

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KEYSHAWN WILKERSON,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KEITH McKINNEY,

Respondent-Appellant,

and

DEBORAH WILKERSON,

Respondent.

In the Matter of KEYSHAWN WILKERSON,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DEBORAH WILKERSON,

Respondent-Appellant,

and

KEITH McKINNEY,

Respondent.

UNPUBLISHED
December 11, 2007

No. 277781
Kent Circuit Court
Family Division
LC No. 04-058044-NA

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Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i) and (g). Respondent Deborah Wilkerson's parental rights were also terminated pursuant to MCL 712A.19b(3)(l). We affirm.

In December 2004, petitioner sought to place nine-year old Keyshawn in the court's custody, alleging that respondent-mother had stabbed her live-in boyfriend and tested positive for drug use. The petition also alleged that respondent-mother had her parental rights to five other children previously terminated. Although the original petition sought termination of respondent-mother's parental rights, because of the strong bond between respondent-mother and Keyshawn and evidence that she had properly cared for him since infancy, the court took temporary custody of the child and ordered respondent-mother to comply with a treatment plan that required her to address concerns regarding domestic relations, housing, substance abuse, parenting skills, emotional stability, behavior, and physical health issues.

Respondent-mother made little progress on her plan. She failed to complete domestic violence counseling or anger management classes to which petitioner referred her because of the domestic violence issues. During the period Keyshawn was in the court's temporary custody, there was evidence of domestic incidents involving respondent-mother and two different men in May 2005 and July 2006. Respondent-mother lived with the individual involved in the July 2006 incident. Respondent-mother also failed to address the concerns regarding substance abuse. She did not attend NA or AA as requested. She also abused alcohol and came intoxicated to visits with Keyshawn. Caseworkers began administering breathalyzer tests at visits, and on February 22, 2006, when respondent-mother tested positive for alcohol use for the third time, respondent-mother's visits were suspended until she was able to demonstrate 30 days' compliance with her treatment plan, including negative drug screens. Respondent-mother never managed to meet those terms before the termination trial. She also failed to establish that she had suitable housing, verify her disability payments, manage her extreme emotional fluctuations, and she failed to provide a written plan for Keyshawn's care during her frequent hospitalizations for her rare blood disorder.

Respondent-father had not been a part of Keyshawn's life for several years, but when he was informed of the proceedings, he indicated that he wanted to plan for the child. Although the original petition raised no allegations against respondent-father, during the course of the proceedings, petitioner prepared a parent-agency agreement for respondent-father to address concerns of substance abuse, emotional stability, and parenting skills. Respondent-father made some progress under the agreement, and Keyshawn was placed in his care in June 2006. In September 2006, respondent-father was arrested and charged with retail fraud. During his incarceration, he placed Keyshawn with respondent-mother and her live-in partner, Curtis Fitzpatrick, despite his knowledge that respondent-mother was prohibited from having contact

with the child. He failed to notify the caseworker of his incarceration or the child's placement. He admitted to the caseworker that he smoked marijuana while Keyshawn was in his care but not in front of the child. After his release, he failed to reestablish contact with the caseworker for several weeks and then missed scheduled meetings. Despite his contention that he had not smoked marijuana since August 2006, a hair follicle test on November 16, 2006, tested positive for marijuana, indicating daily or serious use.

Petitioner filed a supplemental petition seeking termination of both respondents' parental rights on October 16, 2006. At trial, after both parties had presented their witnesses and made their closing arguments, the court reopened proofs, without objection, to question Keyshawn. Keyshawn testified that he did not want to live with respondent-father, explaining that he went to jail too often. He also testified that respondent-father had spanked him with a belt and shoplifted while Keyshawn served as a diversion.

On April 9, 2007, the trial court terminated both respondents' parental rights to Keyshawn. Respondent-mother's parental rights were terminated under §§19b(3)(c)(i), (g), and (l). Respondent-father's parental rights were terminated under §§19b(3)(c)(i) and (g). Respondents appeal as of right.

On appeal, respondent-mother contends that the trial court clearly erred in terminating her parental rights. However, respondent-mother admitted that her parental rights were terminated to five other children, three by the Kent County courts and two by the courts in Denver, Colorado. This evidence was sufficient to establish termination under §19(3)(l). Further, evidence that respondent-mother failed to participate in domestic violence counseling or anger management classes, continued to be engaged in unhealthy relationships, failed to address her substance abuse problem, and failed to establish suitable housing and a written plan for the child in the event of her hospitalization shows that the trial court did not clearly err in finding that termination of respondent-mother's parental rights was appropriate under §§19b(3)(c)(i) and (g). MCR 3.977(J)(3); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Respondent-mother's suspension of her visitation privileges on February 22, 2006, and her failure to comply with her treatment plan for a 30-day period in order for visits to be reinstated showed that termination of her parental rights was clearly not contrary to the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Thus, the trial court did not err in terminating respondent-mother's parental rights to the child.

On appeal, respondent-father raises three arguments: (1) the trial court erred in terminating his parental rights under §§19b(3)(c)(i) and (g), where he had complied with his treatment plan and petitioner failed to provide reasonable efforts towards reunification following his incarceration, (2) the admission of hearsay evidence at trial was erroneous and adversely affected the outcome, and (3) he was denied the effective assistance of counsel.

The evidence at trial supported termination of respondent-father's parental rights under §19b(3)(g). Respondent-father failed to address concerns regarding his drug use as evidenced by his admission to smoking marijuana after Keyshawn was placed in his care and the November 2006 hair follicle test that was positive for daily or serious marijuana use. He failed to show good parenting skills or emotional stability when he engaged in criminal activity resulting in his

incarceration after Keyshawn was placed in his care, placed the child in the care of respondent-mother, who he knew was prohibited from contacting the child, and failed to inform petitioner of any of his actions. After his release from prison, respondent-father failed to contact the caseworker for several weeks and then was inconsistent with his contact. He failed to meet with the caseworker even after the caseworker informed him of the need to arrange for substance abuse treatment. These circumstances supported the court's finding that respondent-father had failed to provide proper care and custody of the child and there was no reasonable expectation that he would be able to do so within a reasonable time considering the child's age. Thus, the trial court did not clearly err in terminating respondent-father's parental rights under §19b(3)(g). Respondent-father's argument that petitioner failed to provide reasonable efforts towards reunification ignores the effect of his own behavior. Respondent-father cannot argue that petitioner failed to provide reasonable efforts to facilitate the child's return to his home when it was his own conduct that prevented such a reunification. Respondent-father was provided a parent-agency agreement or service plan, and because of some progress, Keyshawn was placed in his care, but respondent-father was not entitled to continuing services under the circumstances, see *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000), and efforts by the caseworker were ignored. Moreover, respondent-father's accompanying constitutional claim lacks merit. See *Santosky v Kramer*, 455 US 745, 769; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Reversal is unwarranted.

We find it unnecessary to determine whether the trial court clearly erred when it terminated respondent-father's parental rights under §19b(3)(c)(i) because any error is harmless in light of the evidence establishing termination under §19b(3)(g). *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Respondent-father also contends that reversal is warranted because the court relied upon inadmissible hearsay evidence in terminating his parental rights. Because respondent-father's case involved new or different circumstances than those that led the court to take jurisdiction of the child, MCR 3.977(F)(1)(b) requires that statutory grounds for termination be established by legally admissible evidence. Respondent-father argues that the caseworkers' hearsay testimony regarding statements made by Keyshawn was improperly admitted at trial and relied upon by the court. Because respondent-father did not object to this evidence below, his argument that hearsay testimony was erroneously admitted into evidence is considered only to the extent that the error affected the outcome of the trial. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). The evidence, exclusive of the hearsay testimony, was sufficient to establish statutory grounds for termination of respondent-father's parental rights, and therefore reversal is not warranted on this ground.

Finally, respondent-father argues that he was denied the effective assistance of counsel where counsel failed to object to the admission of the hearsay testimony, questioned respondent-father to confirm this otherwise inadmissible hearsay evidence, and failed to object to the court's reopening of evidence to allow Keyshawn to testify. To prevail on a claim of ineffective assistance of counsel, the respondent must show that trial counsel's performance was deficient and that there is a reasonable probability that, but for counsel's error, the result would have been different. *In re CR*, 250 Mich App 185, 198; 646 NW2d 506 (2002). Respondent-father fails to

show how any of the presumably inadmissible evidence affected the outcome of his trial. Because he has failed to demonstrate that his counsel's representation prejudiced him so as to deprive him of a fair hearing, respondent-father's claim of ineffective assistance of counsel must fail.

Affirmed.

/s/ Alton T. Davis

/s/ William B. Murphy

/s/ Deborah A. Servitto