

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of Y. R. Lopez, Minor.

UNPUBLISHED
June 22, 2010
No. 296506
Cass Circuit Court
Family Division
LC No. 09-000033-NA

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g) and (h). For the reasons set forth in this opinion, we hold that the trial court clearly erred in finding that § 19b(3)(h) was established by clear and convincing evidence, and therefore reverse the trial court as to that finding. In accordance with our Supreme Court's recent ruling *In re Mason Minors*, ___ Mich ___; ___ NW2d ___ (Docket No. 139795; issued May 26, 2010), we also reverse that portion of the trial court's order finding clear and convincing evidence that respondent violated § 19b(3)(g), and remand the matter to the trial court for further proceedings consistent with this opinion.

The mother of the minor child (hereinafter referred to as "Y.") had a history of referrals to the Department of Human Services ("DHS"), involving Y. and other minor children. Allegations against the mother were that minor children were missing excessive amounts of school and that when she gave birth to one of the minor children she tested positive for marijuana and opiates. At the time of the initial petition in this matter, respondent had convictions for drug offenses and was on parole; his whereabouts were unknown. Following a preliminary hearing, the court authorized the petition and placed the children in foster care. Amended petitions filed in March 2009 indicated that respondent, who had been on parole for a drug offense, was incarcerated in Elkhart County, Indiana "on three counts of battery."

At a hearing on April 6, 2009, the mother entered a plea to the allegations against her and respondent "did not object to court jurisdiction." The court took jurisdiction over the children, and a dispositional order was entered on April 23, 2009.

According to the May 2009 court report, the foster care worker had not had any contact with respondent "due to him being incarcerated out of state." According to the July 2009 updated service plan, respondent had been communicating with the foster care worker by mail. He had been sentenced to three years in prison, but "may be out within one year." He expressed a willingness to participate in reunification services upon his release. "He is on a waiting list to begin substance abuse treatment including AA classes, and is also on a waiting list to start GED

classes.” According to the November 2009 court report, respondent’s “earliest release date is 4/19/11 according to the Indiana Department of Corrections.”

The DHS filed a supplemental petition for termination on October 29, 2009. With respect to respondent, it alleged that he “has failed to participate in any way in order to be reunited with” Y. In August 2009, he was sentenced to prison in Indiana “with his earliest out date of April 19, 2011.” Termination was requested pursuant to §§ 19b(3)(c)(i), (g), (h), and (j).

At a hearing on January 7, 2010, Jessica Hacker, the foster care worker, testified that respondent had not participated in any services because he had been incarcerated throughout the proceedings. He was housed at a facility in Westville, Indiana, and his earliest release date is April 19, 2011. The court received an exhibit that showed that in May 2000, respondent was convicted of possession of cocaine or a narcotic drug and sentenced to one year. In September 2000, he was convicted of the same offense and sentenced to 12 years. In February 2002, he was convicted of the same offense and sentenced to 12 years. His earliest possible release date was listed as April 19, 2011.

Hacker testified that given the nature of respondent’s offenses, it appeared that he had a substance abuse problem and would not be a suitable custodian immediately upon his release. The last Hacker had heard, respondent was on a waiting list to start some type of substance abuse treatment and to get his GED. She did testify that respondent expressed a desire to parent Y. During the case, respondent had sent one letter to Y. and “she sent a card to him.” According to the testimony of Hacker, that had been the extent of their contact. Y. reported that sometime before respondent went to prison, they had stayed in Indiana for about a year.

Hacker opined that termination was in Y.’s best interests because respondent “has been incarcerated for quite some time; and Y. needs to have the stability of a family right now, and . . . shouldn’t have to wait for him to get out to be able to have that stability.” Hacker added that stability was important for Y. because “[s]he is a young girl, growing up, being confused right now of what’s going on; having permanency helps her to understand more of what’s going on and what is in her future.” That concluded petitioner’s proofs.

Respondent testified that he went to prison in 2000 and was released on parole on October 5, 2007. At that time, the mother gave him custody of Y. and another minor child “so I could take care of them because they tried to take them away from her already once” and “she was scared they were going to take them away from her.” He and the children shared an apartment in Goshen, Indiana, for “at least, like a year” and respondent was employed. Respondent violated his parole because of something that “happened between me and my girl[.]” He returned to prison in December 2008 and had to give the children back to their mother. He had been continuously incarcerated since 2008. Respondent admitted that except for the year or so that Y. was living with him, his contact with her had been sporadic.

Respondent testified that petitioner had not provided him with any services. When he was incarcerated in Goshen, services were not available to him. Since he was transferred to Westville, he “tried to get in . . . some programs, but they always told me there’s like a waiting list.” If programs ever became available, respondent intended to participate in parenting classes, substance abuse treatment, and “whatever they got here.”

Respondent believed that upon his release in 2011, he would be able to provide proper care and a place to live for Y. because he had done it before. Following this testimony, the proofs were before the trial court.

The trial court then ruled in part as follows:

Y. first came into care on February 27, 2009 . . . because she was removed from her mother, along with her two siblings, as a result of serious allegations, as set forth in the Petition.

The mother's rights have already been terminated and the record in regards to the mother speaks for itself.

Throughout this matter, . . . Mr. Lopez has been either in jail, or prison, in the State of Indiana. . . .

The testimony also indicates that, although Y. is ten years old, Mr. Lopez has maybe only had contact with her about one-tenth of her life because previous to that, Mr. Lopez was in jail for seven and a half years for narcotic offenses Subsequently, from being released from prison . . . in 2007, Mr. Lopez may have had some contact with Y., as he indicated on the record, and that seems to be corroborated by . . . his daughter that there was some contact during that period of time. And, then as a result of a parole violation, and it appears that the circumstance is Domestic Violence, . . . you go back to prison and have an earliest outdate of 2011.

Suffice it to say, Mr. Lopez, through his own fault, has not had contact with his daughter. The question of fault is whether he was able to have services. Obviously, the State of Michigan cannot provide services . . . to an individual who is in jail in the State of Indiana and/or prison in the state of Indiana, but the reason Mr. Lopez is in jail is due to his own fault.

. . . I find by clear and convincing evidence that standard in his [sic] matter that the Prosecutor has met their burden under two grounds.

The grounds that most people would think of in regards to this type of case is 19b(3)(h). . . . Y. has been in our care in Michigan since February 27, 2009. He's been in jail that entire period of time; he will continue to be in jail until 2011; that's more than the two-year period of time. And, as argued, . . . when he does get out of jail, there's issues that he'll have to satisfy the Court that he could accomplish, including staying out of prison, not having parole violations, working on the issues of domestic violence, as well as substance abuse. So, that means the case would go long past the two-year period of time.

Given that, there is no reasonable expectation that he could provide proper custody within a reasonable time considering the age of the child, and there's no indication whatsoever that he's . . . attempted to provide any proper care or custody. Although he's in prison, he could have provided some support from any

work that he might have done in prison, or contact, or other things through family, . . . and, of course, that's not been done.

I also find that the Prosecutor has clearly met the grounds under 19b(3)(g). If you read 19b(3)(g), it really incorporates (b) and (c) of (h) . . . , which I've just covered. . . . I've already outlined under (h) the elements here. There's no expectation that within a reasonable time that Mr. Lopez will be able to provide proper care and custody given that his earliest outdate is 2011, and the history which, to me, is usually most indicative of what the future will be. The history is that Mr. Lopez did not provide proper care for this child prior to . . . 2/27/2009 when the child was first removed, because he had been in prison for seven and a half years before that. So, based upon that history, there's no expectation whatsoever that Mr. Lopez will be able to do so – provide proper care.

The court also found that termination was in the child's best interests.

A trial court's finding that a statutory ground for termination has been proven by clear and convincing evidence is reviewed for clear error. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004); see also *In re Mason Minors*, slip op pp 7-8.

As applicable to this case, a trial court may terminate parental rights if it finds, by clear and convincing evidence, that:

1. 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. [MCL 712A.19b(3)(g).]
2. The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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. [MCL 712A.19b(3)(h).]

It is well established that only one statutory ground need be proven to warrant termination. *In re Trejo*, 462 Mich at 360. Respondent appears to challenge the court's decision to terminate his parental rights under § 19b(3)(h) only. He does not specifically address § 19b(3)(g), the other statutory ground cited by the court. Where a respondent does not challenge a trial court's determination regarding one or more of several statutory grounds for termination, this Court may assume that the trial court did not clearly err in finding that the unchallenged grounds were proven by clear and convincing evidence. See *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998), overruled in part on other grounds by *Trejo*, 462 Mich at 353. However, because respondent's argument as a whole could be read as addressing the "reasonable expectation" component of § 19b(3)(g), we find that this issue has not been abandoned.

We hold that the trial court clearly erred in finding that § 19b(3)(h) was proven by clear and convincing evidence. To terminate on this ground, the court must find that one or more facts alleged in the petition are true and come within § 19b(3)(h). MCR 3.977(G)(3)(a). The petition was filed in October 2009 and alleged that respondent was serving a prison sentence and that his earliest release date is April 2011. Because April 2011 is only 18 months from October 2009, the facts alleged did not show that respondent “is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years.” Further, while April 2011 is respondent’s earliest release date, which indicates that he may not necessarily be released at that time, petitioner did not present any evidence regarding respondent’s maximum discharge date. Additionally, we note that our Supreme Court recently held in *In re Mason Minors* that “[t]he mere present inability to personally care for one’s children as a result of incarceration does not constitute grounds for termination.” *In re Mason Minors*, slip op p 16. Therefore, the trial court clearly erred in finding that termination was warranted under § 19b(3)(h).

Next we must determine whether the trial court clearly erred in finding that § 19b(3)(g) was proven by clear and convincing evidence. The evidence showed that Y. came into care in February 2009 because respondent was unable to provide proper care or custody due to his incarceration and had left the child in the custody of her mother, who was not a fit custodian. The evidence also showed that respondent will not be released from prison until April 2011, at the earliest. Additionally, DHS did not have any initial contact with respondent “due to him being incarcerated out of state.”¹ Also, as was the case in *In re Mason Minors*, DHS did not provide respondent with any services, and according to the record, services were not readily available to him while he was incarcerated. Also analogous to *Mason*, is the fact that prior to his incarceration, Y. lived with respondent and during that time he had cared for and supported her. We find that when examining the record as a whole, DHS failed to fulfill its statutory obligation to provide the trial court with a documented service plan that included respondent. Following its conclusion that the state had failed to adequately inform and allow the respondent to participate in the trial court in *In re Mason Minors*, our Supreme Court stated: “The state failed to involve or evaluate respondent, but then terminated his rights, in part because of his failure to comply with the service plan, while giving him no opportunity to comply in the future. This constituted clear error.” *Id.*, slip op pp 15-16.

While we recognize that the trial court made far more significant findings than did the trial court in *In re Mason Minors*, the error in this case was made by the failures of DHS to fulfill its statutory obligations as extensively outlined in *In re Mason Minors*, slip op pp 12-16. Based on the record before us and our Supreme Court’s decision in *In re Mason Minors*, we conclude that the failure of the DHS to adequately involve or evaluate respondent, by failing to offer him any services and by failing to include him in any service plan, constituted clear error.²

¹ We recognize that respondent in this case was incarcerated in Indiana. However, we find nothing in our Supreme Court’s ruling in *In re Mason Minors* that leads us to conclude that out of state incarceration limits or modifies the statutory obligations of DHS.

² To the extent that services were not available to respondent while he was incarcerated or that DHS was unable to provide any services to respondent because he was incarcerated out of state is not clear from the record. On remand, the trial court may wish to inquire of DHS whether any
(continued...)

Accordingly, we reverse the trial court and remand this matter to the trial court for additional proceedings consistent with this opinion and our Supreme Court's opinion *In re Mason Minors*.

Reversed. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Stephen L. Borrello

/s/ Cynthia Diane Stephens

(...continued)

attempts were made to work with respondent through the State of Indiana, or whether any such attempts were futile.