STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MONTANA SKYE MARIE SCHWAB and AMARYAH JOELEA DAVIS, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CLIFTON RICE,

Respondent-Appellant,

and

TANYA MARIE SCHWAB, CHAD HOWE, and CHARLES BROWN,

Respondents.

UNPUBLISHED
February 11, 2010

No. 292968
Kent Circuit Court
Family Division
LC No. 08-051115-NA

Before: Talbot, P.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Respondent Clifton Rice appeals as of right the order of the trial court terminating his parental rights to his minor children, Montana Schwab and Amaryah Davis.[1] We affirm.

I. Basic Facts And Procedural History

On March 27, 2008, DHS removed Montana Schwab and Amaryah Davis (as well as two other children) from the care of their mother, Tanya Schwab, based on allegations of abuse and drug usage. Throughout much of the proceedings, Rice's specific whereabouts were unknown, though it was suspected, based on Tanya Schwab's representations, that he was incarcerated in

[1] MCL 712A.19b(3)(g) (failure to provide proper care and custody).

Wisconsin. DHS moved for alternate service stating that neither Rice's home nor business addresses were known. By order dated April 8, 2008, the trial court granted DHS's motion for alternate service, finding that personal service upon Rice was impracticable or could not be achieved. Notice of the proceedings was published on April 19, 2008 in the Grand Rapids Press advising of a May 13, 2008 adjudication hearing.

At a dispositional review hearing held in October 2008, foster care case manager Jessica Conway reported that she still had been unable to locate Rice and that Tanya Schwab reported that she also did not know where Rice was. It was reported that Rice had not had contact with Montana Schwab and Amaryah Davis and had not provided financial support for them.

At the permanency planning hearing held in March 2009, Conway reported that she had located Rice in prison in Wisconsin and had sent a letter to him on February 19, 2009. Rice responded with a collect call voicemail for her, and she had sent him another letter on February 26, 2009, advising him that he could correspond with her by mail. Conway also contacted the prison social worker who agreed to answer any questions that Rice might have. Conway testified that she would be willing to work on a parent agency agreement with Rice if he were released from prison and wanted to work on one. Conway, however, recommended that Rice's parental rights, as well as Tanya Schwab's, be terminated as to the minor children because the children had been in foster care for one year and the parents had not made any progress on a parent agency agreement.

At the termination hearing in May 2009, Tanya Schwab did not contest the termination and agreed to the allegations of the amended petition. The trial court accepted her plea of no contest and terminated her parental rights.

The trial court then held a hearing to determine Rice's parental rights. Rice was represented by counsel at the hearing and attended by way of telephone because he was still incarcerated in Wisconsin. At the hearing, Rice raised the issue that he had not been provided with proper notice of the earlier review hearings or the permanency planning hearings.

Foster care worker Conway testified that when she took over the case from the previous caseworker in May 2008, the file indicated that Rice was incarcerated somewhere in Wisconsin but the specifics were unknown. Conway reiterated her earlier testimony that she had attempted to locate Rice, but was unsuccessful until Tanya Schwab eventually gave Conway the details of Rice's place of incarceration. Conway thereafter located Rice in prison in Wisconsin, corresponded with him, and spoke with the prison social worker. But after that initial communication, Conway received no further communication from either Rice or the prison social worker.

At the time of the termination hearing, Montana Schwab was five years old and Amaryah Davis was three years old. The children had been in foster care for over one year. Conway testified that, to her knowledge, Rice had had no contact with the children while the case was pending, had not provided any financial support for the children, had not sought custody of the children, had not participated in a treatment plan, and would not be able to provide proper care and custody. Conway testified that Montana Schwab and Amaryah Davis were both in dire need of permanency and that termination of Rice's parental rights was in the best interests of Montana Schwab and Amaryah Davis.

The trial court took judicial notice of the fact that Rice was incarcerated in Wisconsin, with an earliest parole eligibility date of April 12, 2010, and a last-out date of August 12, 2018. Rice testified that his incarceration in Wisconsin was for failure to pay $75,000 in child support for a child in that state who Rice claimed was not his child. Rice further testified that he earlier had served 3-1/2 years on a six-year sentence for failure to pay child support for the same child in Wisconsin. Rice acknowledged that in March 2008, he had written to the Friend of the Court, stating that he doubted that he was the father of Amaryah Davis and wanted genetic testing. Rice further admitted that he had never paid child support for either Montana Schwab or Amaryah Davis and had not seen the children since his arrest in April 2005. Rice also testified that when he had been released from incarceration previously, he had trouble finding employment because he had ten prior felonies. He did not have employment secured for his anticipated release but testified that he planned to live with a woman who was the mother of his other children.

At the conclusion of the termination hearing, the trial court found that termination was warranted under MCL 712A.19b(3)(g) and that termination was in the best interests of Montana Schwab and Amaryah Davis. The trial court also held that Rice had received proper notice of the proceedings initially and had been represented and permitted to participate at the termination hearing. Rice now appeals.

II. Due Process Notice

A. Standard Of Review

Rice argues that the trial court denied him due process when it permitted DHS to serve him with of the notice of the child protective proceedings by substitute service because DHS did not make a reasonable effort to locate him for personal service. Rice also argues that publication of the notice of the proceedings in a Kent County, Michigan newspaper was insufficient because Rice was known to be in Wisconsin. This Court reviews for clear error a trial court's decision to permit substituted service.[2]

B. Reasonable Efforts

A parent whose child is the subject of a child protective proceeding is entitled to personal service of a summons and notice of the proceedings.[3] Where personal service is impracticable, however, substituted service is permitted.[4] Such substituted service is sufficient to convey jurisdiction upon the trial court.[5]

Contrary to Rice's assertion, a trial court is not required under MCR 3.920(B)(4)(a) to find that "reasonable efforts" at personal service were made before permitting substitute service,

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[2] See *In re SZ*, 262 Mich App 560, 569-570; 686 NW2d 520 (2004).

[3] MCL 712A.12; MCR 3.920(B)(4)(a); *In re SZ*, 262 Mich App at 564.

[4] MCL 712A.13; MCR 3.920(B)(4)(b); *In re SZ*, 262 Mich App at 565.

[5] *Id.*; *In re Mayfield*, 198 Mich App 226, 231; 497 NW2d 578 (1993).

as was the case under former court rule MCR 5.920(B)(4)(c).[6] MCR 3.920(B)(4)(b) provides that the trial court may permit substituted service if it finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved.[7] Further, even where a trial court has failed to meet the requirements of MCR 3.920(B)(4)(b) before ordering substituted service, a trial court's jurisdiction is not endangered as long as the trial court followed the requirements of MCL 712A.13.[8]

This Court has noted that while MCR 3.920(B)(4)(b) requires a trial court to base its decision for substituted service on testimony or a motion and affidavit, MCL 712A.13 does not attempt to specify, limit, or otherwise define the evidence upon which a trial court can rely when determining whether personal service is impracticable.[9] Rather, MCL 712A.13 provides, in pertinent part:

> 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 known addresses, or by publication thereof, or both, as he may direct.

This Court has determined that the statutory provisions prevail over the requirements of the court rule and that failure to follow the dictates of the court rule does not destroy jurisdiction, though failure to follow the notice provisions of the statute would.[10] Further, this Court in *In re SZ* commented in a footnote that although not precedential, this Court in unpublished decisions has held that a trial court is not obligated to receive any evidence about failed attempts at personal service before authorizing service by publication.[11]

To summarize, "reasonable efforts" are not required, as was the case under the former court rule, nor are testimony, motion, or affidavit, as is the case under the current court rule, as

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[6] Former MCR 5.920(B)(4)(c) provided, in pertinent part:

> If the court finds service cannot be made because the whereabouts of the person to be summoned has not been determined after reasonable effort, the court may direct any manner of substituted service, including publication.

[7] MCR 3.920(B)(4)(b), amended in 2003, provides:

> 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.

[8] *In re SZ*, 262 Mich App at 567.

[9] *Id.* at 566.

[10] *Id.* at 567.

[11] *Id.* at 569.

long as the trial court adheres to the statutory requirement that the trial judge be satisfied that it is impracticable to serve the summons or the notice personally.[12]

In this case, testimony at the March 2008 preliminary hearing informed the trial court that Rice was believed to be incarcerated in Wisconsin, but that this had not been verified and Rice's actual location was unknown. DHS thereafter represented to the trial court in its motion for alternate service that neither Rice's home nor business address were known to DHS. The trial court thereafter granted DHS's motion for alternate service, finding that personal service of the summons was impracticable or could not be achieved. Applying the analysis of *In re SZ*, the trial court's order complied with the statutory language and was therefore sufficient.

