2015 IL App (3d) 140759-U

Order filed February 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

In re K.O., a Minor,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
(THE PEOPLE OF THE STATE	)	Rock Island County, Illinois,
OF ILLINOIS,	)	
	)	
Petitioner-Appellee,	)	Appeal No. 3-14-0759
	)	Circuit No. 12-JA-34
v.	)	
	)	
TIMOTHY O.,	)	Honorable
	)	Peter W. Church
Respondent-Appellant)	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McDade and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: Where trial court allowed the minor's paternal grandparents to intervene in the termination hearing, the respondent father waived the issue on appeal that the appearance violated his right to due process when his counsel expressly supported the grandparents' petition to intervene at the hearing. Respondent's counsel's support for the petition to intervene was not ineffective assistance of counsel.

¶ 2 Respondent, Timothy O., challenges the trial court's order terminating his parental rights, arguing that it was error as a matter of law for the trial court to grant the paternal grandparents'

petition to intervene as foster parents at the hearing on the State's petition to terminate his parental rights. Alternatively, he maintains that his trial counsel was ineffective in agreeing to the petition to intervene. We affirm.

¶ 3 FACTS

¶ 4 The minor, K.O. was born January 1, 2010, and taken into the custody of the Illinois Department of Children and Family Services (DCFS) on March 29, 2012. At the time she was taken into custody, the minor was living with her mother and her stepfather. After taking custody of K.O., DCFS placed the minor with her paternal grandparents, June and Jerry Franklin. On June 12, 2012, the minor was adjudicated neglected, and on July 27, 2012, a dispositional order was entered making K.O. a ward of the court and ordering both parents to complete certain conditions. At the time of the dispositional hearing, the respondent was in custody in Newton, Iowa on drug related charges.

¶ 5 On April 12, 2013, DCFS removed K.O. from the Franklins' home due to an administrative finding of neglect and placed the minor in a non-relative foster home. On July 23, 2013, a permanency review hearing was held at which evidence established that the respondent had failed to comply with probation requirements relating to the Iowa conviction. The record further indicated that the respondent's probation had been revoked and he would not be released from incarceration until May 2016. Following this review hearing, the court found that the respondent had not made reasonable efforts or progress toward return of the child and the permanency goal was changed to substitute care pending termination.

¶ 6 On September 27, 2013, the Franklins filed a petition to intervene. DCFS filed a pleading in opposition to the petition to intervene. At a hearing on the petition, respondent's counsel reported that he had been unable to speak to his client regarding the Franklins' petition.

The court denied the petition to intervene as a party, but observed that, in their status as previous foster parents, they had a right to be present and heard at all subsequent hearings.

¶ 7 On October 4, 2013, the State filed a supplemental petition seeking to terminate the respondent's parental rights, alleging four grounds: (1) failed to show a reasonable degree of interest, concern or responsibility as to the child's welfare; (2) failed to make reasonable efforts to correct the conditions that were the basis for the child's removal; (3) failed to make reasonable progress toward the return of the child within nine months after the adjudication of neglect; and (4) his current incarceration prevented him from discharging his parental responsibilities for a period in excess of two years after the filing of the petition to terminate his parental rights.

¶ 8 On December 20, 2013, the Franklins filed a motion to reconsider the order denying their petition to intervene. A hearing was held on the motion on January 10, 2014, at which respondent's counsel argued in favor of the Franklins' petition to intervene. Respondent's counsel reported that he had spoken to his client who was "in complete support" of the Franklins' intervening. Respondent's counsel also stated that it would clearly be in the minor's best interest to have a continuing relationship with the Franklins. Following the hearing, the court granted the Franklins' motion to reconsider and allowed them to intervene as parties.

¶ 9 On January 21, 2014, a hearing was held on the State's petition to terminate the respondent's parental rights. The respondent, who was incarcerated in Iowa at the time of the hearing, did not attend, but was represented by counsel. The State presented testimony by Amber Cousins, a caseworker employed by the Center for Youth and Family Solutions, who testified that she had been assigned to this case in March 2012. Cousins testified to the facts surrounding the respondent's incarceration, probation revocation, and lack of compliance with the service plan goals prior to the filing of the State's petition to terminate his parental rights.

