STATE OF MICHIGAN

IN THE COURT OF APPEALS

IN THE MATTER OF MACKENZIE RENE and KENNEDY ANN DUTCHER,

Minors.

Court of Appeals No: 284949

Lower Court No: 06-457,605

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DOMINIC JAMES DUTCHER,

Respondent-Appellant.

RECEIVED
2008 OCT -3 PM 4:11
COURT OF APPEALS
LANSING OFFICE
SANDRA SCHULTZ MENGEL
CHIEF CLERK

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

Michael A. Cox
Attorney General

B. Eric Restuccia (P49550)
Solicitor General
Counsel of Record

David Goodkin (P69338)
Assistant Attorney General
Attorneys for Dept of Human Services
PO Box 30758
Lansing, MI 48909
(517) 373-7700

Dated: October 3, 2008

Table of Contents

Counter-Statement of Basis of Jurisdiction of the Court of Appeals iv

Counters-Statement of Questions Involved v

Counter-Statement of Facts 1

Argument 9

I. To terminate Appellant's parental rights, a court need only find, by clear and convincing evidence, a single statutory ground for termination. Three possible grounds for termination are: (1) after six months, the conditions that led to the initial dispositional order continue to exist and are not likely to be fixed within a reasonable time considering the child's age; (2) the parent, regardless of intent, fails to provide for proper care or custody of the child and there is no reasonable chance he will be able to within a reasonable time considering the child's age; and (3) there is a reasonable likelihood, based on the parent's conduct, that the child would be harmed if returned to the home of the parent. Appellant's children, initially ages two and four, were removed due to substance abuse and neglect. Where, 19 months after the children's removal, Appellant was using heroin, had been incarcerated for breaking and entering, had no home or income, the trial court properly found that the Department established, by clear and convincing evidence, at least one ground for termination. 9

A. Standard of Review 9

B. Preservation of Issues 9

C. Analysis 10

1. MCL 712A.19b(3)(c)(i) 10

2. MCL 712A.19b(3)(g) 11

3. MCL 712A.19b(3)(j) 12

II. Once a statutory ground for termination of parental rights has been met, a parent's rights must be terminated, unless doing so would not be in that child's best interests. Appellant's children, initially ages two and four, were removed due to substance abuse and neglect. During the 19 months following their removal, the children remained stable and well-cared for in foster care, while Appellant engaged in substance abuse, committed a breaking-and-entering crime (for which he was incarcerated), and possessed no legal income or suitable housing. The trial court did not clearly err when it found that termination of Appellant's rights, thereby allowing for stability and permanency, as opposed to lingering on indefinitely in foster care, was in the children's best interests... 13

A. Standard of Review 13

B. Preservation of Issues 13

C. Analysis 14

Statement Why Oral Argument Should Not Be Heard 16

Conclusion and Relief Sought 17

Index of Authorities

Page

Cases

Dep't of Human Services v Davis (In re Jordan), 278 Mich App 1; 747 NW2d 883 (2008)...10
In re Conley, 216 Mich App 41; 549 NW2d 353 (1996)....11
In re McIntyre, 192 Mich App 47; 480 NW2d 293 (1991)....9
In re Miller, 182 Mich App 70; 451 NW2d 576 (1990)....9
In re Sours, 459 Mich 624; 593 NW2d 520 (1999)....10
In re Trejo, 462 Mich 341; 612 NW2d 407 (2000)....13
Polkton Charter Twp v Pellegrom, 265 Mich App 88; 693 NW2d 170 (2005)....9, 13

Statutes

MCL 712A.19a(5)....12
MCL 712A.19b(3)(c)(i)....8, 10, 11
MCL 712A.19b(3)(g)....8, 10, 11, 12
MCL 712A.19b(3)(j)....10, 12
MCL 712A.19b(4)....6
MCL 712A.19b(5)....13, 14

Rules

MCR 3.973(C)....3
MCR 3.977....10, 13
MCR 3.993(A)(2)....1
MCR 7.214(E)(2)....15

Counter-Statement of Basis of Jurisdiction of the Court of Appeals

MCR 3.993(A)(2) provides an appeal by right to the Court of Appeals from "an order terminating parental rights." For this Court to have jurisdiction, this appeal must be filed within 14 days of the "order of the Family Division of the Circuit Court terminating parental rights" or within 14 days of the order appointing or denying an attorney if the request for that appointment was filed within 14 days of the order terminating parental rights. MCR 7.204(A)(1)(c).

