

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
June 18, 2013

In the Matter of B. COLEMAN, Minor.

No. 313610
Kent Circuit Court
Family Division
LC No. 11-053800-NA

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Respondent-father appeals as of right the order terminating his parental rights to the minor child (d/o/b 3-30-2010) under MCL 712.19b(3)(a)(ii) (desertion for 91 or more days and failure to seek custody during that period) and (g) (failure to provide proper care or custody and no reasonable expectation to be able to do so within a reasonable time). We affirm.

The minor child lived with her mother and had not seen respondent for approximately one year at the time the proceedings began. On November 21, 2011, Child Protective Services (CPS) removed the child from her mother based on complaints of homelessness and substance abuse. The trial court held a preliminary hearing on November 23, 2011, and released the child back to her mother under petitioner's supervision. Respondent was not present, but he was represented by counsel at the hearing. Subsequently, after the child's mother had stopped participating in services and disappeared with the child, the child was located and taken into protective custody pursuant to court order. Petitioner filed an amended petition seeking removal of the child and termination of the mother's parental rights. A preliminary hearing on the amended petition was held on December 22, 2011, attended by respondent and his attorney, and the court authorized the petition, placing the child in foster care. The trial court also ordered supervised parenting time with respect to both parents, and it ordered a home study for potential placement of the child with respondent.¹ The allegations in the original petition and amended petition did not allege any abuse, neglect, or wrongdoing by respondent. Respondent and his counsel, as well as the mother and her attorney, appeared for the adjudication trial on December 27, 2011, at which time the court accepted a plea to the allegations in the amended petition.

¹ Petitioner had rejected possible placement of the child with respondent due to the fact that he had an extensive criminal history, but the trial court found that having a criminal history did not necessarily prohibit placement.

Given that the allegations pertained to the mother and that respondent did not have personal knowledge of several of the allegations, the trial court decided to have respondent simply indicate whether certain allegations were true to the best of his knowledge and belief. Respondent's counsel had initially suggested that respondent plead no contest to unknown allegations, but that was rejected by the court. In regard to the adjudication phase of the proceedings, the trial court took jurisdiction over the child on the basis of the parents' pleas. We note that, at this stage of the proceedings, respondent was not even technically a "respondent" under the court rules. MCR 3.903(C)(10) (a "respondent" is a "parent, guardian, legal custodian, or nonparent adult who is alleged to have committed an offense against a child"). And only a "respondent" can make a plea. MCR 3.971(A). Respondent, however, did not appeal the adjudication-jurisdiction ruling to this Court at the time, as permitted by right pursuant to MCR 3.993(A)(1).

Respondent and the child's mother were both provided a case service plan, a parent-agency treatment agreement, parenting time, and various service referrals. In September of 2012, petitioner filed a supplemental petition seeking termination of respondent's and the mother's respective parental rights to the child. Thereafter, the trial court terminated the parental rights of both parents.² As reflected in the record, respondent failed miserably with respect to compliance with the parent-agency treatment agreement, effectively deserting the child after January 2012, and he essentially refused or declined to take advantage of the many reunification services repeatedly offered to him by petitioner under the case service plan. And respondent continued to engage in criminal conduct during the proceedings, resulting in convictions for domestic violence and breaking and entering in 2012.

On appeal, respondent maintains that he was incarcerated at the time of the first preliminary hearing on November 23, 2011, and when a dispositional review hearing was conducted on March 20, 2012. He argues that he was denied his right to participate by telephone at those hearings. In *In re Mason*, 486 Mich 142, 152-153; 782 NW2d 747 (2010), our Supreme Court addressed a respondent's right to participate by telephone under MCR 2.004:

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. See MCR 2.004(A) to (C). The express purposes of the rule include ensuring "adequate notice . . . and . . . an opportunity to respond and to participate," in part by determining "how the incarcerated party can communicate with the court . . . during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional phone calls." MCR 2.004(E)(1) and (4). [Omissions in original.]

To comply with MCR 2.004, the court must offer a parent the opportunity to participate in each and every proceeding in a child protective action. *In re Mason*, 486 Mich at 154. "A court may not grant the relief requested by the moving party concerning the minor child if the

² The respondent-mother is not a party to this appeal.

incarcerated party has not been offered the opportunity to participate in the proceedings, as described in th[e] rule.” MCR 2.004(F); see also *In re Mason*, 486 Mich at 155.

Here, respondent simply states that “[t]he record indicates [that he] was incarcerated at the time of each hearing.” Even though respondent was often incarcerated, there is no citation to the voluminous record in support of this contention. With respect to the March 20, 2012, hearing, judgments of sentence and other records in the file indicate that respondent was not in jail on that date, but instead had been arrested and jailed for a 64-day period commencing on March 21, 2012. In regard to the November 23, 2011, hearing, respondent did indicate at the adjudication proceeding on December 27, 2011, that he had been in jail in November 2011 for 11 days, but he did not provide particular dates. And respondent then testified that he had been out of jail “going on two months” and “[c]lose to two months,” which, considering the December 27 hearing date, would place the incarceration period in October 2011 and certainly not at the end of November. That said, a letter from respondent’s attorney to the family division of the circuit court dated November 26, 2011, gave notice that the new address for respondent was the Kent County Jail, but this letter does not indicate that said address applied on November 23, 2011, or earlier. Given respondent’s complete failure to cite a supporting transcript page as required by MCR 7.212(C)(6), along with the apparent lack of record support for his assertions, we are not prepared to accept the factual basis for respondent’s argument. Accordingly, reversal is unwarranted.

Moreover, MCR 2.004(A)(2) provides that the rule applies to neglect and termination proceedings “in which a party is incarcerated *under the jurisdiction of the Department of Corrections* [DOC].” (Emphasis added.) The rule further requires DHS to contact the DOC to “confirm the incarceration and the incarcerated party’s *prison number and location*.” MCR 2.004(B)(1) (emphasis added). Thus, it would appear that MCR 2.004 does not even apply to persons incarcerated in a county jail, and the record, including respondent’s testimony, plainly reflects that the stints in which respondent was incarcerated in October/November 2011 and March 2012 were in the county jail, not prison. Our Supreme Court’s ruling in *In re Mason*, 486 Mich 142, concerned hearings during which time the respondent was incarcerated in prison and not jail.

Additionally, to the extent that plain-error analysis is applicable relative to this unpreserved issue, respondent, who was at all times represented by counsel and attended the adjudication and termination proceedings, along with review hearings, fails to demonstrate plain error affecting his substantial rights, i.e., error affecting the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).³

Respondent does not raise a challenge to the statutory grounds for termination or the trial court’s best interests finding. Nevertheless, we have reviewed the record and hold that the trial

³ We are a bit hesitant to apply plain-error analysis, given that the Supreme Court in *In re Mason*, 486 Mich 142, did not apply it despite the lack of preservation and considering that the language in MCR 2.004(F) clearly precludes a court from granting relief to the DHS in a termination case absent an offer to an incarcerated party to participate by phone.

court did not clearly err in finding clear and convincing evidence establishing a statutory ground for termination and in determining that such termination was in the child's best interests. MCL 712A.19b(3) and (5); MCR 3.977(K); *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id.*

The record supports the conclusion that respondent was noncompliant with service referrals, did not cooperate with caseworkers, and did not reduce any of his reunification barriers throughout the case. Respondent failed to attend most of his supervised parenting times and had not seen or contacted the child since January 25, 2012. The caseworker testified that respondent had not sought custody of the child since January 25, 2012, and had failed to provide her with proper care and custody. Also, "a parent's failure to comply with the parent-agency agreement[, as was the case here,] is evidence of a parent's failure to provide proper care and custody for the child." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Accordingly, the trial court's finding that MCL 712A.19b(3)(a)(ii) and (g) provided statutory grounds for termination does not leave us with a definite and firm conviction that a mistake was made. Moreover, the record supports a conclusion that the child was thriving in foster care. Conversely, the record indicates that the child had only minimal contact with respondent throughout her young life and was not bonded to him. The caseworker testified that delaying permanency any longer would be detrimental and that termination was in the child's best interests. There was no clear error relative to the best interests determination.

Respondent also argues that the trial court erred by finding that petitioner engaged in reasonable efforts in support of reunification. "Generally, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re HRC*, 286 Mich App at 462. However, although petitioner "has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

In this case, respondent received a case service plan and a parent agency treatment agreement, caseworker support, supervised parenting time, drug tests, referrals for parenting classes and employment services, and multiple home studies. Even during his periods of incarceration, respondent's caseworker mailed him multiple letters and a parenting skills curriculum and test. The record reflects that respondent did not make the necessary improvements to his home, did not obtain employment or provide verification that he attended Michigan Works, did not comply with parenting time, did not complete parenting classes, and did not maintain contact with caseworkers or keep appointments. Respondent failed to satisfy his "commensurate responsibility . . . to participate in the services that [were] offered." *Id.* The trial court did not err by finding that petitioner made reasonable efforts at reunification.

Finally, respondent argues that the trial court misapplied the one-parent doctrine⁴ to obtain jurisdiction where there were no material allegations made against respondent in the petition at the time of adjudication, and respondent contends that the trial court erred in using his “information and belief” plea as a basis of obtaining jurisdiction. We find it unnecessary to examine the substance of these arguments, considering that the arguments constitute a collateral attack regarding adjudication-jurisdiction matters. In *In re SLH, AJH, and VAH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008), this Court explained:

Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights. That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court. [Citations omitted.]

A challenge of a trial court's finding of jurisdiction in a child protective proceeding must be by direct appeal of the jurisdictional decision and not by collateral attack in an appeal from the order terminating parental rights. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993); *In re Powers*, 208 Mich App 582, 587-588; 528 NW2d 799 (1995). Given that respondent's arguments in the case at bar relate to the exercise of the trial court's jurisdiction, and considering that there was an adjudication hearing and ruling followed by a subsequent and separate termination trial and ruling, we reject respondent's arguments as they constitute an improper collateral attack.⁵

⁴ In *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002), this Court announced the doctrine, stating:

[T]he court rules simply do not place a burden on a petitioner like the FIA to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity. The family court's jurisdiction is tied to the children, making it possible, under the proper circumstances, to terminate parental rights even of a parent who, for one reason or another, has not participated in the protective proceeding.

⁵ We note that the constitutionality of the one-parent doctrine is going to be examined and determined by our Supreme Court in the near future. *In re Sanders Minors*, ___ Mich ___; 828 NW2d 391 (2013) (granting application for leave and directing the parties to address the constitutionality of the doctrine under due process and equal protection rights).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra