

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TIMOTHY A. GENTRY, III, and
JULIA BREANN MACKE GENTRY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JAMANIQUE BRYANT,

Respondent,

and

TIMOTHY A. GENTRY,

Respondent-Appellant.

UNPUBLISHED
February 26, 2009

No. 287137
Wayne Circuit Court
Family Division
LC No. 06-453960-NA

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Respondent father appeals as of right from the trial court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(a)(ii), (c)(i), and (g). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

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. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). If a statutory ground for termination is established, the trial court must terminate parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5)¹; *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The trial court's

¹ MCL 712A.19b(5) was amended, effective July 11, 2008, to require that the trial court make an affirmative finding that termination of a parent's parental rights is in the best interest of the child. 2008 PA 199. The amended statute does not affect the instant case because the termination order was entered on July 10, 2008.

decision terminating parental rights is reviewed for clear error. MCR 3.977(J); *Trejo, supra* at 355-357; *Sours, supra* at 632-633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re Miller* 433 Mich 331, 337; 455 NW2d 161 (1989). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller, supra* at 337.

There was clear and convincing evidence to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(a)(ii) because respondent deserted Timothy and Julia for a period exceeding 91 days. He never visited or contacted his children since they were placed in protective care in April 2006. He did not seek custody of Timothy and Julia, provide financial support for them, telephone them, or send letters asking about their welfare. He never inquired into their medical needs. He also failed to attend court hearings via speaker telephone, maintain contact with petitioner, or complete any court ordered services. Thus, termination of parental rights under MCL 712A.19b(3)(a)(ii) was not in error.

Termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i) and (g) was also appropriate. The conditions that led to the court's assumption of jurisdiction on November 3, 2006 included medical neglect, improper supervision, physical abuse, and abandonment of Timothy and Julia. Because these conditions were never rectified, respondent was unable to provide proper care and custody for the children. Respondent never sought therapy to address issues of physical abuse, or verified employment to demonstrate that he could financially support Timothy and Julia. He also never visited the children which demonstrated that he was not committed the well-being and care required by two children with special medical needs like Timothy and Julia. Respondent's noncompliance with the treatment plan demonstrated that his neglect of Timothy and Julia would continue because he failed to show a willingness to change. *In re Miller*, 182 Mich App 70, 83; 451 NW2d 576 (1990). There is no evidence that respondent is able to provide proper care and custody of Timothy and Julia, and because he never addressed the issues that brought his children into protective care, termination of his parental rights under MCL 712A.19b(3)(c)(i) and (g) was proper.

Respondent argues that petitioner failed to make reasonable efforts to provide him services because it did not facilitate a home study in Mississippi where he lived. Respondent has not provided legal authority to establish that the petitioner's failure to make reasonable efforts alone establishes a basis for relief. MCL 712A.18f(4). Rather, the absence of reasonable efforts by the petitioner has only been relevant to assessing whether the statutory grounds for termination were established. See, e.g., *In re Newman*, 189 Mich App 61, 65-68; 472 NW2d 38 (1991). The court did not clearly err in terminating respondent's parental rights under three statutory bases because he failed to take advantage of the services offered to him and not because of petitioner's failure to make efforts. Moreover, from February 2007 through April 2008, he was unavailable by telephone, attempts to reach him were met with no response, and he never contacted petitioner. Petitioner could not have performed a home study in Mississippi because respondent's whereabouts were unknown. Further, although respondent did not attend any hearings in 2007 or 2008, he was represented by counsel at every relevant review hearing and his counsel never requested specific services for him.

Respondent further contends that his due process rights to proper notice and a hearing were violated. He also argues that his attorney was not present. Because respondent did not

raise this due process issue in the trial court, the issue is not preserved and review is limited to plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Petitioner requested all forms of notice to respondent, including notice by publication, because respondent's whereabouts were unknown. The court ordered notice by personal service and certified mail to respondent's last known address in Mississippi, and ordered notice by publication in case the address they had for him was incorrect. MCL 712A.13 provides for service of process by alternative methods, including publication, to confer jurisdiction on the court, as long as the trial court has first determined that personal service is impracticable. *In re Adair*, 191 Mich App 710, 714; 478 NW2d 667 (1991). In this case, the trial court authorized notice by publication because neither petitioner nor respondent's attorney had been able to reach respondent for six months at the address they had for him. In granting substituted service by publication, the trial court proceeded with jurisdiction and respondent was properly notified of the proceedings. Thus, respondent's claim regarding a violation of his due process rights and lack of notice is without merit.

Additionally, respondent contends he was not represented by counsel. A review of the trial court's record shows that respondent was represented by counsel at every hearing except for the medical authorization hearing on March 27, 2007, and the permanency planning hearing on April 30, 2007. This Court has explicitly recognized that the United States Constitution provides a right to counsel in parental rights termination cases. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000) ("The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel"). However, a hearing held without counsel can be harmless error where testimony was later taken at the permanent custody hearing and counsel was present. *In re Hall*, 188 Mich App 217, 223, 469 NW2d 56 (1991). Reversal is only warranted when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). While the appearance of counsel at every hearing would have better served respondent's need for representation and more fully protected his constitutional rights, the process afforded minimally satisfied the United States Constitution. In this case, where respondent was represented by counsel throughout the majority of the case, and the outcome of the case would not have been different had respondent's counsel appeared for every hearing, reversal is not warranted. The April 30, 2007 hearing discussed only the case of the children's mother and the March 2007 medical authorization hearing only addressed whether the court should authorize medication for Timothy. Therefore, respondent failed to establish that he was denied the right to the effective assistance of counsel.

Finally, the trial court did not clearly err in its best interests determination. There was no evidence in the record that it was not in the children's best interests to terminate respondent's parental rights. To the contrary, the evidence established there could not have been a significant bond between respondent and the children because respondent had not seen or had any contact with Timothy or Julia since prior to their placement in protective care in April 2006. It is not in the children's best interests to be reunited with a parent who has demonstrated a lack of interest and commitment to them during the entire duration of the case.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens