'm telling you.
>
> At the hearing on September 30, after respondents had tested positive for cocaine on additional drug tests and respondent father removed his drug patch, the court reiterated that it had "found the statutory criteria to be established beyond any reasonable doubt, let alone clear and convincing evidence." The court explained that it had only hesitated in making a best interests determination and believed that in general, "children ought to be raised by parents." The trial court judge then concluded the hearing, stating, "I am disheartened.... I see no end to this continued drug use. I see no expectation that mother will be able to complete, or father for that matter, their fight against substance abuse within a reasonable time."

The trial court's comments at the two September hearings, taken together, demonstrate a clear understanding of the law and constitute a finding that termination of parental rights was in the children's best interests. Furthermore, we find that the court's best interests determination was supported by clear and convincing evidence, particularly the evidence of respondents' continued drug use, even after repeated warnings that it would result in termination of their parental rights, and respondent father's violent behavior.

III

Respondent mother further argues that she was deprived of the effective assistance of counsel. In child protective proceedings, a respondent has a right to the effective assistance of counsel. *In re CR*, 250 Mich.App. 185, 197–198, 646 N.W.2d 506 (2002). Whether a respondent is denied that right is a question of constitutional law subject to de novo review. *Id.* at 197, 646 N.W.2d 506. Applying by analogy the standards from criminal cases, the respondent must show that counsel's performance fell below an objective standard of reasonableness, and that the performance was so prejudicial

that it denied the respondent a fair trial. *Id.* at 197–198, 646 N.W.2d 506. To show prejudice, the respondent must show that, but for counsel's error, there is a reasonable likelihood that the result would have been different. *Id.* at 198, 646 N.W.2d 506. Because respondent mother did not move for an evidentiary hearing or a new trial, our review is limited to errors apparent on the existing record. *People v. Rodriguez*, 251 Mich.App. 10, 38, 650 N.W.2d 96 (2002).

Respondent mother first argues that her lower court counsel was ineffective for failing to move for an adjournment on September 30. According to respondent mother, because there was "considerable confusion" about the results of the drug tests she took after the September 8 hearing, counsel should have moved for an adjournment to have an expert evaluate and explain the tests. We disagree. The decision whether to grant or deny an adjournment is within the sound discretion of the trial court, *In re Krueger Estate*, 176 Mich.App. 241, 247–248, 438 N.W.2d 898 (1989), and an adjournment may be granted for unavailability of a witness or evidence only if the court finds the evidence is material and the party was diligent in procuring it, MCR 2.503(C)(2). Contrary to respondent mother's arguments on appeal, there was no confusion over the results of her drug tests. Kathy Pendergrass, a drug testing facility employee who routinely handled respondents' drug tests, provided clear testimony about the types of tests administered and how to interpret the results. There is no question that respondents' urine samples, taken September 8 and 9 respectively, were positive for cocaine, indicating that they had both used cocaine in the last few days. In fact, respondent mother's urine sample contained 8988 nanograms of cocaine per milliliter, and Pendergrass testified that "anything over 7500 is considered a regular, daily user." Thus, any motion for an adjournment to present additional testimony about the drug tests would have been futile. Counsel cannot be deemed ineffective for failing to make a futile motion. *People v. Thomas*, 260 Mich.App. 450, 457, 678 N.W.2d 631 (2004).

***5** Additionally, respondent mother takes issue with counsel's statement at the conclusion of the September 8 hearing that "if Ms. Preston [respondent mother] fails another drug test, I no longer want to be her lawyer." Even if the comment was inappropriate, as respondent mother suggests, she cannot establish that it had any affect on the outcome of the case. When counsel made the statement, the trial court had already stated its findings regarding the statutory grounds for termination and warned respondents that if they had "one more positive drug screen" it would find that termination was in the best interests of the children. Considering that respondent mother tested positive for cocaine later that day, she cannot establish that the outcome of the case would have been different but for counsel's statement. A new trial is not warranted. See *In re CR, supra* at 197–198.

Affirmed.

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