

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JACOB ANTHONY GAY, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

LENNY ALLEN WALKER,

Respondent-Appellant.

UNPUBLISHED

August 28, 2008

No. 284006

Genesee Circuit Court

Family Division

LC No. 06-121414-NA

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(g) and (j). We affirm.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). If a statutory ground for termination is established, the trial court must terminate parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The trial court's decision terminating parental rights is reviewed for clear error. MCR 3.977(J); *Trejo, supra* at 355-357; *Sours, supra* at 632-633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller, supra* at 337.

There was clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(g). Respondent was unable to provide proper care and custody for Jacob because there was no evidence that he had suitable housing or a stable source of income. Respondent never completed petitioner's intake assessment evaluation or participated in a psychological evaluation as directed by his treatment plan. Respondent's failure to comply with his treatment plan is evidence of his failure to provide proper care and custody for his child. See *In re JK, supra*.

Respondent argues that most of the evidence used to find a basis for terminating his parental rights was based on hearsay testimony. However, hearsay evidence is admissible in the dispositional phase of the proceedings such as a permanent custody hearing. *In re Futch*, 144 Mich App 163, 166; 375 NW2d 375 (1984). Further, even though jurisdiction over Jacob was based on admissions made by the child's mother and not respondent, the court did not err in terminating respondent's parental rights. The family court's jurisdiction is tied to the children, making it possible to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding under proper circumstances. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002). In this case, because the court had jurisdiction over Jacob based on admissions made by his custodial parent and because termination of respondent's parental rights was not based on new or changed circumstances, the lower court was not obligated to apply the admissibility standard of legally admissible evidence used in adjudication.

The court also did not err in terminating respondent's parental rights under MCL 712A.19b(3)(j). Respondent's complete lack of commitment to Jacob was demonstrated by his failure to make any efforts toward reunification by participating in his treatment plan or visiting Jacob. Jacob would risk emotional harm if returned to respondent's care because respondent was uncommitted and unavailable for Jacob throughout the duration of the case. Furthermore, because respondent did not participate in an intake assessment evaluation or complete a psychological assessment as he was court ordered to do, the record is without detailed evidence of respondent's limitations and mental health concerns that could have put Jacob at risk of harm in his care.

Respondent also argues that his due process rights were violated when the trial court proceeded with the permanent custody hearing in his absence and without personally serving him with notice of the proceedings. Because respondent did not raise this due process issue in the trial court, the issue is not preserved. Review is therefore limited to plain error affecting respondent's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCL 712A.13 provides for service of process by alternative methods, including publication, to confer jurisdiction on the trial court, as long as the court has first determined that personal service is impracticable. *In re Adair*, 191 Mich App 710, 714; 478 NW2d 667 (1991). The court file in this case shows that both personal service and the alternative method of publication were used in attempting to serve respondent with a summons and petition for the permanent custody hearing. The court granted petitioner's motion for alternate service after two unsuccessful attempts were made to personally serve respondent and petitioner's caseworker signed an affidavit indicating that she had made a diligent search for respondent's address and whereabouts. Because the trial court determined that reasonable efforts had been made to locate respondent before it decided to grant substituted service by publication, the court proceeded with jurisdiction with regard to respondent and respondent was properly notified of the proceedings.

Respondent also argues that proceeding in his absence without clear indication that he was aware of and understood the proceedings was a violation of his constitutional rights. The trial court "may proceed in the absence of parties provided that proper notice has been given." MCR 3.973(D)(3). To determine when the court is obligated to assure a parent's presence at a court hearing so as not to violate due process guarantees, this Court applies the three-part balancing test set forth in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18

(1976),¹ which balances the private interest at stake, the risk of an erroneous determination in the absence of the parent's physical presence, and the government's interest in avoiding the burden of physically producing the parent for the termination hearing. *In re Vasquez*, 199 Mich App 44, 47-48; 501 NW2d 231 (1993).

By applying the *Mathews* balancing test in the instant case, it is unlikely that the risk of an erroneous deprivation was increased by respondent's absence because termination of respondent's parental rights was based on his failure to visit his child, participate in a treatment plan, or demonstrate parental fitness. Although a further adjournment for respondent's presence may not have been an onerous burden on the trial court, when considered in light of the minimal likelihood that such testimony could have altered the outcome of the trial, the denial of the request for adjournment did not constitute a denial of due process. And, although an adjournment for an absent parent in one case may not have burdened the court, the court would be burdened if it were obligated to adjourn every time a parent was absent or tardy.

Finally, respondent argues that he did not understand the way these proceedings could affect his parental rights. The record does not support this argument. The court found that respondent was properly notified and made aware of the fact that his failure to appear could result in the request to terminate his parental rights. Respondent met with his attorney in October 2006 and presumably the nature of child protective proceedings was explained to him. Respondent was aware that Jacob had been placed in foster care because Jacob's care and custody were at issue in this case. Respondent attended the jurisdictional hearing where he was informed of the services he needed to complete if he wanted to be reunified with Jacob. Respondent had several conversations with the caseworker in which he was informed of services that were required of him. During these encounters with the court and caseworkers, the issue of Jacob's custody and care was addressed multiple times directly with respondent and respondent had ample opportunity to ask questions about his parental rights.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

¹ In *Vasquez*, this test was used to determine whether a court had to secure the physical presence of an *incarcerated* parent, who, unlike respondent, could not freely attend a termination hearing. In this case, where respondent was not incarcerated at the time of the permanent custody hearing and was free to come to the hearing, the court was not obligated to secure his presence.