

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 18, 2012

In the Matter of RIFFEY/WHITE/HURT, Minors.

No. 310421
Wayne Circuit Court
Family Division
LC No. 09-488360-NA

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to his minor child pursuant to MCL 712A.19b(3)(c)(i), (g), and (h). We affirm.

Termination of parental rights requires a finding that at least one of the statutory grounds under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010); *In re B and J*, 279 Mich App 12, 18; 756 NW2d 234 (2008). The trial court must then order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). Appellate courts review "for clear error both the trial court's decision that a ground for termination of parental rights has been proved by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interests." *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003) (citations omitted). "A circuit court's decision to terminate parental rights 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.* at 209-210 (citations omitted).

The evidence in this case is largely undisputed. The principal conditions that led to the 2009 adjudication were respondent's admission that he sold crack cocaine and marijuana out of the home he shared with his child, then nine months old, and the child's mother. Respondent also admitted that he used marijuana daily and that the home had significant hygiene issues. Respondent was incarcerated shortly after the child's involuntary removal. Respondent pleaded guilty to assault with intent to do great bodily harm less than murder and felony firearm and was sentenced to seven to 12 years' incarceration for both crimes. His earliest release date is in June 2016, at which time his son will be eight years old. Respondent remained incarcerated throughout the approximately three years that the case proceeded, although he fully participated in the case proceedings by speakerphone and was represented by court-appointed counsel. The child was placed with his paternal grandmother shortly after his removal and remained in her care for nearly three years while the trial court gave the child's mother repeated opportunities to

comply with and benefit from a treatment plan. In 2009, petitioner prepared a treatment plan for respondent that included participating in parenting classes and individual counseling, acquiring and maintaining safe and suitable housing, and securing a legal income source. However, petitioner was unable to directly provide respondent with services because of his incarceration. Moreover, the three correctional facilities in which respondent was incarcerated, were unable to provide services until respondent was within one year of his release date.

MCL 712A.19b(3)(g) provides for termination of parental rights if “[t]he 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.” Here, the trial court properly concluded that respondent was unable to provide proper care and custody of his child. Respondent had not provided his son with a safe and suitable home before his incarceration. Respondent was using and selling drugs out of the home he shared with his child. Respondent did nothing to remove his child from the care of an unfit mother while living in deplorable conditions. He did not have any legal source of income. Further, the record indicates that respondent made no specific arrangements for his son’s care at the time of the child’s involuntary removal and respondent’s incarceration. Respondent was ineligible for a prison work training program. It was reasonable to conclude that respondent was unlikely to secure employment and achieve financial stability upon his release from prison within a reasonable time. Accordingly, the trial court did not clearly err in concluding that MCL 712A.19b(3)(g) was proven by clear and convincing evidence.

The proofs similarly showed that the trial court did not clearly err in terminating respondent’s parental rights pursuant to MCL 712A.19b(3)(h). It is undisputed that respondent was serving a seven to 12-year sentence and would remain in prison for more than two years. Accordingly, there was ample evidence to support the trial court’s conclusion that the child would be “deprived of a normal home for a period exceeding [two] years, and [respondent] has not provided for the child's proper care and custody . . .” MCL 712A.19b(3)(h).

Once at least one statutory ground for termination is established the trial court must order termination of parental rights if it finds that termination is not in the child’s best interests. MCL 712A.19b(5). Because termination was proper under MCL 712A.19b(3)(g) and (h), it is unnecessary to review the propriety of termination under MCL 712A.19b(3)(c)(i). *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009) (citations omitted) (“Having concluded that at least one ground for termination existed, we need not consider the additional grounds on which the trial court based its decision.”).

Respondent argues for the first time on appeal that the trial court did not comply with *Mason*, 486 Mich at 142, and terminated his rights solely because of his incarceration. Additionally, respondent asserts that petitioner did not make reasonable efforts in implementing its own treatment plan. He did not challenge petitioner’s reunification efforts in the trial court at the 10 dispositional review hearings or the termination hearing. When a respondent fails to raise an issue in the lower court, it is not properly preserved for appellate review and this Court reviews the issue only for “plain error affecting substantial rights.” *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

Our Supreme Court has explained that “[t]he mere present inability to personally care for one’s children as a result of incarceration does not constitute grounds for termination.” *Mason*, 486 Mich at 160. Further, “[t]he state is not relieved of its duties to engage an absent parent merely because that parent is incarcerated.” *Id.* at 152. Respondent argues that the trial court failed to consider that the child was being well-provided for by a relative. Respondent relies heavily on that fact that his son was placed with the paternal grandmother and, under a proposed permanent placement plan, would likely remain in her care until respondent’s release from prison in 2016. He notes that no evidence was presented that respondent ever abused his child or any other sibling of his child. Thus, respondent contends, the trial court erred in finding that respondent had failed to provide his son with proper care and custody. This claim is meritless. As the Court in *Mason* explained, an incarcerated parent may be able to provide proper care and custody for his or her child if the parent voluntarily places the child with relatives. *Id.* at 162. However, this case is markedly different from *Mason*. Here, although the child was ultimately placed with respondent’s mother after the child’s involuntary removal, there was no evidence, as presented in *Mason*, that respondent requested or facilitated the placement.

Moreover, in *Mason*, the DHS failed to secure the respondent’s presence at the hearings, thus depriving him of a meaningful participation in the proceedings, and completely “abandoned its statutory duties to involve him in the reunification process.” *Mason*, 486 Mich at 152-160. Unlike the respondent in *Mason*, respondent here communicated with petitioner and was provided a treatment plan and actively participated in hearings for almost three years of the proceeding. Petitioner also contacted a prison liaison to determine the services available to respondent during his incarceration. Petitioner could not provide respondent with services because of his voluntary acts, which caused his imprisonment. Also, petitioner was unable to provide services for reasons beyond petitioner’s control, namely, eligibility restrictions based on respondent’s release date, as mandated by the correctional facilities where respondent was incarcerated. Accordingly, the trial court did not plainly err in finding that petitioner satisfied its statutory duty to make reasonable reunification efforts. Reunification opportunities were limited because of respondent’s incarceration, not because of any failure of petitioner. Additionally, the court properly considered that respondent had issues with providing his child with care and custody before his incarceration by using and selling drugs while living in squalor. Also, unlike in *Mason* where the respondent was only months from his earliest release date and had a job waiting for him upon his release, *id.* at 148-149, respondent’s earliest release date was more than four years away and his employment prospects were dim.

Further, the trial court properly considered the child’s young age and respondent’s lengthy prison term when weighing whether to terminate respondent’s parent rights, which would allow the child to be adopted, or place him under a guardianship. In reviewing the record as a whole, the trial court, in keeping with the directives of *Mason*, did not base its decision to terminate respondent’s parental rights solely on his incarceration. The proofs squarely support the trial court’s findings that respondent was unlikely to be able to properly care for the child within a reasonable time considering the child’s age.

Lastly, the evidence established that terminating respondent’s parental rights was in the child’s best interests. MCL 712A.19b(5). The evidence supported the trial court’s conclusion that the child needed permanency and stability and that it would be at least four years before respondent would be able to properly parent his child. Although the proofs showed that the child

regularly spoke with respondent on the phone and had received some cards and pictures from respondent, the caseworker testified that the child would likely not be able to recognize respondent out of a group of men. There was ample evidence that respondent would need to overcome significant hurdles to resume custody of his child, including benefiting from services that could be made available to him within one year of his release, being granted early parole in 2016, and achieving financial stability once he reentered society. Given these unknowns, considered with the fact that the child was only three years old at the time of the termination hearing and had been in foster care for almost three years, the trial court did not clearly err in finding an additional period of four years was an unreasonable time for the child to wait for the uncertain possibility of reunification with respondent. Also, the trial court properly considered evidence that the child was thriving in his paternal grandmother's care, and that she was willing to adopt the child, as a factor in determining the child's best interests. *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000). Accordingly, reviewing the record as a whole, we conclude that the trial court did not clearly err in finding that the existence of a tenuous parent-child bond was dwarfed by the child's needs for permanence and stability, which in turn was best achieved by terminating respondent's parental rights.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Donald S. Owens

/s/ Christopher M. Murray