

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
August 16, 2012

In the Matter of HAYES, Minors.

No. 307924
Washtenaw Circuit Court
Family Division
LC No. 2010-000014-NA

Before: TALBOT, P.J., AND WILDER AND RIORDAN, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(g). We affirm.

I. FACTUAL BACKGROUND

This case arises out of the termination of respondent father's parental rights to his four minor children. Respondent father was convicted of two counts of unarmed robbery and has been incarcerated since June 2009. Respondent father's earliest release date is February 2016, and his maximum release date is December 2024. After respondent father was taken into custody, the minor children were left in the care of respondent mother.¹ A petition was filed on January 29, 2010, requesting the removal of the minor children from respondent mother's home. Petitioner alleged, inter alia, that respondent father was incarcerated, respondent mother was leaving the children unattended at night, one of the minor children, a baby, tested positive for cocaine at his birth and respondent mother failed to follow up with his care after an emergency room visit for respiratory problems, and police believed armed robbers were hiding out in respondent mother's home with the children. After the court authorized the removal of the children from respondent mother's home, the children were placed with relatives.

Respondent father's preliminary inquiry was held on February 24, 2010, where he was present. At the pretrial hearing on April 7, 2010, respondent father entered a plea admitting that the allegations in the amended petition were true. The court entered an order of adjudication, noting that respondent made a knowing and voluntary plea and a preponderance of the evidence

¹ Respondent mother's parental rights were also terminated, although she stipulated to termination and is not appealing.

established statutory grounds for jurisdiction such as failure to provide for the children and lack of proper custody or guardianship. Various service plans were prepared for respondent father, noting that while the length of his incarceration was a limiting factor, potential goals included participation in substance abuse programs, vocational classes, parenting classes in prison, and writing letters to the children. Respondent father advised the court that he was involved in substance abuse counseling, attends Alcoholics Anonymous (AA)/Narcotics Anonymous (NA), attends church, and is on work assignment. Petitioner agreed that there were not a great deal of services available at the prison facility but that respondent father was participating in substance abuse counseling and AA.

Respondent father wrote a few letters to the children, although he claimed difficulty in sending letters because he did not have money for stamps. Respondent father repeatedly requested visitation with the minor children and telephone contact. While the court eventually ordered that supervised telephone contact was possible if the relative caregivers consented, visitation was never ordered. A foster care supervisor commented that a therapist for the children felt they were not stable and it was not healthy for them to visit respondent. There were also objections based on whether respondent father would be in chains during these visits and the negative impact that would have on the minor children.

Eventually in May 2011, petitioner submitted a petition for termination, seeking termination pursuant to MCL 712A.19b(3)(a)(i), (a)(ii), (c)(i), (c)(ii), (g), and (j). In regard to MCL 712A.19b(g), petitioner alleged that respondent father failed to provide proper care and custody for the minor children because he did not provide for them financially, he did not present relatives to care for the children, and he was unable to care for the children in a reasonable time especially considering the minor children's ages. The termination hearing occurred on November 15, 2011, and respondent father stated that he was not disputing the grounds for termination, only the best interest analysis. Respondent father acknowledged his long history of criminal convictions dating back to 1983, his poor choices, and his failure to make a plan for the minor children because of his lack of immediate family members in state. Respondent father insisted that he loved the minor children and was bonded with them. He also averred that the only service available to him in prison was a substance abuse program and that he discontinued writing letters to the minor children in June 2011 because he never received any responses. He also asserted that he had not received telephone contact because the relative caregivers rejected the contact.

Petitioner acknowledged that it had sent respondent father numerous treatment plans and it contacted respondent father at the hearings, on the telephone, and in writing. Respondent father was only eligible for phase one of the substance abuse treatment program in prison and he had submitted one sign in sheet for an AA/NA meeting. Petitioner read an email in court relating that respondent father worked in prison, did not incur any major violations, participated in some AA/NA meetings, attends religious services, and that parenting classes were not available to him. Petitioner also averred that the minor children were doing well in their current placements with relatives.

The trial court terminated respondent father's parental rights pursuant to MCL 712A.19b(3)(g), finding that respondent father had not provided proper care and custody of the minor children and that petitioner made reasonable efforts in terms of the service plan. The trial

court also found that it was in the best interests of the minor children to terminate respondent father's parental rights, as the children needed stability and the assurance of not being abruptly and constantly removed from their home. Respondent father now appeals.

II. GROUNDS FOR TERMINATION

A. Standard of Review

"We review for clear error a trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "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." *Id.* (internal quotations and citations omitted).

B. Analysis

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g), which states: "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."² While respondent now challenges there was not clear and convincing evidence of this statutory ground, he explicitly stated during the termination trial that he was "not disputing that there are grounds for termination in this case" and was only disputing whether termination was in the children's best interests. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008), quoting *Czybor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006).

