

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 6, 2011

In the Matter of J. RUGG, Minor.

No. 302117
Clinton Circuit Court
Family Division
LC No. 09-021612-NA

Before: SHAPIRO, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right from an order of terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

Respondent first argues that the trial court erred when it allowed Mercy Temple to testify as a rebuttal witness despite the fact that the court's witness sequestration order was violated. We disagree. This Court reviews a decision regarding the remedy for a violation of a sequestration order for an abuse of discretion. *People v Meconi*, 277 Mich App 651, 654-655; 746 NW2d 881(2008).

The purposes of sequestering witnesses are to prevent a witness from coloring his or her testimony to conform to the testimony of another witness and to aid "in detecting testimony that is less than candid." *Id.* There are three recognized sanctions that are available to a trial court to remedy a violation of a sequestration order: (1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying. *Id.* However, the exclusion of a witness's testimony is an extreme remedy that should be sparingly used. *Id.*

Here, petitioner's case worker violated the sequestration order by discussing respondent's testimony with Temple before Temple testified. However, there was no indication that the case worker intentionally violated the sequestration order with the purpose of affecting Temple's testimony. Furthermore, the violation occurred during a bench proceeding, and the court was capable of considering the fact that Temple had been advised of respondent's testimony when determining Temple's credibility. *Id.* at 655. Under these circumstances, the trial court did not abuse its discretion when it utilized one of the recognized sanctions of permitting the witness, Temple, to testify, while allowing cross-examination regarding the violation of the sequestration order. We further note that any error in the court's handling of the sequestration violation would have been harmless where the record contained clear and convincing evidence of the statutory factors even without Temple's testimony. MCR 2.613(A).

Respondent next argues that the trial court erred when it determined that the statutory factors for termination were proven by clear and convincing evidence. We disagree.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). This Court reviews that finding under the clearly erroneous standard. MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). 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 BZ*, 264 Mich App 286, 296-697; 690 NW2d 505 (2004).

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(i),(3)(g), and (3)(j), which provide as follows:

(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.

* * *

(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.

The court acquired jurisdiction over the child in October 2009 based on respondent's inability to properly care for the child because of her drug use. The record contained evidence that this condition continued to exist at the time of the termination hearing in December 2010. There was evidence that respondent used drugs as recently as November 2010. Furthermore, at the time of the termination hearing, respondent had not completed substance abuse treatment to resolve her serious and long-standing substance abuse problems. The evidence showed a pattern of respondent using drugs, becoming incarcerated, and relapsing upon her release. We find no

clear error in the trial court's finding that the conditions of the adjudication continued to exist at the time of the termination hearing and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time. Therefore, the trial court did not clearly err in finding that the requirements of MCL 712A.19b(3)(c)(i) were established.

Respondent also alleges that she was not afforded services by DHS because of her being incarcerated. Specifically, respondent contends that it was incumbent upon DHS to provide respondent with intensive inpatient substance-abuse treatment. However, respondent's reliance on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), is misplaced. Respondent was given a case service plan, but she did not comply with it during the periods she was not in prison, and respondent has not shown that petitioner did not give her an opportunity to participate in the proceedings.

With regard to MCL 712A.19b(3)(g) and (j), respondent was in jail four times during the pendency of this case, the child was five to seven immunizations behind schedule when she was taken into the court's custody, and respondent repeatedly left the child with respondent's mother without proper legal arrangements for the child's care, such as a power of attorney or medical authorization. Further, respondent almost died from a heroin overdose in March 2010, and she had not yet resolved her substance abuse problem by the time of the termination hearing. Respondent also did not have any housing established for after her releases from jail and the rehabilitation center. Finally, respondent was unemployed throughout the case and failed to substantially comply with the case service plan when she was out of jail. "Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being." MCR 3.976(E)(2). On the basis of this evidence, we find no clear error in the trial court's finding that the statutory grounds for termination set forth in MCL 712A.19b(3)(g) and (j) were proven by clear and convincing evidence.

Again, contrary to respondent's argument, this case is clearly distinguishable from *In re Mason*, in which the court effectively terminated the respondent's parental rights solely because he was incarcerated. *In re Mason*, 486 Mich at 146. Here, it was respondent's pattern of drug use and incarceration, as well as her failure to comply with services while she was out of jail, that led to the termination decision.

We therefore affirm the trial court's order terminating respondent's parental rights to the child.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray