

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
October 19, 2010

In the Matter of M. SESSIONS, Minor.

No. 295145  
Oakland Circuit Court  
Family Division  
LC No. 2005-703877-NA

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Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Respondent father appeals as of right the termination of his parental rights to the minor child under MCL 712A.19b(3)(c)(i) and (g). For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Respondent married the minor child's mother in 2003, and the parties divorced in 2005. The minor child, a son, was born during the marriage. There was evidence that respondent committed acts of domestic violence against the minor child's mother during and after the marriage. The minor child was the subject of a child protective proceeding involving respondent and the minor child's mother in 2005. The relevant allegations in the 2005 petition included the fact that a visibly intoxicated respondent was arrested after he physically assaulted the mother while she was holding the minor child. That case was dismissed in 2006 after respondent and the mother appeared to comply with the services provided. In October 2006, the minor child was placed in the custody of his maternal grandmother. This placement was made for safety reasons, with the mother's consent, following an incident of domestic abuse perpetrated by respondent against the mother.

In June 2007, a second petition was filed and authorized. This petition contained allegations regarding respondent's domestic abuse of the mother, which resulted in respondent serving jail time and the mother getting a personal protection order to protect herself from respondent, and respondent's abuse of alcohol and numerous drunk driving offenses. On August 2, 2007, respondent and the minor child's mother both pleaded no contest to the allegations in the petition, and the trial court took jurisdiction over the minor child. On August 18, 2008, a supplemental petition to terminate respondent's parental rights was filed. Following a statutory grounds hearing, the trial court concluded that there was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(c)(i) and (g). Thereafter, the trial court held a best interest hearing. In an order filed November 10, 2009, the trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(i) and (g), ruling

that there was clear and convincing evidence to support termination on those grounds and that termination of respondent's parental rights was in the best interest of the minor child. Respondent appeals as of right.

## II. ANALYSIS

### A. STANDARD OF REVIEW

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). Once the lower court determines that a statutory ground for termination has been established "and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights . . . ." MCL 712A.19b(5). This Court "review[s] for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and . . . the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); see also MCR 3.977(J). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (quotations and citations omitted). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Id.*, citing MCR 2.613(C).

### B. JURISDICTION

Respondent first argues that the trial court improperly took jurisdiction in this case because the petition stated that his home and the home of the minor child's mother were unfit for the child, but the minor child was in the care and custody of his maternal grandmother at the time the court took jurisdiction, and it was never determined that the maternal grandmother's home was unfit or that the maternal grandmother was unwilling to care for the minor child.

The lack of subject matter jurisdiction can be raised at any time and can be collaterally attacked. *In re Hatcher*, 443 Mich 426, 439; 505 NW2d 834 (1993). However, a respondent in a child protection proceeding cannot collaterally attack the trial court's exercise of jurisdiction in an appeal from a subsequent order terminating the respondent's parental rights. *Id.* at 438-439, 444. It is difficult to glean from respondent's brief on appeal whether respondent challenges the trial court's subject matter jurisdiction or the trial court's exercise of jurisdiction in this case. To the extent that respondent challenges the trial court's exercise of jurisdiction, he may not do so. *Id.* The court's exercise of jurisdiction can only be challenged by direct appeal from the initial order of disposition.<sup>1</sup> MCR 3.993(A)(1); *In re Bechard*, 211 Mich App 155, 159-160; 535

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<sup>1</sup> The court's exercise of jurisdiction can be challenged following termination when parental rights are terminated at the initial dispositional hearing pursuant to an original petition for permanent custody, but not when parental rights are terminated pursuant to a supplemental petition filed after entry of the initial dispositional order. *In re SLH, AJH, & VAH*, 277 Mich

NW2d 220 (1995). Because respondent did not raise this issue in a direct appeal from the initial dispositional order<sup>2</sup> after the trial court's exercise of jurisdiction, he may not now collaterally challenge the trial court's exercise of jurisdiction on appeal.