The Family Division entered an order terminating appellant's parental rights on March 25, 2008. Appellant requested appointment of appellate counsel on that same day. This request was granted on April 7, 2008. Appellant's appeal was filed with the Court of Appeals on April 21, 2008. Per MCR 1.108(1), that date was within 14 days of the date of the request for appellate counsel, and the request for appellate counsel was within 14 days of the order terminating parental rights. Thus, this appeal was timely filed. Therefore, this Court has jurisdiction.

Counters-Statement of Questions Involved

I. **To terminate Appellant's parental rights, a court need only find, by clear and convincing evidence, a single statutory ground for termination. Three possible grounds for termination are: (1) after six months, the conditions that led to the initial dispositional order continue to exist and are not likely to be fixed within a reasonable time considering the child's age; (2) the parent, regardless of intent, fails to provide for proper care or custody of the child and there is no reasonable likelihood he will be able to so within a reasonable time considering the child's age; and (3) there is a reasonable likelihood, based on the parent's conduct, that the child would be harmed if returned to the home of the parent. Appellant's children, initially ages two and four, were removed due to substance abuse and neglect. Where, 19 months after the children's removal, Appellant was using heroin, had been incarcerated for breaking and entering, and had no home or income, did the trial court properly find that a basis for termination existed under the statute?**

Trial Court's answer: "Yes"

Appellant's answer: "No"

Appellee's answer: "Yes"

II. **Once a statutory ground for termination of parental rights has been met, a parent's rights must be terminated, unless doing so would not be in that child's best interests. Appellant's children, initially ages two and four, were removed due to substance abuse and neglect. During the 19 months following their removal, the children remained stable and well-cared for in foster care, while Appellant engaged in substance abuse, committed a breaking-and-entering crime, for which he was incarcerated, and possessed no legal income or suitable housing. Did the trial court clearly err when it found that termination of Appellant's rights, thereby allowing stability and permanency for the children as opposed to indefinite lingering in foster care, was in the children's best interests?**

Trial Court's answer: "No"

Appellant's answer: "Yes"

Appellee's answer: "No"

Counter-Statement of Facts

Introduction

This case is before this Court on an appeal of right from a March 25, 2008 Order of the Third Judicial Circuit Court terminating Appellant Dominic Dutcher's parental rights to his two children, Mackenzie Dutcher (born September 25, 2002) and Kennedy Dutcher (born March 30, 2004). That same Order also terminated the Mother Cassandra Dutcher's parental rights as to those children. The factual history of the case reveals that both parents lost their parental rights primarily due to their long history with, and continued use of, heroin. Their addictions led to additional criminal activity and incarceration. They lost jobs, that could have supported their children, and residences, where they could have raised their children. In the end, after 19 months of attempts at substance abuse treatment, Appellant and his wife Cassandra Dutcher ended up right where they started: in rehab, with no source of income or home; there was no assurance of sobriety after this treatment, and no means of supporting or sheltering their children. The facts that led to this appeal are set forth in detail as follows.

Preliminary hearing – August 4, 2006

The Department of Human Services (Department) filed a petition requesting that the court assert jurisdiction over the children due to allegations of substance abuse by both parents. Stacey Moyler, the Department's protective services representative, testified that both children were removed from their parents' custody and placed with their maternal grandmother on August 3, 2006 (T 8/4/06, pp 3, 5-6). At the preliminary hearing on August 4, 2006, the court found that it was contrary to the welfare of the children to remain in their parents' care and custody because both parents were heroin users, both had a criminal history, with Appellant on probation at that time, and with "the mother . . . arrested in July 2006 while reportedly using heroin in the presence of her child at a McDonald's parking lot" (T 8/4/06, p 6). Both parents were granted

supervised visitation at that time (T 8/4/06, pp 7-8). Counsel for Appellant and Mother indicated that both parents would be starting a 28-day rehabilitation the following week (T 8/4/06, p 8).

Second Preliminary hearing – September 12, 2006

Appellant, but not Mother, attended the second preliminary hearing on September 12, 2006 (T 9/12/06, p 4). At that time, Appellant was being held at the Wayne County Jail on a probation violation (T 9/12/06, p 4). Appellant indicated that he was in a treatment program that would end on November 29th (T 9/12/06, p 4). Counsel for the children reported that the children were with their maternal grandparents at that time and were "healthy, in good spirits" and "seem[ed] very happy" (T 9/12/06, p 6).