Further, the trial court expressed its satisfaction that under the circumstances, Rice had not been denied his opportunity to participate in the proceedings because he was ultimately located, notified of the termination proceedings, and participated in the termination hearing via telephone; his incarcerated status throughout the proceedings would have prevented Rice from any other type of participation. Applying this Court's analysis in *In re SZ*, the trial court was not obligated to review DHS's attempts at personal service prior to authorizing substituted service, and the trial court therefore did not err.

C. Newspaper Publication

We also reject Rice's contention that the notice by publication was not adequate because it was placed in a newspaper in Kent County, Michigan when DHS was aware that Rice was incarcerated in Wisconsin. MCR 3.920(B)(5)(c) provides that if service is made by publication, the published notice must appear in a newspaper in the county where the party resides, if known, otherwise in the county where the action is pending. In this case, the county where Rice was residing was unknown at the time of publication; therefore, publication was properly made in Kent County, the county where the action was pending.

III. Statutory Grounds For Termination

A. Standard Of Review

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence.[13] We review for clear error a trial court's decision terminating parental rights.[14] A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that

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[12] See *id.* at 566-569.

[13] MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

[14] MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Sours*, 459 Mich at 633.

a mistake has been made.[15] Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.[16]

B. Analysis

Rice argues that the trial court erred in finding that clear and convincing evidence supported termination under the statutory provision. We disagree.

In this case, the record supports the trial court's determination that termination was warranted under MCL 712A.19b(3)(g), finding that Rice had failed to provide proper care and custody for Montana Schwab and Amaryah Davis and that it was unlikely that he would be able to do so within a reasonable time. At the time of termination in June 2009, Rice had been incarcerated in Wisconsin since 2005. Rice's earliest possible parole date was April 2010, but it was possible for him to be incarcerated until August 2018. Looking strictly at accessibility, at the time of termination Rice simply was unavailable to parent the children and would remain unavailable for some undetermined time, but at least until April 2010.

Moreover, Rice had demonstrated virtually no interest in parenting the children until the termination hearing. Rice had never met Amaryah Davis who was born after his incarceration, and, in fact, Rice had challenged his paternity to her to avoid child support obligations. He had not seen Montana Schwab since her infancy. As the trial court noted, Montana Schwab and Amaryah Davis would have no recollection of Rice, who was a total stranger to them.

The record also indicates that Rice was reluctant to support his children. Even when not incarcerated, Rice had not supported Montana Schwab financially, and as previously noted, had actually challenged his paternity of Amaryah Davis to avoid support obligations. Rice was incarcerated in Wisconsin for unpaid child support. He explained that he had not paid child support in Wisconsin because he did not believe that the child at issue in that case was his, and he further explained that he had challenged his paternity to Amaryah Davis in the Friend of the Court proceedings because he did not wish to be held responsible for child support for another child that was not his. When asked why he had not paid child support for Montana Schwab when he was not incarcerated, Rice testified that even when not incarcerated it was impossible for him to find employment because of his ten prior felonies. He conceded that he had no plans for employment upon release and intended to live with another women who was the mother of some other of his children.

We conclude that the trial court did not clearly err in determining that termination was proper under MCL 712A.19b(3)(g) was established by clear and convincing evidence.

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[15] *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

[16] MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

IV. Best Interests Determination

A. Standard Of Review

Once DHS has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is clearly in the child's best interests, then the trial court shall order termination of parental rights.[17] There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available.[18] We review the trial court's decision regarding the child's best interests for clear error.[19]

B. Analysis

Rice contends that the trial court erred in its best interests analysis because Rice indicated a willingness to parent the children and because termination would leave long-lasting scars on the children.

Contrary to Rice's contentions, the trial court appropriately weighed the evidence and found that Rice was unavailable to parent and would not be available to parent for some undetermined time. Rice had never had contact with Amaryah Davis and had not had contact with Montana Schwab since her infancy. He had never supported the children financially, even when not incarcerated. The record indicates that Montana Schwab and Amaryah Davis were in dire need of permanence. They could not wait for Rice to someday emerge from incarceration and begin to demonstrate parenting ability. In light of the children's need for permanency, we conclude that the trial court did not clearly err in finding that termination of Rice's parental rights was in the children's best interests.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Donald S. Owens

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[17] MCL 712A.19b(5); *Trejo*, 462 Mich at 350.

[18] *Trejo*, 462 Mich at 354.

[19] *Id.* at 356-357.