Cousins opined that the claimant had not made reasonable progress or put forth reasonable efforts to correct the conditions which gave rise to the child being taken into custody. Following the close of the State's evidence, neither the respondent nor the Franklins presented any evidence. On January 23, 2014, the court entered an order finding that the respondent was an unfit parent.

¶ 10 At the best interest hearing, held on March 10, 2014, the State presented a best interest report prepared by case-worker Cousins. Cousins testified that the child was thriving in the non-relative foster home that she had been living in for nearly one year. The home was clean and appropriate and had sufficient space for K.O. The foster parents had indicated a willingness to adopt K.O. and the child had also been accepted into the family. The child attended pre-school and church and participated in family outings. The child called the foster parents "mom and dad" and displayed love and affection toward the foster parents and their children. Cousins opined that it was in the best interest of K.O. that the respondent's parental rights be terminated so that an adoption by the foster parents could take place. On cross-examination, Cousins opined that it would be in the best interest of the child to maintain contact with the Franklins. The foster mother testified that they were open to maintaining contact with the Franklins. The respondent testified that he would do whatever he could to remain a part of K.O.'s life. June Franklin and Jerry Franklin each testified to the circumstances surrounding the removal of the child from their care the prior year. The Franklins also testified that they wished to see the respondent maintain a relationship with K.O.

¶ 11 Following the hearing, the trial court found that it was in the best interest of the child to terminate the parental rights of both parents, and granted the petition to terminate the respondent's parental rights to K.O. The respondent filed a timely motion to vacate both the

finding that he was unfit and the termination of his parental rights. This motion did not raise any issue regarding the granting of the Franklins' motion to intervene. The court denied the respondent's motion to vacate. This appeal followed.

¶ 12 ANALYSIS

¶ 13 On appeal, the respondent does not contest the findings of unfitness or the termination of his parental rights. Rather, for the first time, he now argues that the trial court erred in permitting the Franklins to intervene in the proceedings. He maintains that the trial court erred as a matter of law in permitting the Franklins to intervene as foster parents since the Franklins were no longer foster parents when they filed their petition to intervene. 705 ILCS 405/1-5(2)(d) (West 2010) (allows the court to grant standing to "any foster parent if the court finds that it is in the best interest of the child for the foster parent to have standing and intervenor status"). The respondent argues that, as *former* foster parents, the Franklins should not have been allowed to intervene under this statutory provision.

¶ 14 We find that the respondent has forfeited any argument regarding the Franklins' status. The record established that, not only did the respondent not challenge the Franklins' petition to intervene, his counsel expressed to the court his support for their petition to be given standing as intervenors. Respondent's counsel stated to the court that he had discussed the Franklins' petition with him and that he was in complete support of it. Counsel further noted that he believed it was in K.O.'s best interest to have the Franklins in her life, and that their petition would serve those interests. While it is unstated, the reasonable inference is that the respondent believed that the presence as full parties of his mother and her husband (the Franklins) would benefit his cause, either at the fitness or the best interest phase of the proceedings.

¶ 15 It is well-settled that a party forfeits his right to complain of an error where to do so would be inconsistent with his position in an earlier court proceeding. *In re Ch.W.*, 408 Ill. App. 3d 451, 457 (2011). Additionally, a party cannot complain of error that it induced the court to make or to which it consented. *Id*. It is manifestly unfair to allow a party a second hearing based upon a claim of error that he injected into the proceedings. *In re E.S.*, 324 Ill. App. 3d 661, 670 (2001). Here, the respondent not only did not object to the petition to intervene, he actively supported it. The respondent may not now contend that the trial court's ruling, which he expressly supported, was erroneous. We find that the respondent has forfeited this argument on appeal.

¶ 16 The respondent next maintains that his counsel was ineffective in not opposing the Franklins' petition to intervene. He further maintains that this ineffectiveness denied him due process and requires that the trial court's decision to terminate his parental rights must be reversed and remanded for a new hearing at which the Franklins must not be allowed to participate as an intervenor. We disagree.

¶ 17 To prevail on a claim of ineffective assistance of counsel in a proceeding to terminate parental rights, the respondent must demonstrate that: (1) the representation fell below an objective standard of reasonableness; and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for counsel's error. *In re D.D. Jr.*, 385 Ill. App. 3d 1053, 1062 (2008). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *In re A.R.*, 295 Ill. App. 3d 527, 531 (1998). In determining whether there is such a reasonable probability, the reviewing court must consider the totality of the evidence before the trial court. *Id*. Moreover, errors in trial strategy or judgment alone do not establish that the representation was incompetent. *In re R.G.*, 165 Ill. App. 3d 112, 127 (1988).

¶ 18 Regarding whether his counsel's representation fell below an objective standard of reasonableness, the respondent maintains that allowing the Franklins in as full parties to the proceedings was at odds with his objective of convincing the court that he alone, *to the exclusion of all others*, was best capable of raising the child. The respondent argues that the presence of the Franklins as parties raised another alternative to him as the best custodian of the child, and thus made it more likely that the court would terminate his parental rights.

¶ 19 We find nothing in the record to support the respondent's assertion. The Franklins did not seek custody of K.O. for themselves, nor did they oppose the respondent's desire not to have parental rights terminated. In fact, the record suggests that, contrary to the respondent's assertion, the presence of the Franklins as full participating parties strengthened the case against terminating his parental rights. All parties, including caseworker Cousins, agreed that it was in K.O.'s best interest to maintain a relationship with the Franklins. The Franklins did offer evidence against the respondent and the evidence they did give tended to support, rather than oppose his position. Our review of the record leads us to conclude that the presence of the Franklins may have made a somewhat stronger case against terminating the respondent's parental rights than would have existed without their presence. In that same vein, respondent's counsel's decision to actively support the Franklins' petition to intervene constituted trial strategy. Respondent's counsel stated to the trial court that it would clearly be in the minor's best interest to have a continuing relationship with the Franklins. Having the Franklins in court articulating their desire to have a relationship with K.O., arguably strengthened the respondent's position. Thus, the respondent has failed to establish that agreeing to the petition to intervene fell below an objective standard of reasonableness.

¶ 20 Having found that the respondent's counsel's performance did not fall below an objective standard of reasonableness, we also find that the respondent failed to establish that a reasonable probability existed that the outcome would have been different had his counsel opposed the Franklins' petition to intervene. *In re A.R.*, 295 Ill. App. 3d at 531. The record established that, even before granting the petition to intervene, the trial court was going to allow the Franklins, as former foster parents of K.O., the right to be present and heard at all hearings. 705 ILCS 405/1-5(c) (West 2010). While there is a substantive difference between the right to be present and heard afforded to former foster parents, and standing as a party to a proceeding, in the instant matter there was no practical difference. Again, we note that the Franklins' testimony concerned only their own circumstances surrounding the removal of K.O. from their home, their desire to maintain a relationship with the child after the proceedings, and their belief that the respondent should continue to have a relationship with his daughter. There is no reason to presume that these statements would not have been presented to the court had the Franklins merely been exercising a right to be heard rather than participating as parties to the proceeding.

¶ 21 Moreover, the respondent has failed to establish how the lack of Franklin's presence as parties would have resulted in a different outcome. The respondent acknowledges that the State proved by clear and convincing evidence the four grounds of unfitness alleged in the petition to terminate his parental rights. Additionally, the record is unrebutted that K.O. was thriving in her new environment in a stable, loving home where all her needs were being met. Consequently, we find the record insufficient to establish that the outcome of the proceeding to terminate the respondent's parental rights would have been different had the respondent's counsel opposed the Franklins' petition to intervene.

¶ 22 The judgment of the circuit court of Rock Island County is affirmed.

¶ 23 Affirmed.