Even if respondent's statement did not constitute a waiver, the trial court did not clearly err in finding that the statutory ground had been proven by clear and convincing evidence. Respondent acknowledged at the termination hearing that he had been unavailable to care for the children due to his incarceration beginning in June 2009. Respondent also acknowledged that he was unable to plan for the children's proper care and custody and was unable to provide them with any financial support. It is also undisputed that respondent's earliest release date is February 2016 and his maximum release date is December 2024. Thus, respondent will remain unable to provide proper care and custody of the children for more than four years from the date of the termination hearing. Therefore, the trial court did not clearly err in finding that respondent had failed to provide proper care and custody for the children and there was no reasonable

² While respondent father argues that the statutory grounds for termination of MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(j) were not proven by clear and convincing evidence, these were not the grounds the trial court cited when terminating respondent father's parental rights.

expectation that he would be able to provide proper care and custody within a reasonable time considering the children's ages.³

There also was no improper burden shifting. While due process requires a petitioner to prove that the natural parent is unfit, this is accomplished when petitioner proves by clear and convincing evidence that at least one statutory ground for termination exists. See *Hunter v Hunter*, 484 Mich 247, 270; 771 NW2d 694 (2009). As discussed above, clear and convincing evidence demonstrated that the statutory ground, MCL 712A.19b(3)(g), existed. Also, while respondent father states that he was "not properly adjudicated by the trial court[,]" any issue relating to the adjudication is not properly before this Court, as "an adjudication cannot be collaterally attacked following an order terminating parental rights." *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). Respondent father's claim that visitation was improperly denied is likewise meritless. The children's therapist specifically recommended against visitation and the lawyer-guardian ad litem objected to the children seeing respondent father in shackles. The therapist's report was that visiting with respondent father would negatively impact the children's health and well-being. MCR 3.965 explicitly allows a court to forbid visitation if it "may be harmful to the child." Thus, there was no error.

III. HEARSAY EVIDENCE

A. Standard of Review and Preservation

Respondent father also posits that inadmissible hearsay evidence was admitted at various points in the proceedings. Respondent father offered no objection to the alleged hearsay evidence and an issue not raised in the lower court is not properly preserved for appellate review. See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). This Court reviews unpreserved claims only for "plain error affecting substantial rights." *Id.* An error affects substantial rights when it affects the outcome of the proceedings. *Id.* at 9.

B. Analysis

There was no plain error requiring reversal. Respondent father alleges one instance of improper hearsay evidence at a dispositional review hearing on May 4, 2010, when a foster care worker communicated to the court that the therapist's recommendation was to forbid visitation with the minor children. However, the Michigan Rules of Evidence, with limited exceptions that do not apply in this case, do not apply to dispositional hearings. MCR 3.975(E); MCR 3.973(E).⁴ Thus, the trial court was permitted to consider hearsay evidence at these hearings.

³ At the time of the termination hearing, the children were nine years old, seven years old, four years old, and two years old.

⁴ MCR 3.975(E) provides that, "[d]ispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing[,]" and MCR 3.973(E)(1) provides that "[t]he Michigan Rules of Evidence do not apply at the initial dispositional hearing, other than those with respect to privileges."

Respondent father also alleges that petitioner submitted hearsay evidence at the termination hearing in regard to an email and report regarding the services available at the prison and respondent father's behavior and participation in prison programs. If termination is sought based on new or different circumstances from the original petition, the trial court must consider legally admissible evidence at the termination hearing. MCR 3.977(F) and (H); see also *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000). However, termination of respondent father's parental rights was sought on the same grounds alleged in the petition, not new or different circumstances. We also note that this alleged hearsay evidence was beneficial to respondent father because it confirmed that he had been participating in services at the prison. Accordingly, no plain error affecting respondent father's substantial rights occurred as a result of the admission of the alleged hearsay testimony during the termination hearing.

IV. PARTICIPATION & SERVICES

A. Standard of Review

Lastly, respondent father argues that due to his incarceration, he was denied a meaningful opportunity to participate in the proceedings and was denied reasonable services necessary to promote reunification. When a respondent fails to raise an issue in the lower court, it is not properly preserved for appellate review. *In re Utrera*, 281 Mich App at 8. This Court reviews unpreserved issues only for "plain error affecting substantial rights." *Id*; see also *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

B. Analysis

Respondent father cites *In re Mason*, 486 Mich at 152, where the Michigan Supreme Court stated that "[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated." *In re Mason* involved an incarcerated respondent who was not afforded the opportunity to be present at the majority of hearings and was not informed of his right to continually participate in the proceedings. Yet, unlike *In re Mason*, respondent father in this case was afforded the opportunity to participate throughout the duration of the proceedings. He was present at all hearings at which the adjudication and termination of his parental rights were considered. He was provided with multiple service plans. Petitioner was also in contact with the prison liaison to determine the services available to respondent father during his incarceration. Also, while the services available were admittedly limited, respondent father was afforded the opportunity to participate in substance abuse services while in prison.

Moreover, respondent father was afforded the time and opportunity to plan for the care and custody of the children. Petitioner did not move for termination at initial disposition and engaged in a lengthy proceeding that afforded respondent father the ability to propose an alternate plan for the children. Respondent father was unable to do so, not because of petitioner's behavior, but because respondent father's relatives lived out-of-state. Also unlike *In re Mason*, 486 Mich at 148-149, where the respondent was only months from his earliest release date, respondent father's earliest release date was more than four years away. Thus, a realistic opportunity at reunification was not probable because of respondent father's incarceration, not because of any failure of petitioner.

V. CONCLUSION

The trial court did not clearly err in finding that petitioner had established the statutory grounds for termination. There also was no plain error in the admission of alleged hearsay evidence or in petitioner's facilitation of respondent father's participation in the proceedings and in services. We affirm.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan