

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
October 16, 2012

In the Matter of HUGHES, Minors.

No. 309415  
Van Buren Circuit Court  
Family Division  
LC No. 08-016181-NA

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Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Respondent father appeals the trial court's order that terminated his parental rights pursuant to MCL 712A.19b(3)(g). For the reasons set forth below, we affirm.

The trial court did not err in finding that petitioner established the statutory ground for termination by clear and convincing evidence. MCR 3.977(K); *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The evidence showed respondent had a history of criminality and was imprisoned for the first seven months of his daughter's life in 2006, and thereafter lived with her only briefly until his 2007 incarceration for domestic violence. Respondent was incarcerated for approximately half of his daughter's life and his infant son was removed from his custody because respondent physically assaulted the child's mother in the hospital two days after the infant was born. The children were placed in the care of their maternal grandparents, where they remained for the next three years and nine months.

Respondent admitted he had a 15-year history of heroin use, and during the first year of these proceedings he continued to use heroin, he failed to participate in services, and he continued to repeatedly commit retail fraud. He made no progress toward reunification during the first year, and was incarcerated for the final two years and nine months of the proceedings on a one to six-year sentence. Respondent completed parenting classes, an anger management class, and educational services in prison, but was denied parole twice for misconduct, and committed another misconduct six weeks before the termination hearing.

The trial court acknowledged respondent's participation in services in prison, but found respondent had failed to provide proper care or custody for the children, and that there is no reasonable expectation he would be able to do so within a reasonable time in light of respondent's (1) failure to provide care for the children, (2) failure to make progress toward reunification during the time he was out of prison, (3) long history of criminality, (4) failure to reform even after repeated incarcerations and the removal of his children, (5) serious long-term heroin addiction for which previous treatment had been unsuccessful, (6) nearly three-year

imprisonment during the proceeding, (7) recent, additional misconduct, and (8) time needed upon release to demonstrate sobriety and ability to abide by the law.

Respondent cites our Supreme Court's statement in *In re Mason*, 486 Mich 142, 163-164; 782 NW2d 747 (2010), that the children's placement with relatives weighs against termination. However, as noted, respondent did not place the children with the maternal grandparents to fulfill his duty to provide custody while he was in prison. Rather, a year before he became incarcerated, the children were involuntarily separated from him and he was prohibited from having unsupervised contact with them because he had failed to provide them proper care, was addicted to heroin, and was violent. Moreover, the trial court considered as a fact the children's placement with the maternal grandparents, it considered establishing a guardianship, and also received evidence that the grandparents and respondent did not have a good relationship.

Respondent claims the trial court erred in terminating his parental rights solely due to his current incarceration and past violence and criminality, again relying on *Mason*, 486 Mich at 163-164. He argues petitioner had little contact with the Michigan Department of Corrections and therefore could not accurately assess whether he would reoffend or relapse into heroin addiction upon his release. Respondent's case is not comparable to *Mason*, in which the caseworker failed to have any contact with respondent father Mason or provide him case service plans for the majority of the proceedings. *Mason*, 486 Mich at 150. Here, respondent received treatment plans and participated in every hearing. The evidence showed he refused to communicate with the caseworker during most of the proceedings, so any lack of information was attributable to him rather any lack of effort by the caseworker. Regardless, respondent had the opportunity to present evidence throughout the proceeding on his own behalf, and to testify at the termination hearing about services he completed in prison. The trial court noted his efforts, but found "there is no reason for this Court to believe that [respondent] will suddenly benefit from the most recent classes he has taken in prison when serving time in prison on at least three separate prior episodes has not changed his behavior." The trial court did not clearly err in terminating respondent's parental rights under § 19b(3)(g).

Respondent also claims that the trial court lacked subject matter jurisdiction to conduct a hearing on the termination petition, and/or that the termination order was barred by *res judicata*. At the conclusion of the permanency planning hearing, the trial court entered an order dated April 6, 2011, finding that neither respondent nor the children's mother was able to parent the children now or in the future, and that "a guardianship be established" for the minor children with the maternal grandparents. The prosecuting attorney, on behalf of petitioner, thereafter filed a termination petition on April 28, 2011. After considering briefs by the parties regarding whether the prosecutor possessed authority to file a termination petition when a juvenile guardianship had been ordered by the trial court, the court entered an order on September 13, 2011 allowing the termination petition, stating that it had not yet held a review hearing and finding under MCL 712A.19a(10)<sup>1</sup> that it retained subject matter jurisdiction over the children in

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<sup>1</sup> MCL 712A.19a(10) provides,

the child protective proceeding until both a guardian was appointed and a review hearing was held. It conducted the termination hearing on December 13, 2011, and terminated the parental rights of respondent and the children's mother on February 10, 2012.

Whether the trial court possessed subject matter jurisdiction to conduct a termination hearing and terminate respondent's parental rights is a question of law, reviewed de novo, *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), as is the question whether the doctrine of *res judicata* bars a subsequent action, *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

The subject matter of a child protective proceeding is the child. *In re Gillespie*, 197 Mich App 440, 442; 496 NW2d 309 (1992). It was uncontroverted that the trial court assumed jurisdiction over the children in this child protective proceeding in 2008 pursuant to MCL 712A.2(b)(1) and/or (2), and the parties do not dispute the trial court's authority to establish a juvenile guardianship pursuant to MCL 712A.19a(6)-(7)<sup>2</sup> and MCR 3.979.<sup>3</sup> The trial court

The court's jurisdiction over a juvenile under section 2(b) of this chapter shall be terminated after the court appoints a guardian under this section and conducts a review hearing under section 19 of this chapter, unless the juvenile is released sooner by the court.

In turn, MCL 712A.19(6) provides the requirements for such a review hearing:

At a review hearing under subsection (2), (3), or (4), the court shall review on the record all of the following:

- (a) Compliance with the case service plan with respect to services provided or offered to the child and the child's parent, guardian, custodian, or nonparent adult if the nonparent adult is required to comply with the case service plan and whether the parent, guardian, custodian, or nonparent adult if the nonparent adult is required to comply with the case service plan has complied with and benefited from those services.
- (b) Compliance with the case service plan with respect to parenting time with the child. If parenting time did not occur or was infrequent, the court shall determine why parenting time did not occur or was infrequent.
- (c) The extent to which the parent complied with each provision of the case service plan, prior court orders, and an agreement between the parent and the agency.
- (d) Likely harm to the child if the child continues to be separated from the child's parent, guardian, or custodian.
- (e) Likely harm to the child if the child is returned to the child's parent, guardian, or custodian.

<sup>2</sup> The relevant portions of MCL 712A.19a(6) and (7) provide,

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(6) If the court determines at a permanency planning hearing that a child should not be returned to his or her parent, the court may order the agency to initiate proceedings to terminate parental rights. Except as otherwise provided in this subsection, if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights. The court is not required to order the agency to initiate proceedings to terminate parental rights if 1 or more of the following apply:

(a) The child is being cared for by relatives.

\* \* \*

(7) If the agency demonstrates under subsection (6) that initiating the termination of parental rights to the child is clearly not in the child's best interests, or the court does not order the agency to initiate termination of parental rights to the child under subsection (6), then the court shall order 1 or more of the following alternative placement plans:

(a) If the court determines that other permanent placement is not possible, the child's placement in foster care shall continue for a limited period to be stated by the court.

(b) If the court determines that it is in the child's best interests based upon compelling reasons, the child's placement in foster care may continue on a long-term basis.

(c) Subject to subsection (9), if the court determines that it is in the child's best interests, appoint a guardian for the child, which guardianship may continue until the child is emancipated.

<sup>3</sup> Relevant portions of MCR 3.979 provide,

(A) Appointment of Juvenile Guardian; Process. If the court determines at a posttermination review hearing or a permanency planning hearing that it is in the child's best interests, the court may appoint a juvenile guardian for the child pursuant to MCL 712A.19a or MCL 712A.19c.

(1) Under MCR 3.979(A), the court shall order the Department of Human Services to:

(a) conduct a criminal record check and central registry clearance of the residents of the home and submit the results to the court within 7 days; and

recognized that before its § 2(b) jurisdiction terminated and the guardianship became effective, certain procedures must be followed. MCL 712A.19a(10) states that jurisdiction “shall” be

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(b) perform a home study with a copy to be submitted to the court within 28 days, unless a home study has been performed within the immediately preceding 365 days, in which case a copy of that home study shall be submitted to the court.

(2) If a child for whom a juvenile guardianship is proposed is in foster care, the court shall continue the child’s placement and order the information required above about the proposed juvenile guardian. If the information required above has already been provided to the court, the court may issue an order appointing the proposed juvenile guardian pursuant to subrule (B).

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(B) Order Appointing Juvenile Guardian. After receiving the information ordered by the court under subsection (A)(1), and after finding that appointment of a juvenile guardian is in the child’s best interests, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator. Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing. A separate order shall be entered for each child.

(1) Acceptance of Appointment. A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on a form approved by the state court administrator. The acceptance shall state, at a minimum, that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian’s authority, and will perform required duties.

(2) Letters of Authority. On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator. Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority, including but not limited to, not moving the domicile of the child from the state of Michigan without court approval.

(3) Certification. Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.

(4) Notice. Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian’s address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian’s last address on file shall be considered notice to the juvenile guardian.

terminated after the court appoints a guardian *and* conducts a review hearing under section 19 of this chapter . . .” (emphasis added). The word “shall” requires mandatory action. See *Mich Ed Ass’n v Secretary of State*, 489 Mich 194, 218; 801 NW2d 35 (2011) (quotation omitted) (“The use of ‘shall’ in a statute generally ‘indicates a mandatory and imperative directive.’”). The use of the conjunction “and” means “with; as well as; in addition to[.]” *Gen Motors Corp v Dep’t of Treasury*, 290 Mich App 355, 390; 803 NW2d 698 (2010) (quotation omitted). Thus, under the statute, jurisdiction only mandatorily terminates where the court appoints a guardian as well as conducts the required review hearing. The appointment was not complete and no review hearing was held.

The trial court noted in its April 6, 2011 order that, pending completion of the guardianship, the children remained temporary court wards and respondents must continue to participate in services. MCR 3.979(A)(1)(a) and (b) required a criminal record check, central registry check, and home study for the prospective guardians, which had been completed previously for the maternal grandparents. MCR 3.979(B)(1)-(4), however, required the filing of a written order appointing the grandparents as guardians and their acceptance of appointment on state-approved forms, and that the trial court issue them certified letters of authority. There is no evidence in the lower court record that those documents were executed, and respondent has not submitted those documents on appeal. Cross-examination of the caseworker during the termination hearing established that petitioner had mailed paperwork to Lansing to begin the process of establishing a guardianship, but there is no indication in the lower court record or provided by respondent on appeal that approval was received by the time of the December 13, 2011 termination hearing, and the guardianship requested was a subsidized one, which the caseworker testified took longer to process.

The evidence shows the appointment of guardianship had not been completed and a review hearing had not been held when the termination petition was filed. Therefore, the trial court correctly interpreted MCL 712A.19a(10) as providing that it still possessed § 2(b) jurisdiction over the children. Therefore, it had subject matter jurisdiction and authority to conduct a hearing on the termination petition, and to terminate respondents’ parental rights.

We further hold that the doctrine of *res judicata* does not apply here because the guardianship had not been completed when the prosecutor filed the termination petition, or at the time of the termination hearing. The doctrine of *res judicata* bars a subsequent action between the same parties when facts or evidence is essentially the same, *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006), but here there was no subsequent action. The termination hearing was a continuation of the child protective proceeding that commenced in 2008.

Lastly, respondent cites *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) and claims that he was denied due process, but he presents no facts to support that claim. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Regardless, respondent failed to preserve this issue for review. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 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). There is no indication in this case that any error similar to that in *Rood* occurred or affected respondent's substantial rights or the outcome of the proceeding.

Affirmed.

/s/ Henry William Saad  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly