

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of LAJOYIA DYE, J'ONIE
LAMAR, and JOSE MCCOMBS, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

YOLANDA LAMAR,

Respondent-Appellant.

UNPUBLISHED

May 10, 2007

No. 273314

Genesee Circuit Court

Family Division

LC No. 01-114464-NA

Before: Talbot, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i),¹ (g), and (j). Because the trial court clearly erred in finding that the statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence, and termination of respondent's parental rights was clearly not in the children's best interests, we reverse and remand for further proceedings.

Respondent raises several issues on appeal. She first argues that the preliminary hearing was defective because she was not advised of her right to an attorney, was not allowed to respond to the allegations in the petition, and was not advised of her right to a jury trial. The failure to object to the procedure used at a preliminary hearing before the adjudicative hearing waives a claim of error with respect to the preliminary hearing. *In re Jones*, 137 Mich App 152, 155; 357 NW2d 840 (1984). Respondent failed to raise this argument in the trial court. Therefore, the issue is not preserved. A review of the record reveals that the trial court promptly appointed an attorney to respondent once the trial court realized that respondent was without counsel and did not understand the allegations contained in the petition. Refusing to accept any statement made by respondent was for respondent's own benefit and did not deny her the right to participate in the proceedings. And although the trial court did not specifically advise

¹ Although the trial court did not specifically state MCL 712A.19b(3)(b)(i), it was clear from the trial court's findings that this was the subsection it relied upon.

respondent of her right to a jury trial, it was clear that she understood such a right when she opted to proceed with a bench trial.

Respondent next argues that failure to bring the matter to trial within 63 days of the preliminary hearing, as required by MCR 3.972(A), denied her of her right to due process. Respondent failed to preserve the issue for appeal and tacitly agreed to waive the 63-day period by failing to object to the date at the pretrial hearing. Nonetheless, failure of a trial court to hold trial within the time required does not divest the court of jurisdiction. *In re Prater*, 189 Mich App 330, 333; 471 NW2d 658 (1991).

Respondent also asserts that the trial court erroneously proceeded on an amended petition that did not contain statutory references for the basis of jurisdiction. Respondent failed to preserve the issue for appeal. In any event, the original petition contained the statutory basis for assuming jurisdiction over respondent. The amended petition that was filed on the day of trial was filed to plead the statutory basis for termination with regard to the children's fathers. Additionally, MCR 3.920(G) provides that "[t]he appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record."

Respondent also argues that the trial court erred in asserting jurisdiction. Generally, the establishment of jurisdiction may not be collaterally attacked. *In re Hatcher*, 443 Mich 426, 433-434; 505 NW2d 834 (1993). However, this rule does not apply where the parent's rights were terminated at the original dispositional hearing and the order terminating parental rights was the first order from which an appeal by right was available. MCR 3.993(A); see also *In re Bechard*, 211 Mich App 155, 159-160; 535 NW2d 220 (1995). To properly exercise jurisdiction, the trial court must find by a preponderance of the evidence that a statutory basis for jurisdiction exists. MCR 3.962(B)(3); *In re BZ*, 264 Mich App 286, 294; 690 NW2d 505 (2004); *In re Toler*, 193 Mich App 474, 476; 484 NW2d 672 (1992).

The trial court was granted jurisdiction over the children in this case pursuant to MCL 712A.2(b)(1) and (2). The preponderance of the evidence showed that the children's three-month-old brother died as a result of pneumonia, presumably caused by malnutrition. Respondent failed to appreciate the fact that the baby was not gaining weight and did not take him to the doctor for a well-baby visit at two months of age that would have likely resulted in action taken to spur weight gain. Aside from her failure to recognize the child's nutritional deficits, respondent failed to act in a timely and reasonable manner in terms of seeking medical treatment once she discovered that the child was ill. Respondent admitted that she did not think that the baby was "that sick" and that, because of transportation issues, she thought she could wait to take him to the doctor. The tragic result of respondent's negligence was the death of the child. The trial court was within its right to assert jurisdiction over the remaining children to ensure their continued safety.

Finally, respondent argues that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). While the facts supported the trial court's assumption of jurisdiction, there was clearly a rush to terminate respondent's parental rights. Respondent should have been given a treatment plan. While respondent's decision-making as it concerned the infant was questionable at best, respondent appeared to adequately provide for the

older children. The children were eleven, seven, and four-years-old. The testimony revealed that respondent had lived in a house next to her mother for the past five years. The house was clean and appropriate. She cared for all of the children without assistance from their respective fathers. This care included numerous doctor's visits and surgeries for Jose's laryngeal papilloma. The children were also up to date on their immunizations. Contrary to the trial court's statement, respondent's treatment of Jose was not a "red herring." It went directly to the issue of whether the remaining children were at risk of harm. It demonstrated that, while she failed to understand the seriousness of the infant's illness, she was ready and willing to follow through on medical treatment for the older children.

With regard to the children's best interests, the trial court referred to the numerous problems that the children had according to their psychological and psychiatric evaluations. However, many of the issues were the result of the loss of their brother and subsequent loss of their mother. These children had a bond with one another and a bond with their mother. They also shared a bond with their extended family, including their maternal grandmother, whom they saw almost every day, and their maternal great-aunt. The workers were quick to dismiss the idea of a guardianship, but without adequate justification. The workers claimed that family members inappropriately talked to Jose about the proceedings, but they failed to consider that Jose was eleven years old and cognizant of what was happening. The workers also failed to treat each child as an individual. The two older children, especially, were clearly attached to their mother and were suffering from being separated from her.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Pat M. Donofrio

/s/ Deborah A. Servitto