

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 27, 2012

In the Matter of HALL, Minors.

No. 308095
Berrien Circuit Court
Family Division
LC No. 2010-000014-NA

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Respondent father appeals as of right the trial court's order terminating his parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

I. TERMINATION OF PARENTAL RIGHTS UNDER MCL 712A.19b

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. MCL 712A.19b(5); *In re Sours*, 459 Mich 624, 632; 593 NW2d 520 (1999). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000), see also MCL 712A.19b(5). We review for clear error a trial court's factual findings, its determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence, and its best interests determinations. MCR 3.977(K); *In re Trejo*, 462 Mich at 356-357. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

In this case, respondent's parental rights were terminated under MCL 712A.19b(3)(c)(i), (g), and (j), which provide:

(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.

* * *

(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.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

Focusing on the statutory ground under MCL 712A.19b(3)(g), the evidence showed that respondent failed to provide proper care or suitable alternate custody for his children, DH and CH, and there was no reasonable expectation that the situation would be rectified within a reasonable amount of time. Respondent's care of the children before his incarceration was fraught with addiction, domestic violence, and financial insecurity. In fact, the incident that led to his incarceration involved respondent kidnapping the mother of the children, two of her friends, and four children (including DH and CH). During this incident, respondent, while wielding a knife, forced all of them into a truck and stated, "We are going as far south as this money will take us and then I'm going to kill you all." Respondent's plans were thwarted when the mother escaped at the gas station and was able to contact the police. Further, when he became incarcerated, respondent left the children in the neglectful care of their similarly addicted mother and was unable to name a suitable, available alternate caretaker for them at any time during the proceeding.

Respondent argues on appeal that the evidence was not sufficient to show he would be unable to rectify the conditions of adjudication and provide proper care for the children within a reasonable time. He claims that, as in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), petitioner failed to provide adequate reunification services and consequently there was lack of information about him on which to base termination. He argues that he was complying with services offered by the prison and that the caseworker's opinion that he would require 9 to 12 months of services following his release was an unproven estimate. He argues that the trial court's termination of his parental rights was improperly based on his past poor decisions and current incarceration. We disagree.

This case is distinguishable from *In re Mason*. In *In re Mason*, the Supreme Court found that the trial court and DHS's failure to secure Mason's presence at the hearings, along with DHS's *complete abandonment* of its statutory duty to involve Mason in the reunification process, had prevented Mason's meaningful participation in the proceedings. *Id.* at 152-160. Unlike respondent Mason, respondent here communicated with petitioner and was provided a treatment plan for 14 months and actively participated in hearings for 12 months of the proceeding. Although respondent willingly completed prison classes as they became available, clear and convincing evidence showed that his release was not imminent but that he would remain incarcerated for at least 11 more months. In addition, the caseworker's testimony that petitioner would require 9 to 12 months of services after his release before it would consider reunifying the

children with him was not merely an estimate or conjecture, but based on the following facts: (1) respondent had not yet received a psychological evaluation to determine his mental and emotional health because the prison did not offer an evaluation; (2) he had not completed and returned the questionnaire the caseworker had sent him more than a year earlier, requesting him to outline his plan to care for the children; (3) he had been not only neglectful but destructive as a parent when he had resided with the children; (4) he was an addict who needed to demonstrate a significant period of sobriety once he was released into society; (5) he had engaged in unusually violent behavior and needed to demonstrate an ability to manage his anger in relationships with others while out in society; and (6) he needed time to jointly counsel with and establish a relationship with the children, particularly DH who was diagnosed with reactive attachment disorder and was afraid of respondent. Respondent's assertion that his violent behavior during the kidnapping incident was an aberration in character is belied by the statement of the children's mother that he had often abused her and her friend's statement that she had observed respondent's anger before.

Given evidence of his behavior before incarceration, the significant hurdles he needed to overcome before resuming custody of the children, the fact that DH and CH had been in foster care 23 months by the time of the termination hearing and were not placed with family members while he was incarcerated, and that respondent's release was still at least 11 months away, the trial court did not clearly err in finding an additional period of 1-1/2 to 2 years in foster care was an unreasonable time for the children to wait for the uncertain possibility of reunification with respondent. Sufficient evidence clearly showed there was no reasonable expectation respondent would demonstrate within a reasonable time that he had rectified the conditions of adjudication and become able to properly parent the children. Therefore, the trial court properly terminated his parental rights under MCL 712A.19b(3)(g).

Because we conclude that termination of respondent's parental rights was proper under MCL 712A.19b(3)(g), we need not address the propriety of termination under the other sections that the trial court relied upon. See *In re Trejo*, 462 Mich at 364-365.

II. DUE PROCESS

Respondent next argues that his right to procedural due process was violated when petitioner and the trial court failed to notify him of the proceeding and secure his physical or telephonic presence at hearings in accord with MCR 2.004 for the first several months of the proceeding, and failed to timely provide him a case service plan or any reunification services, but merely relied on services available through the Michigan Department of Corrections. Respondent did not raise this issue in the trial court, and an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). An error affects substantial rights if it causes prejudice, meaning that it affects the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). In this case, the evidence showed that petitioner waited eight months to provide respondent a parent agency

treatment plan, and that the trial court failed to secure his presence at some hearings early in the proceeding in accord with MCR 2.004, but the errors did not prejudicially affect the outcome of the proceeding.

MCR 2.004 requires the court and the petitioning party to arrange for telephonic communication with incarcerated parents whose children are the subject of child protective actions. The express purposes of the rule include ensuring “adequate notice . . . and . . . an opportunity to respond and to participate” [*In re Mason*, 486 Mich at 152-153.]

Here, the record showed that the trial court ordered respondent’s telephonic presence at a conference held between the preliminary hearing and adjudication trial pursuant to that court rule, but later failed to do so for the adjudication trial and next two review hearings, which took place over approximately the first 9 of the 23 months of this proceeding. The trial court’s failure to notify respondent for these initial hearings was erroneous. The adjudication trial was a key hearing at which the trial court assumed jurisdiction over the children and entered the initial dispositional order, and the next two hearings were review hearings at which the trial court ordered respondent to comply with the case service plan. Despite not being notified to participate at these hearings, however, respondent later received copies of all case service plans admitted during the hearings he missed, and he also received copies of the orders issued as a result of those hearings. Thus, despite the trial court’s erroneous failure to provide notice to respondent at the beginning of the proceedings, respondent was subsequently provided a meaningful opportunity to participate in the proceeding.

Respondent does not show how the outcome of adjudication would have been different had he been present at the initial hearings. It was undisputed that he was incarcerated and unable to care for his children, that there was no suitable relative caretaker for them, and that respondent supported the plan for reunification with the children’s mother. The dispositional orders merely required respondent to comply with and benefit from his then non-existent treatment plan. Respondent was present and represented by counsel at the next six hearings for a period of one year, and the trial court repeatedly entered similar orders requiring respondent’s compliance with and benefit from his treatment plan without his objection. Respondent participated actively in those six hearings, asked questions of the trial court, had an opportunity to present evidence in his favor, and was allowed to confer privately with counsel. As a result, we find no plain error as it is clear respondent’s substantial rights were not affected. On the record before us, respondent’s due-process claim must fail.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly