STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JAMARI TYREE DONALD,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

NICOL DONALD,

Respondent-Appellant,

and

JOHN MCCOY,

Respondent.

UNPUBLISHED
May 26, 2009

No. 289207
Oakland Circuit Court
Family Division
LC No. 08-746083-NA

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Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JOHN MCCOY,

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and

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No. 289497
Oakland Circuit Court
Family Division
LC No. 08-746083-NA

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court's order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(g) and (j) and, regarding respondent-father only, MCL 712A.19b(3)(h). We affirm.

I. Jurisdiction

Respondent-mother first argues that she did not receive sufficient notice of the proceedings because the trial court ordered notice by publication without complying with MCR 3.920(B)(4). We disagree. This Court reviews whether the trial court has personal jurisdiction over a party, de novo, as a question of law. *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004); *In re Terry*, 240 Mich App 14, 20; 610 NW2d 563 (2000). Statutory interpretation is also a question of law that is reviewed de novo. *In re SZ, supra* at 564.

A parent of a child who is the subject of a child protective proceeding is entitled to personal service of a summons and notice of proceedings. *In re SZ, supra* at 564; MCL 712A.12; MCR 3.920(B)(4)(a). However, MCR 3.920(B)(4)(b) allows for substitute service, as follows:

> If the court finds, *on the basis of testimony or a motion and affidavit*, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication. [Emphasis added.]

In addition, there is a statutory provision that governs substitute service. MCL 712A.13 provides:

> Service of summons may be made anywhere in the state personally by the delivery of true copies thereof to the person summoned: Provided, That if the judge is satisfied that it is impracticable to serve personally such summons or the notice provided for in the preceding section, he may order service by registered mail addressed to their last know addresses, or by publication thereof, or both, as he may direct. It shall be sufficient to confer jurisdiction if (1) personal service is effected at least 72 hours before the date of hearing; (2) registered mail is mailed at least 5 days before the date of the hearing if within the state or 14 days if outside of the state; (3) publication is made once in some newspaper printed and circulated in the county in which said court is located at least 1 week before the time fixed in the summons or notice for the hearing.

While MCR 3.920(B)(4)(b) requires that the trial court base its decision for substitute service on testimony or a motion and affidavit, MCL 712A.13 contains no such requirement and does not specify, limit, or define the evidence upon which the trial court can rely when it determines whether personal service is impracticable. *In re SZ, supra* at 566. In *In re SZ*, this Court ruled that the conflict between the statute and the court rule involving the jurisdictional issue of notice requirements should be decided in favor of the statute. *Id.* at 567. Thus, a failure

to follow the statutory notice requirements establishes a jurisdictional defect; however, the failure to provide notice required by the court rules does not. *Id.*

The trial court properly followed the statutory notice requirements and properly exercised jurisdiction after ordering notice by publication. *Id.* At the pretrial hearing, the trial court ordered that personal service be attempted but also ordered publication in Saginaw and Oakland counties. While the record contains no evidence of an attempt at personal service, the trial court did not err in its method for ordering substitute service pursuant to MCL 712A.13. The record clearly reflects the attempts that petitioner made to contact respondent-mother by mail, by phone, and through messages left with her relatives who were caring for her children. The record also clearly reflects the trial court's satisfaction that the evidence supported its finding that personal service was impracticable. *In re SZ*, *supra* at 570. Considering that respondent-mother's whereabouts were unknown, multiple efforts to contact her were undertaken, and she appeared to be avoiding service, the trial court properly exercised jurisdiction after ordering substituted service.

Respondent-father argues that the trial court erred in assuming jurisdiction of the child because respondent had placed the child with respondent-father's sister, Regina Wicker-Bey, and as such, the child was not without proper care and custody. We disagree. The trial court must find by a preponderance of evidence that a statutory basis for jurisdiction exists. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). This Court reviews the trial court's decision to exercise jurisdiction for clear error in light of the trial court's findings of fact. *Id.*

In order for a trial court to find that a child comes within its jurisdiction, at least one statutory ground for jurisdiction contained in MCL 712A.2(b) must be proven at trial or by a plea. *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). MCL 712.2(b) provides that:

> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. As used in this sub-subdivision:
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> * * *
>
> (B) "Without proper custody or guardianship" does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance.

Placement of the child with a guardian capable of providing proper care and custody before petitioner's involvement does not, by itself, warrant the assumption of jurisdiction. *In re Nelson*, 190 Mich App 237, 241; 475 NW2d 448 (1991). In the instant matter, Wicker-Bey was

not a "person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance," as prescribed by MCL 712A.2(b)(1)(B). Neither respondent entered into a legal arrangement that would have allowed Wicker-Bey to provide JaMari with proper care and maintenance. Wicker-Bey approached petitioner for help because she could not provide JaMari with the medical attention that he needed. Wicker-Bey had asked respondent-mother several times for a medical authorization without success. Respondent-father was unable to help because he was incarcerated. Accordingly, the trial court properly concluded that a statutory basis for jurisdiction, MCL 712A.2(b)(1), was supported by a preponderance of evidence.