To the extent that respondent challenges the trial court's subject matter jurisdiction, we review this issue de novo. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004). "[T]he probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *In re Hatcher*, 443 Mich at 437. In this case, the petition alleged that the minor child was within the court's jurisdiction under MCL 712A.2(b)(1) and (2). The petition included allegations that the minor child had been the subject of previous child protective proceedings due in part to respondent's substance abuse issues (alcohol) and domestic violence perpetrated by respondent against the minor child's mother, that respondent severely beat the minor child's mother after the parties engaged in a night of drinking after their divorce and after respondent had been released from jail, where he had been serving time for aggravated assault against the mother, that the mother had obtained a personal protection order against respondent in October 2006, that respondent was arrested in January 2007 for drunk driving and that he had pleaded guilty to a third offense of operating while intoxicated and was to be sentenced in June 2007, and that respondent and the minor child's mother were "'swingers' who engage voluntarily in sexual relationships with persons they meet on the internet and at swingers' parties . . . ." These allegations were not clearly frivolous and, if proven, they were sufficient to establish jurisdiction under MCL 712A.2(b). Therefore, the trial court had subject matter jurisdiction. *Id.*

According to respondent, jurisdiction was not proper in this case because the minor child was in the care and custody of his maternal grandmother at the time the court took jurisdiction, and it was never determined that the maternal grandmother's home was unfit or that the maternal grandmother was unwilling to care for the minor child. To the extent that respondent's argument challenges the trial court's exercise of its jurisdiction, it is an improper collateral attack that is not properly before this Court. *Id.* at 438-439. To the extent that respondent's argument implicates the trial court's subject matter jurisdiction, it is without merit. The fact that the minor child was in the care and custody of his maternal grandmother when the trial court took jurisdiction does not divest the trial court of jurisdiction in this case. MCL 712A.2(b)(2) provides that a child comes within the court's jurisdiction if the child's "home or environment . . . is an unfit place for the juvenile to live in." (Emphasis added.) Even assuming that the minor child's home with his maternal grandmother was fit and safe, there was evidence that the child's environment while with respondent was unfit based on his abuse of alcohol and his propensity to

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App 662, 668-669; 747 NW2d 547 (2008). However, in this case, respondent's parental rights were terminated pursuant to a supplemental petition filed after entry of the initial dispositional order, not at the initial dispositional hearing pursuant to an original petition for permanent custody.

<sup>2</sup> Respondent challenged the court's jurisdiction in a motion filed *in propria persona* in July 2009. However, this motion was not timely because it was not a direct appeal from the initial dispositional order.

commit domestic violence against the child's mother. Under these circumstances, the trial court possessed jurisdiction.

### C. STATUTORY GROUNDS FOR TERMINATION

Respondent next argues that there was not clear and convincing evidence to support termination of his parental rights based on MCL 712A.19b(3)(c)(i) and (g).

MCL 712A.19b provides, in relevant part:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

\* \* \*

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

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(g) The 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.

There was clear and convincing evidence to support the trial court's termination of respondent's parental rights under MCL 712A.19b(3)(c)(i). The conditions that led to the adjudication included respondent's relationship and domestic violence issues with the minor child's mother and his abuse of alcohol. There was evidence that while he was incarcerated, respondent participated in services and completed programs that would have been designed to help him overcome some of the conditions that led to the adjudication. Specifically, respondent attended Alcoholics Anonymous meetings and participated in substance abuse programs and screening.

Even though respondent participated in services and completed programs to assist him in overcoming his problem with alcohol abuse, it was not certain whether respondent actually received any benefit from such programs because he was still incarcerated at the time of the termination hearing, and he had not had an opportunity to demonstrate his sobriety outside of prison. Compliance with services offered is not enough; "a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody." *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005). Respondent had a long-term problem with alcohol abuse; he admitted that he was an

alcoholic, and he admitted that he had five drunk driving convictions and that two of those convictions occurred in 1996 and 1998. He also admitted that he had been through substance abuse rehabilitation in 1998 but continued to drink alcohol after that. When asked whether he would drink alcohol when he was released from prison and what was different this time, respondent stated: "I take it day by day and I pray that I'm not going to go back to drinking." Given his long history of problems with alcohol, his previous inability to stop drinking after rehabilitation, his numerous drunk driving convictions, and his propensity to re-offend, there was no reasonable expectation that respondent would not drink alcohol again and re-offend by drinking and driving again despite his participation in services and programs.

At the time of the termination hearing,<sup>3</sup> respondent was incarcerated due to a drunk driving offense; he was not due to be released from prison until June 2009. The minor child was approximately 4½ years old at the time of the termination hearing. Respondent had not seen the minor child since June 2007. By the time respondent was released from prison in June 2009, it would have been almost two years since respondent last saw the minor child and the minor child would be almost five years old. Even then respondent would not be in a position to care for the minor child immediately. Given the age of the minor child and the uncertainty regarding whether respondent would drink alcohol and drink and drive again given his significant history of re-offending in this regard, there was no reasonable expectation that respondent's abuse of alcohol would be rectified within a reasonable time considering the child's age. Thus, termination of respondent's parental rights was proper under MCL 712A.19b(3)(c)(i).

The other primary condition that led to the adjudication was the fact that respondent was the perpetrator of domestic violence against the minor child's mother. Respondent testified that he had two domestic violence convictions and that the victim in both cases was the minor child's mother. He stated that he was currently appealing both convictions. According to foster care service specialist Tracy Judge, respondent completed domestic violence classes while he was incarcerated. However, respondent would not be able to show that he had benefitted from the classes until after his release from prison. Ms. Judge indicated that it would take a significant amount of time to monitor respondent to determine if he had truly made progress in this regard. Ms. Judge noted that like with drinking and driving, respondent had re-offended with regard to domestic violence offenses.

Because of his incarceration, it was not possible to ascertain whether respondent had actually benefitted from the domestic violence classes that he completed. Given the minor child's age, the fact that respondent was incarcerated, the fact that upon his release from incarceration it would still take a significant amount of time to ascertain whether he had benefitted from domestic violence classes, and the fact that respondent had re-offended in the past, there was no reasonable expectation that respondent's problems with domestic abuse would

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<sup>3</sup> The statutory grounds hearing was held on December 5, 2008, December 8, 2008, December 22, 2008 and January 12, 2009. The best interest hearing occurred over an eight-day period beginning on February 2, 2009, and concluding on April 29, 2009.

be rectified within a reasonable time considering the child's age. Thus, termination of respondent's parental rights was proper under MCL 712A.19b(3)(c)(i).

For the reasons explained above, there was also clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(g). Given the uncertainty regarding whether respondent had actually benefitted from the services provided to deal with his alcohol abuse and propensity to commit domestic violence and the fact that it would take a significant amount of time after his release from prison to ascertain whether he had actually benefitted from services and programs, there was no reasonable expectation that respondent would be able to provide proper care and custody of the minor child within a reasonable time considering the minor child's age. Thus, termination of respondent's parental rights was proper under MCL 712A.19b(3)(g).

#### D. BEST INTERESTS

Respondent also argues that it was not in the minor child's best interests to terminate his parental rights. According to respondent, by terminating his parental rights, the trial court short-circuited any efforts to reunite the family and failed to consider the detrimental effect that severing the bond between respondent and the minor child would have on the child.

If the trial court finds that a statutory ground for termination has been established, and that termination of parental rights is in the child's best interests, it shall terminate parental rights. MCL 712A.19b(5); *Trejo*, 462 Mich at 352-354. As noted above, the minor child was approximately 4½ years old at the time of the termination proceedings. Respondent acknowledged that the last time he had seen the minor child was when the minor child was approximately 2½ years old. Respondent further admitted that he had not spent much time with the minor child during the minor child's life. A psychologist who interviewed the minor child testified that the minor child did not know respondent or identify respondent as a parental figure in his life. Similarly, Ms. Judge testified that the minor child did not identify respondent as being part of his family. On the other hand, there was evidence that the minor child recognized respondent as his father in a photo. Regardless of whether a bond existed between respondent and the minor child, the fact remained that by the time respondent was released from prison, he would not have seen the minor child for almost two years. Moreover, respondent would not be able to immediately care for the minor child upon his release from prison because it would take a significant amount of time to ascertain whether he had benefitted from the services and programs he had participated in and completed to address his problems with alcohol abuse and his propensity to perpetrate domestic abuse. The best interests of the minor child are not served by forcing him to wait indefinitely to see if respondent, who had a history of re-offending, had overcome his problems this time. The trial court did not clearly err in concluding that termination of respondent's parental rights was in the minor child's best interests.

Affirmed.

/s/ Stephen L. Borrello

/s/ Mark J. Cavanagh

/s/ Donald S. Owens