Adjudication – November 6, 2006

The adjudication was held on November 6, 2006 (T 11/6/06, p 1). At that hearing, Appellant stated that he was in Operation Get Down, a 90-day court-ordered drug treatment program, as part of a sentence for "Possession of Anesthetic, an illegal substance" (T 11/6/06, pp 4-5). He said he would complete the program on January 27, 2007 (T 11/6/06, p 5). Both Appellant and the Mother stipulated that they would waive their right to a trial and they would make admissions that would result in their children being made temporary wards of the court (T 11/6/06, pp 8-11). Mother testified that she used heroin "[e]veryday for about four years" and that this impeded her from caring for her children (T 11/6/06, p 13). Mother said that she had used drugs as recently as two weeks prior to the hearing (T 11/6/06, pp 14-15). She admitted that she had two prior convictions: retail fraud and possession of drug paraphernalia (T 11/6/06, p 14). She said that she was employed at McDonald's (T 11/6/06, p 15).

Appellant testified that he used heroin "on and off" for "about ten, twelve years" (T 11/6/06, p 17). When he was initially asked if this affected his ability to take care of his kids, he

said "no because [he] was still able to take care of" them, but then when pressed, he said that it did affect his ability to take care of them (T 11/6/06, p 17). He said that, as of November 6, 2006, he had no suitable housing (T 11/6/06, p 17). He said at that time he was on probation for possession of morphine (T 11/6/06, p 18).

The court found that the parents' admissions provided a basis for the court to assert jurisdiction under MCL 712A.2(b), and brought the matter back just two days later for the dispositional hearing.[1]

Disposition – November 8, 2006

The assigned foster care worker testified that the treatment plan developed for parents required individual and group therapy, alcohol and drug rehabilitation, weekly random drug screens, and parenting skills training, to be added when parents progressed in their treatment (T 11/8/06, pp 5-7). The plan also required that both parents attend AA or NA, attend court hearings, visit their children, and obtain/maintain suitable housing and a legal source of income sufficient for family support (T 11/8/06, p 7). The court adopted the treatment plant (T 11/8/06, p 14). The foster care worker testified that the children were still with their maternal grandmother and that they were "doing excellent" and had "no special needs" at that time (T 11/8/06, pp 8-9).

At the end of the hearing, the court addressed both parents regarding what they had to do to regain custody of their children (T 11/8/06, pp 14-15):

> The bottom line is you're never to get your children back until you're clean. If you don't get clean within nine months, I'm going to . . . have [the] Permanency

[1] Although disposition can immediately follow the adjudicative portion of the proceedings, under MCR 3.973(C), the interval can be extended up to 28 days. Although the court desired to proceed immediately to disposition on November 6, 2006, brining the matter back two days later falls squarely within the court rule and reveals no failing of the foster care worker (T 11/6/06, pp 19-21; T 11/8/06, p 3).

> Planning Hearing and I'll order them to file a petition to terminate your rights so you[r] kids can be adopted by somebody else. It's that simple. I can't be more frank. . . . You're either a substance abuser or you're a mother or a father but you can never be both. That's the reality of this case. . . . I will not send your children home if you continue to relapse, your visits are suspended if you have a positive drug screen or you drop a drug screen. . . . You have to make a choice when you decide . . . which pull is stronger, the attraction of using heroin or the attraction of seeing Mackenzie and Kennedy.

Dispositional Review Hearing – February 12, 2007

At the first dispositional review hearing, the foster care worker testified that the Department was satisfied with the parents' drug screens, as they both were having random testing as part treatment at Operation Get Down (T 2/12/07, pp 6-7). The foster care worker testified that she had been advised that both parents would be completing the program within two weeks, following which they would be subject to random drug screens by the Department (T 2/12/07, pp 7-8). Appellant reported that he had completed his parenting class at that time (T 2/12/07, p 8).

At the close of the hearing, the court remarked that both parents were "doing fantastic" and "look[ed] fantastic" (T 2/12/07, p 20). The court said they were both "well on [the] way to reunification" (T 2/12/07, p 20).

Dispositional Review Hearing – May 21, 2007

At the dispositional review hearing on May 21, 2007, the parents seemed to be making great strides toward reunification. Pay stubs from Denny's restaurant were entered into evidence for both parents, reflecting employment for both (T 5/21/07, p 5). Also admitted were reports showing that both parents were negative for all of their drug screens to date (T 5/21/07, p 5). The foster care worker testified that both parents had completed their drug rehabilitation programs (T 5/21/07, pp 5-7). While the foster care worker testified that the screens were negative, she admitted that the children's attorney brought to her attention that Mother may have been hospitalized during the previous 30 days for a possible overdose on unknown substances (T

5/21/07, p 7). The foster care worker testified that both parents were in full compliance and that they just had not completed their treatment plan (T 5/21/07, p 10). The Department was considering overnight visitation and unsupervised visits for both parents, but such would not be recommended if it were confirmed that Mother had overdosed and/or Appellant had also been using drugs (T 5/21/07, p 11).

The court found that the evidence reflected the parents were not testing positive for drugs and would "not . . . accept hearsay upon hearsay" as evidence to the contrary (T 5/21/07, p 14).

Motion Hearing – June 18, 2007 and June 29, 2007

Shortly thereafter, the attorney for the children requested a motion hearing to introduce evidence of Mother's hospitalization and drug overdose (T 6/18/07, p 4). Admitted at this hearing was a three-page EMS record for a Wayne County patient named Cassandra Dutcher, and a medical record from Oakwood Hospital for Cassandra Dutcher (T 6/29/07, pp 6-8). Although adjourned from the originally set date to secure the parents' presence, the parents were not present for the continued date either (T 6/29/07, p 4).

May -- August 2007

Mother would subsequently admit that she relapsed to using heroin in May 2007 (T 3/10/08, p 63). She admitted to using heroin on "pretty much . . . a daily basis until [she] was arrested in August" (T 3/10/08, p 64). Both parents were arrested in August for breaking and entering for "scrapping copper out of an abandoned building" (T 3/10/08, p 73). Mother was sentenced to one year of probation, and had to attend inpatient substance abuse until discharged from probation (T 3/10/08, p 66).

Permanency Planning Hearing – September 12, 2007 and September 20, 2007

Neither parent attended the permanency planning hearing on September 12, as both were in jail at that time. The hearing was adjourned to September 20 (T 9/12/07, pp 3-6, 8). On September 20, 2007, both parents were still in Wayne County Jail (T 9/20/07, p 6).

The foster care worker testified that neither parent had visited the children since May 13, 2007 (T 9/20/07, pp 12-13). The Department's recommended permanency plan for the children was adoption (T 9/20/07, p 12). The court adopted the permanency plan and ordered the Department to file a petition seeking termination of parental rights "[g]iven the current circumstances . . . and . . . lack of participation in the treatment plan" (T 9/20/07, p 15).

Pretrial hearing – November 15, 2007

At the pretrial hearing before the referee, the court suspended visitation pursuant to the statute (T 11/15/07, p 7).[2]

Pretrial hearing– December 17, 2007

Both parents requested visitation again, at the December 17, 2007 hearing, and both requests were denied (T 12/17/07, pp 12-14).

Permanent Custody Hearing – March 10, 2008

At the permanent custody hearing, the court received testimony from multiple individuals regarding the progress being made toward reunification. The foster care worker testified that both parents completed anger management counseling and parenting classes (T 3/10/08, p 18). Mother submitted two drug screens in January 2008, but Appellant provided no drug screens in 2008 (T 3/10/08, p 15). Appellant's last screen was submitted on May 8, 2007 (T 3/10/08, pp 15-16). The foster care worker testified that part of the treatment plan for both parents was

[2] MCL 712A.19b(4).

outpatient treatment for substance abuse (T 3/10/08, p 17). She testified that neither parent completed treatment and "their whereabouts [were] unknown for awhile" (T 3/10/08, p 18).

At the time of the permanent custody hearing, Mother was living with the Sanford House Director and Appellant was living at Operation Get Down (T 3/10/08, p 18). Neither of them had a residence of their own or their own source of income (T 3/10/08, p 19). Both parents had been incarcerated in September 2007 for breaking and entering (T 3/10/08, p 22). Neither parent had any visitation between May 2007 and March 2008 (T 3/10/08, p 20).