II. Statutory Grounds and Best Interests

The trial court also did not clearly err in finding that the statutory grounds for termination of respondents' parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, the evidence clearly established that termination of their rights was in the child's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

The petition was filed in this case because respondent-mother left JaMari in the care of his paternal aunt, Wicker-Bey, without any specific or legal arrangements. Wicker-Bey was unable to obtain medical attention, such as immunizations and a yearly evaluation for a heart murmur, for JaMari, so she contacted petitioner for assistance. Respondent-mother had not visited or contacted JaMari and Wicker-Bey, regularly, since July 2007. At the time of the adjudication on June 26, 2008, Wicker-Bey had not seen respondent-mother since September 2007 and had not even spoken to her in approximately three or four months. Respondent-mother had not provided for JaMari's medical or financial needs. There was also no reasonable expectation that respondent-mother would be able to provide proper care and custody for the child within a reasonable time. As previously indicated, petitioner made reasonable efforts to locate respondent-mother, but was unable to locate her throughout the case. Despite being told by Wicker-Bey that a case was pending, respondent-mother made no attempts to contact petitioner or to make provisions for JaMari. Considering this evidence, the trial court properly concluded that clear and convincing evidence existed to support termination of respondent-mother's parental rights pursuant to MCL 712A.19b(3)(g).

There was also a reasonable likelihood, based on respondent-mother's conduct, that the child would be harmed if returned to her care. As discussed above, respondent-mother left JaMari without proper care and custody. In addition, respondent-mother had another son, born after JaMari, Jerion, who had to be admitted to the hospital for a virus.[1] Respondent-mother did not maintain contact with the hospital while Jerion was hospitalized and she could not be located when Jerion was discharged. Jerion was thus discharged into the care of Protective Services. Respondent-mother's treatment of Jerion is probative of the way she would treat JaMari. *In re*

[1] There was a separate termination proceeding involving Jerion, pending in Saginaw County, at the time of the pretrial hearing in the instant case. The trial court was informed that respondent-mother had also failed to appear in the Saginaw County case.

AH, 245 Mich App 77, 84; 627 NW2d 33 (2001); *In re La Flure*, 48 Mich App 377, 392; 210 NW2d 482 (1973). Respondent-mother left the care of both of her children to others without any instruction or direction and without any way to contact her. Based on respondent-mother's conduct, the trial court properly concluded that there was a reasonable likelihood that JaMari would be harmed if returned to respondent-mother's care. This evidence, considered with respondent-mother's complete lack of involvement in her child's life, also supported the trial court's conclusion that termination of respondent-mother's parental rights was clearly in the child's best interests.

Respondent-father also failed to provide proper care and custody for JaMari. As discussed above, the petition was filed because respondent-mother left JaMari in Wicker-Bey's care without any specific or legal arrangements giving Wicker-Bey authorization to provide for JaMari's care. During most of this same time, respondent-father was incarcerated and unable to provide proper care and custody for JaMari. There was no reasonable expectation that he would be able to provide proper care and custody within a reasonable time considering the child's age. Respondent-father was incarcerated in December 2005, and his earliest release date was the middle of 2013. Respondent-father was unable to provide for JaMari or help Wicker-Bey provide for JaMari. In fact, Wicker-Bey sent respondent-father money while he was in prison. Considering that respondent-father was going to be incarcerated until 2013, and he did not provide for the proper care and custody of his child before or during his incarceration, the trial court did not err in concluding that clear and convincing evidence existed to support termination pursuant to MCL 712A.19b(3)(g).

Petitioner also presented clear and convincing evidence establishing that respondent-father was "imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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." MCL 712A.19b(3)(h). The focus of the first requirement of subsection 19b(3)(h) is "whether the imprisonment will deprive the child of a normal home for two years in the future and not whether past incarceration has already deprived the child of a normal home." *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992), quoting *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987).

Respondent-father had been in prison since his son was four months old. He did not arrange for Wicker-Bey to have a legal guardianship or custody of JaMari before or during his imprisonment. Because Wicker-Bey did not have legal responsibility for the child, she and JaMari had been in limbo waiting for respondent-mother to provide financial support and proper medical authorizations. The petition for termination was filed on April 25, 2008. Respondent-father faces possible release in 2013 or 2014; five or six years from the date of the petition. Accordingly, there was clear and convincing evidence to conclude that respondent-father's incarceration would deprive the child of a normal home for a period exceeding two years. Thus, the trial court did not clearly err in terminating respondent-father's parental rights pursuant to subsection 19b(3)(h).[2]

[2] Any error in finding that MCL 712A.19b(3)(j) was established with regard to respondent-father (continued…)

Furthermore, considering that respondent-father had no bond with JaMari (due to his incarceration when JaMari was only months old), that respondent-father would not be released from prison for another five to six years, and that respondent-father had not provided for the child prior to his incarceration, the trial court did not clearly err in determining that termination of respondent-father's parental rights was in the child's best interests.

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra

(…continued)

was harmless because the trial court needed clear and convincing evidence of only one statutory ground to support its termination order. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).