

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ASHLEY YOUNG, MARIAH
BARTLETT, and DEVIN YOUNG, Minors.¹

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

EDDIE BRAZZELL,

Respondent-Appellant,

and

AARON BARTLETT,

Respondent.

UNPUBLISHED
December 4, 2007

No. 276942
Wayne Circuit Court
Family Division
LC No. 06-458546-NA

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Respondent-appellant Eddie Brazzell appeals from an order terminating his parental rights to Ashley Young under MCL 712A.19b(3)(g). For the reasons set forth below, we affirm.

I. Facts and Procedural History

The family court authorized a petition to take temporary custody of Ashley after the Department of Human Services (DHS) removed Ashley and her half-siblings from their mother, Jalaunda Young's home on August 31, 2006. The first petition sought termination of Ms. Young's parental rights for failure to protect Ashley from sexual abuse by Young's boyfriend, Joseph Campbell. With regard to Ashley's father, Eddie Brazzell, the petition alleged that he failed to visit or support Ashley. Mr. Brazzell was then the putative father of Ashley and was

¹ This appeal concerns only the termination of Mr. Brazzell's parental rights to Ashley Young.

ordered to establish paternity. On October 4, 2006, an amended petition was filed seeking termination of both Ms. Young and Mr. Brazzell's parental rights.

The record reflects that Mr. Brazzell did not receive formal notice of the first hearing in the termination proceedings, and the trial court adjourned the hearing until Mr. Brazzell and others could be properly notified. However, Mr. Brazzell did not appear for the follow-up hearing on September 13, 2006. Mr. Brazzell attended a pretrial hearing scheduled for October 5, 2006, and he stated that he is Ashley's father. The court ordered Mr. Brazzell to establish his paternity, but a written order for DNA testing was not entered until November 20, 2006. Mr. Brazzell also attended a pretrial hearing on November 28, 2006, and testing established his paternity in February 2007. Mr. Brazzell did not attend a pretrial hearing on February 16, 2007, but he was represented by appointed counsel. Based on the DNA results, the court entered an order identifying Mr. Brazzell as Ashley's legal father. The court also scheduled the neglect adjudication to begin on March 1, 2007.

Mr. Brazzell did not appear for the neglect adjudication. Mr. Brazzell's attorney stated that he had called Mr. Brazzell, but Mr. Brazzell did not return his phone call. At the hearing, Ashley testified in chambers about the abuse perpetrated by Mr. Campbell and another of Ms. Young's boyfriends, Aaron Bartlett. With regard to Mr. Brazzell, Ashley testified that he visited her approximately once a month. Ashley recalled that they would play video games, watch TV, go out to dinner, or go to the park during Mr. Brazzell's visits. Ashley also testified that Mr. Brazzell sometimes helped her with her homework and attended parent-teacher conferences at her school. She further testified that she did not tell Mr. Brazzell about Mr. Campbell's abuse because she was afraid Mr. Brazzell might physically confront Mr. Campbell which might lead to Mr. Brazzell having to return to prison.²

The neglect adjudication continued on March 2, 2007 and, again, Mr. Brazzell did not appear for the hearing. According to Ashley's grandmother, Gloria Ervin, Ms. Young and Mr. Brazzell lived with her when Ashley was born in 1993. When Ashley was six months old, doctors diagnosed her with retinol blastoma, a form of cancer of the eyes.³ Ashley required significant medical treatments, including hospital stays. Ashley lost some of her hearing because of her chemotherapy treatments and she later developed a speech impediment that was evident during the termination proceedings. Notwithstanding Ashley's medical problems, Mr. Brazzell moved out of Ms. Ervin's home when Ashley was 10 months old. Though Ms. Ervin recalled that Mr. Brazzell was employed at the time, after he left the home, Mr. Brazzell stopped providing any financial support for Ashley. According to Ms. Ervin, when Ashley was almost two years old, Ms. Young began to associate with drug dealers and she decided to move out of

² The court admitted a copy of a judgment of conviction relating to Mr. Brazzell's parole violation on a home invasion charge.

³ Ms. Young also suffered from retinol blastoma but, because of a failure to timely diagnose her condition, she became completely blind. Ms. Young received a financial settlement in a malpractice lawsuit in the form of an annuity that the trial court found would total in the millions of dollars over her lifetime. Ms. Ervin testified that she also recalled hearing that Mr. Brazzell was legally blind, and she noticed he held objects close to his face to view them.

Ms. Ervin's house. Ms. Ervin became Ashley's guardian because Ms. Young could not handle the hospital stays required for Ashley's care. After she left Ms. Ervin's home, Ms. Young stopped providing any financial support for Ashley.