The foster care worker recommended terminating both parents' parental rights because they were not in compliance with the treatment plan, they did not comply with the drug screens, they did not complete substance abuse counseling, they did not have housing or employment, and, both parents were "still at square one" (T 3/10/08, p 23).

Mother also testified at the permanent custody hearing. Mother testified that she met Appellant when she was 18 and that they were married on October 19, 2001 (T 3/10/08, p 71). She said that, at the time she met Appellant, he was in drug treatment at a methadone clinic (T 3/10/08, p 77). She said that he was already using heroin when she met him and that he introduced her to it (T 3/10/08, p 71). Mother testified that she was arrested at McDonald's, where she was employed at the time, for "shooting up" heroin while the children were with her in her car (T 3/10/08, 72). As of the date of the hearing, neither she nor Appellant was working (T 3/10/08, p 76).

Appellant's counsel indicated that Appellant was in treatment and would complete it in March 2008 (T 3/10/08, p 82-83). Appellant's counsel asked that he "be given a little more time" (T 3/10/08, p 83).

The trial court noted that both parents were "arguably on a path to recovery, but . . . not reasonably close to being able to have the children returned to them at [that] time" (T 3/10/08, p 90). The court noted that, after 19 months, to grant the parents' request for more time would be to add "a minimum of at least six months . . . to see if [it was] possibly able to consider the children going back" and that those "very young children are entitled to some permanency" (T 3/10/08, p 92). The court then found that "by clear and convincing evidence . . . under [Section] (c)(i) and Section (g) that there is a case for termination of parental rights" (T 3/10/08, p 92). The court then further found that while there was "perhaps some recent progress" it was "not sufficient for the Court to be convinced that at [that] time" it would be appropriate "to extend to for another indefinite period efforts on behalf of the parents" (T 3/10/08, p 92). The court lauded the parents' efforts, but could not "find that it was clearly not in the children's best interests to terminate parental rights" (T 3/10/08, p 93).

The trial court then advised both parents that it would enter an order terminating both parents' rights to their children, Mackenzie and Kennedy (T 3/10/08, p 93). This appeal of right followed the entry of that order.

Argument

I. **To terminate Appellant's parental rights, a court need only find, by clear and convincing evidence, a single statutory ground for termination. Three possible grounds for termination are: (1) after six months, the conditions that led to the initial dispositional order continue to exist and are not likely to be fixed within a reasonable time considering the child's age; (2) the parent, regardless of intent, fails to provide for proper care or custody of the child and there is no reasonable chance he will be able to within a reasonable time considering the child's age; and (3) there is a reasonable likelihood, based on the parent's conduct, that the child would be harmed if returned to the home of the parent. Appellant's children, initially ages two and four, were removed due to substance abuse and neglect. Where, 19 months after the children's removal, Appellant was using heroin, had been incarcerated for breaking and entering, had no home or income, the trial court properly found that the Department established, by clear and convincing evidence, at least one ground for termination.**

A. Standard of Review

A trial court's decision regarding termination of parental rights is reviewed for clear error.[3] "To be clearly erroneous, although there is evidence to support it, a finding must leave this Court with a definite and firm conviction that a mistake has been made."[4]

B. Preservation of Issues

Appellant argued before the trial court that, because he was making sufficient progress on his treatment plan after his relapse, and only needed a little more time, there was no statutory basis for terminating his parental rights (T 3/10/08, pp 82-84). The trial court ruled there was a statutory basis for terminating his parental rights (T 3/10/08, p 92). Thus, this issue is preserved for appellate review.[5]

---

[3] *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991); MCR 3.977(J).
[4] *In re Miller*, 182 Mich App 70, 81; 451 NW2d 576 (1990).
[5] *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (Issues raised with, and decided by, the trial court are preserved for appellate review).

C. Analysis

In order to terminate a parent's rights, one of the statutory grounds under MCL 712A.19b(3) must be met. Only a single ground is necessary.[6] "The existence of a statutory ground for termination of parental rights must be proven by clear and convincing evidence."[7] The trial court found three grounds for termination in this case: MCL 712A.19b(3)(c)(i), (g), and (j). Each will be examined in turn.

1. MCL 712A.19b(3)(c)(i)

This subsection allows termination of parental rights, in relevant part:

> 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 . . . 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.

Appellant's children were initially removed due to substance abuse and criminality in the home environment (T 11/6/06, pp 17-18; T 8/4/06, p 6). After 19 months, despite the successful completion of a drug treatment program, Appellant returned to heroin, lost his job and his home, committed a breaking and entering, and was incarcerated and placed back in drug treatment (T 3/10/08, pp 18-23, 63-64, 73, 82-83). As his foster care caseworker noted, after all that time, both parents were "still at square one" (T 3/10/08, p 23). The court had clear and convincing evidence that, after 182 days, the "conditions that led to the adjudication continue to exist."[8]

---

[6] *In re Sours*, 459 Mich 624, 641; 593 NW2d 520 (1999).
[7] *Dep't of Human Services v Davis, (In re Jordan)*, 278 Mich App 1, 22; 747 NW2d 883 (2008); MCR 3.977(F)(1)(b) and (G)(3).
[8] MCL 712A.19b(3)(c)(i).

Appellant admitted he has been a heroin user for 10 or 12 years (T 11/6/06, p 17). He has been in treatment at least twice, and despite completion of that treatment, both times he returned to abusing illegal substances, resulting in him losing his job and his home (T 3/10/08, pp 18-23, 63-64, 77). While conceding that he was in treatment again for a third time at the time of the permanent custody hearing, there was no evidence that the conditions that led to the children's removal would be rectified within a reasonable time. Nineteen months had passed since they were originally removed, and those 19 months reflect a cycle of abuse, treatment, and relapse. This Court has affirmed termination under similar circumstances in the past under MCL 712A.19b(3)(c)(i), based upon a similar cycle of substance abuse treatment and relapse. [9]

These children are now over four and six years old, having spent almost two years of their lives outside of their parents' custody. Based upon the evidence below, there was no reasonable likelihood that Appellant would rectify the conditions within a reasonable time for those children. Thus, the trial court did not clearly err when it found clear and convincing evidence that the statutory ground for termination of Appellant's parental rights was met under MCL 712A.19b(3)(c)(i).

2. MCL 712A.19b(3)(g)

This subsection allows termination of parental rights when:

> 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.

As noted above, Appellant lacks legal income or a home, and there is evidence to suggest that even if he does complete drug treatment for a third time, he will ultimately return to using heroin, as he has for the previous 12 years of his life. Given the children's young age and the time that has already elapsed, there is no reasonable expectation that he will be able to provide

[9] *In re Conley*, 216 Mich App 41, 43-44; 549 NW2d 353 (1996).

proper care for them in a reasonable timeframe. Thus, the trial court did not clearly err when it found clear and convincing evidence that the statutory ground for termination of Appellant's parental rights was met under MCL 712A.19b(3)(g).[10]

3. MCL 712A.19b(3)(j)

This subsection allows termination of parental rights when:

> 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.

MCL 712A.19a(5) states in relevant part that:

> In determining whether the return of the child would cause a substantial risk of harm to the child, the court shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan prepared under section 18f of this chapter as evidence that return of the child to his or her parent would cause a substantial risk of harm to the child's life, physical health, or mental well-being.

Appellant lost his job, lost his home, resumed using heroin, stopped providing drug screens, and committed a crime, ultimately landing him in jail (T 3/10/08, pp 18-23, 63-64, 73, 82-83). His conduct shows substantial non-compliance with the terms and conditions of his case service plan, which required negative drug screens, sobriety, employment, and housing (T 11/8/06, pp 5-7, 14). Thus, Appellant's failure to comply with the plan is, by itself, evidence of substantial risk of harm to the children if they were returned to Appellant's home.[11] And there is no home for his children to come home to. Based on Appellant's conduct over the last 19 months of wardship and before, there may never be a stable home for them to return to.

With no home to house the children, they would be at substantial risk of harm for living in the streets. With no money to support them, Appellant's children would be at substantial risk

---

[10] See *In re Conley*, 216 Mich App at 43-44 (Parental rights terminated under MCL 712A.19b(3)(g) based upon failure to provide proper custody or care through cycles of substance abuse treatment and relapse).

[11] MCR 712A.19a(5).

of harm for lack of life's necessities, such as food and clothing. And without sobriety, there is no way to list all of the risks of harm facing the children if returned to Appellant's care. Therefore, the trial court did not clearly err when it found that there was clear and convincing evidence that Appellant's children would be at substantial risk of harm if they were returned to him.

In sum, there was clear and convincing evidence to support all three of the statutory grounds for termination of Appellant's parental rights. Thus, the trial court did not clearly err when it found those three statutory grounds for terminating Appellant's parental rights were met.

II. Once a statutory ground for termination of parental rights has been met, a parent's rights must be terminated, unless doing so would not be in that child's best interests. Appellant's children, initially ages two and four, were removed due to substance abuse and neglect. During the 19 months following their removal, the children remained stable and well-cared for in foster care, while Appellant engaged in substance abuse, committed a breaking-and-entering crime (for which he was incarcerated), and possessed no legal income or suitable housing. The trial court did not clearly err when it found that termination of Appellant's rights, thereby allowing for stability and permanency, as opposed to lingering on indefinitely in foster care, was in the children's best interests.

A. Standard of Review

A trial court's decision as to whether, looking at the whole record, termination of a parent's parental rights would be in the best interest of a child is reviewed for clear error.[12]

B. Preservation of Issues

Appellant argued before the trial court that it was not in his children's best interests for his parental rights to be terminated (T 3/10/08, p 83). The trial court held that it was in their best interest, preserving this issue (T 3/10/08, p 93).[13]

---

[12] *In re Trejo*, 462 Mich 341, 353, 356-357; 612 NW2d 407 (2000); MCR 3.977(J).
[13] *Polkton Charter Twp*, 265 Mich App at 95.

C. Analysis

At all times relevant to the proceedings in this case, MCL 712A.19b(5) provided that[14]:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

Appellant has, by his own admission, been a steady user of heroin for upwards of 12 years (T 11/6/06, p 17). Virginia Dutcher, Appellant's mother, testified that Appellant started doing drugs when he was 16 or 17 (T 3/10/08, p 55). At the time his parental rights were terminated, he had lost his job and his home, had relapsed, and was in yet another round of treatment (T 3/10/08, pp 18-23, 63-64, 73, 82-83). There is nothing to support the finding that he had finally reached the time when he would stop using illegal narcotics. To the contrary, the evidence indicates that he was likely to return to use, as he has for basically his entire adult life. The birth of his first child did not stop it. The birth of his second child did not stop it. Having both of his children taken away from him did not stop it. Two rounds of drug treatment did not stop it, even when one of those rounds was precipitated by his loss of his children to foster care.

Mackenzie and Kennedy cannot wait forever for Appellant to learn to be a responsible parent. They have already waited a good portion of their lives. And while they have been waiting since Appellant lost custody, they have done well and have not had any special problems being in foster care (T 11/8/06, pp 8-9; T 9/12/06, p 6). They have already spent two years lingering and waiting in foster care. The court found that they deserve the permanency that

---

[14] Effective July 11, 2008, MCL 712A.19b(5) was changed to: "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." This change requires the court to make an affirmative finding on the issue of whether termination of parental rights is in a child's best interests.

adoption will afford them. Such a finding does not reflect error and the Department would argue that the decision to terminate was not contrary to their best interests.

Statement Why Oral Argument Should Not Be Heard

Per MCR 7.214(E)(2), DHS respectfully suggests that this is an appropriate case for disposition without oral argument because the dispositive issues have already been authoritatively decided, the briefs and record adequately presented the facts and legal arguments, and the appeal is without merit.

Conclusion and Relief Sought

Mackenzie and Kennedy came into care due to neglect. Specifically, after their Mother was arrested for shooting up heroin in the car in their presence. Mother testified that it was Appellant who introduced her to heroin. According to the testimony below, Appellant has been using heroin since he was 16 or 17; he is now 32 years old. Despite treatment and incarceration, he continued using illegal narcotics. The births of his two children and the threat of losing his parental rights to his children could not motivate him to stop his illegal activity. After 19 months of family court intervention, he had no job, no income, no home, additional incarceration, and no clear indication as to whether he would ever stop using heroin. The lower court considered all of this and found that Mackenzie and Kennedy deserved the protection that the law affords them, and terminated the Appellant's parental rights.

The statutory grounds for termination were established by clear and convincing evidence and termination of Appellant's parental rights was not contrary to the children's best interests. Accordingly, the Department requests that this Honorable Court affirm the trial court's termination order, as the record below does not reflect clearly error that would warrant reversal.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia (P49550)
Solicitor General
Counsel of Record

David Goodkin (P69338)
Assistant Attorney General
Attorneys for Dept of Human Services
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700

Dated: October 3, 2008