Ms. Ervin testified that, when he first moved out of her home, Mr. Brazzell would see Ashley only when he would visit Ms. Young. After Ms. Young also moved out, Mr. Brazzell would visit Ashley for 20 or 30 minutes approximately once a month. When Ms. Ervin told Brazzell that she needed money to support Ashley, Mr. Brazzell responded that he could not afford to help. And, despite an order that required him to pay support when Ms. Ervin assumed guardianship for Ashley, Mr. Brazzell claimed he did not have to do so because he received disability payments from the government. Mr. Brazzell never gave Ashley gifts for holidays or birthdays and, according to Ms. Ervin, when Mr. Brazzell visited, he never took Ashley out of her house. Nonetheless, Ms. Ervin believed that Ashley and Mr. Brazzell formed a bond, though Mr. Brazzell failed to establish his paternity of Ashley until late in these proceedings. Accordingly, for most of Ashley's life, Mr. Brazzell was merely Ashley's putative father.

Ms. Ervin experienced significant health problems in 2003 or 2004, so Ashley went to live with Ms. Young and her boyfriend, Joseph Campbell. Ms. Ervin relinquished her guardianship of Ashley in 2005 because her medical problems. The record does not reflect that Mr. Brazzell provided any support for Ashley when she left Ms. Ervin's home or that he visited her during that time.

During the summer of 2006, Ashley revealed to her mother that Mr. Campbell had sexually abused her. According to Ashley, since she was seven or eight years old, Mr. Campbell touched her inappropriately and forced her to perform oral sex. Ashley testified that Mr. Campbell said he would kill her if she told anyone about the abuse. Ms. Young called the police but, when she and Mr. Campbell's mother took Ashley to talk to the prosecutor, Ms. Young and Mr. Campbell's mother both convinced Ashley to lie about the abuse so that Mr. Campbell would not go to prison. When she spoke to the prosecutor, Ashley recanted her story and the criminal charges were dropped. Ms. Ervin testified that, when she learned about Mr. Campbell's abuse, Ms. Young told her that she believed Ashley's story because Ashley would come home with money after she spent time with Mr. Campbell. After Ms. Ervin learned that Ms. Young told Ashley to recant her story, Ms. Ervin reported the abuse to Child Protective Services (CPS). Around the same time, Ashley returned to live at Ms. Ervin's home.⁴

The record reflects that Mr. Brazzell did not know about the sexual abuse but, after Ms. Ervin reported it, he was contacted by CPS worker Jeraldine Bennett to attend a team decision meeting to plan for Ashley's care. Mr. Brazzell failed to attend the meeting. Ms. Bennett testified that DHS never considered placing Ashley with Mr. Brazzell because, though Mr. Brazzell's mother stated that he should take custody, Mr. Brazzell did not express an interest in taking custody of Ashley. Mr. Brazzell also no longer lived with his mother because he moved in with a woman with whom he fathered another child. Further, Ms. Bennett noted that Ashley

⁴ Ms. Ervin testified that her prior medical problems significantly improved by the time Ashley returned to her custody.

could not be placed with Mr. Brazzell until he established his paternity, which did not occur until several months after her removal from Ms. Young's home.

After the close of proofs, Mr. Brazzell's lawyer notified the court that Brazzell's mother told him the night before that, though he was "invested" in the proceedings, Mr. Brazzell did not appear for the hearing because he was "hospitalized for his tonsil and adenoids." Nonetheless, Mr. Brazzell's attorney urged the court not to terminate Mr. Brazzell's parental rights because evidence established that he visited and cared about Ashley and that the two had formed a bond.

The family court judge, Judy Hartsfield, ruled that Mr. Brazzell's parental rights to Ashley should be terminated under MCL 712A.19b(3)(g) because Mr. Brazzell failed to provide proper care or custody of Ashley and nothing indicated he would be able to do so within a reasonable time. Judge Hartsfield observed that, though Mr. Brazzell seemed to be a good person, he had limited skills, he had health issues, and he did not appear to have the "wherewithal" to take care of Ashley. Judge Hartsfield also noted that Mr. Brazzell's brief visits only 12 times a year were simply insufficient for a parent. She further emphasized that, had Mr. Brazzell been more involved in Ashley's life and upbringing, he would have known about the "criminal depravity" and "neglectful behavior" to which the mother exposed Ashley, particularly in light of the fact that Ashley's abuse started when she was six or seven years old and continued until she was 13. Judge Hartsfield found Ms. Ervin's testimony credible about the limited nature of Mr. Brazzell's visits and she did not find Ashley's testimony credible that Mr. Brazzell attended parent-teacher conferences and sometimes helped Ashley with homework.

Judge Hartsfield also stressed that Mr. Brazzell never provided financial support for Ashley and never gave Ashley any gifts or necessities, though he could have done so if he received social security benefits for a disability as he claimed. Judge Hartsfield acknowledged Mr. Brazzell's excuse for not appearing at the neglect adjudication, but she reiterated that, as a parent, Mr. Brazzell was required to show an ability and intention to provide for his child and he failed to offer any plan to demonstrate that he would be able to take care or custody of Ashley in the near future. Thus, the trial court entered a written order terminating Mr. Brazzell's parental rights on March 9, 2007.

II. Analysis

A. Ineffective Assistance of Counsel

Mr. Brazzell contends that his attorney was ineffective for failing to request an adjournment of the neglect proceedings when Mr. Brazzell failed to appear for the hearing.

"In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). As this Court further explained in *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005):

To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel.

People v Grant, 470 Mich 477, 485; 684 NW2d 686 (2004). The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 486. Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Mr. Brazzell did not raise this issue in the family court and, because we apply the legal principles applicable to criminal cases, our review of this unpreserved claim is limited to those errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

We hold that Mr. Brazzell has failed to establish that his attorney's performance was deficient.

To the extent Mr. Brazzell's argument stems from his belief that he was denied his due process right to attend the termination hearing, his claim that his situation is analogous to that of an incarcerated parent is misplaced. While a balancing test may be appropriate in cases involving a parent's physical presence at a termination hearing when the parent is incarcerated, *In re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993), Mr. Brazzell was not imprisoned when the neglect adjudication occurred. With regard to his rights, those are defined in MCR 3.973, which clearly provides that a respondent may appear at the termination hearing through an attorney as Mr. Brazzell did here. MCR 3.973(D)(2). Moreover, if a respondent receives notice of the hearing and fails to attend, the court may proceed in the respondent's absence. MCR 3.973(D)(3). Accordingly, the failure to adjourn the proceedings did not deprive Mr. Brazzell of any constitutional right.

For the same reasons, it was not unreasonable for Mr. Brazzell's attorney to proceed when Mr. Brazzell was aware of the hearing and, after an attempt to contact him, Mr. Brazzell failed to return his counsel's phone call. Further, though Mr. Brazzell's mother told the attorney that Mr. Brazzell was in the hospital for a tonsil or adenoid problem, this occurred after the first day of the hearing and it was not unreasonable for counsel to again proceed. Mr. Brazzell was well represented by his attorney at the adjudication and nothing suggests that Mr. Brazzell was prejudiced by his absence, particularly when Mr. Brazzell had missed other hearings during the pendency of the case. Moreover, we note that, before the hearing, Mr. Brazzell could have developed a strategy with his attorney, provided him with additional evidence, or notified counsel if he intended to testify about a plan to care for Ashley, but he did not. Accordingly, we reject Mr. Brazzell's argument that his counsel was ineffective for failing to move for an adjournment of the hearing.

B. Evidence to Support Termination

Mr. Brazzell claims that the court erred when it found there is clear and convincing evidence to terminate his parental rights.

The court terminated Mr. Brazzell's parental rights under MCL 712A.19b(3)(g) which provides that "[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." As this Court explained in *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004):

Termination of parental rights is appropriate where the petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once this has occurred, the court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Id.* at 353; MCR 3.977(E)(3), (F)(1), or (G)(3). This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). 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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Terry*, 240 Mich App 14, 22, 610 NW2d 563 (2000).

We hold that the trial court did not clearly err when it found clear and convincing evidence to terminate Mr. Brazzell's parental rights under MCL 712A.19b(3)(g). Evidence established that Mr. Brazzell stopped caring for Ashley just four months after doctors diagnosed her with cancer. Despite Ashley's significant medical problems, and although he was working at the time, Mr. Brazzell failed to provide any financial support for Ashley. Indeed, for the next thirteen years, Mr. Brazzell declined to provide Ashley with any monetary support, though a court order required him to do so when Ms. Ervin became her guardian. Mr. Brazzell also failed to give Ashley any gifts for holidays or on her birthday. Indeed, Ms. Ervin testified that Mr. Brazzell visited Ashley at her home only 12 times per year and his visits were very brief. Meanwhile, Ashley was subjected to significant neglect and sexual and physical abuse in Ms. Young's household. Though others were also unaware of the sexual abuse, as Judge Hartsfield observed, if Mr. Brazzell were more involved in Ashley's life, he would have known of at least some of these problems. Simply put, providing proper care for a child requires more than occasional, casual visits over a 13-year period.

After Mr. Brazzell learned about the sexual abuse, he failed to attend the team decision meeting to plan for Ashley's care and custody. As the CPS worker also observed, though his mother indicated that she and Mr. Brazzell should be given custody of Ashley, Mr. Brazzell did not express this intention, and the record clearly reflects that Mr. Brazzell never attempted to take care or custody of Ashley earlier in her life. Indeed, throughout these proceedings, Mr. Brazzell never offered to petitioner or to the court, by himself or through his attorney, a plan to show that he is willing or able to provide Ashley a safe and stable home. For these reasons, we find no clear error in the trial court's decision to terminate Mr. Brazzell's parental rights.⁵

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane M. Beckering

⁵ The court also correctly ruled that, on the basis of the above evidence, termination is not contrary to Ashley's best interests.