

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 9, 2012

In the Matter of R. E. NICHOLS, Minor.

No. 309794
Van Buren Circuit Court
Family Division
LC No. 08-016251-NA

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Respondent-father, B. Ramsdell, appeals as of right the trial court's order terminating his parental rights to his minor son under MCL 712A.19b(3)(g) and (j). The trial court also terminated the parental rights of J. Larkin, the minor son's mother, who is not a party to this appeal. We affirm.

I. FACTS

A. BACKGROUND FACTS

In August 2008, Ramsdell, his minor son, and M. Rowan lived together in a home. Rowan was Ramsdell's girlfriend. When police searched the home, they found drugs, evidence of possible drug sales, and drug manufacturing equipment. Ramsdell had several prior convictions for delivering controlled substances. Rowan had several prior convictions for possessing controlled substances and for operating a methamphetamine laboratory. At that time, Larkin was homeless and had an open foster care case with another child.

The Department of Human Services (the Department) filed a petition to remove the son from Ramsdell's care because of the presence of drugs and drug manufacturing equipment in the home, and because of Ramsdell's apparent drug use. Ramsdell requested a jury trial to determine the truth of the allegations. Between the son's removal and the jury trial, Ramsdell was convicted of fleeing and eluding a police officer, and was sentenced to serve one to five years' imprisonment.

In January 2009, a jury found that the Department proved one or more grounds in the petition, and the trial court assumed jurisdiction over the son. The trial court placed the son with his paternal grandfather, and ordered Ramsdell to participate in services, including "all programming recommended by the correctional facility he is residing at during his incarceration." The trial court also ordered Ramsdell to receive supervised visitation.

In October 2009, Ramsdell was released from prison. The trial court amended its order to include requirements that Ramsdell participate in parenting classes, individual counseling, a psychological evaluation, a substance abuse assessment, and random drug screens. In February 2010, the trial court found that Ramsdell made “slow progress . . . toward alleviating or mitigating the conditions” that caused the son’s removal.

In June 2010, the Department petitioned the trial court to terminate Ramsdell and Larkin’s parental rights. The trial court terminated Larkin’s parental rights, but concluded that insufficient evidence existed to terminate Ramsdell’s parental rights. It found that Ramsdell attended parenting classes and individual therapy, remained drug free, and attended parenting time. It ordered Ramsdell to continue his services.

One year later, in June 2011, the Department asked the trial court to authorize it to file a second petition to terminate Ramsdell’s parental rights. Valorie Mason, the son’s foster care worker, testified that Ramsdell had not benefitted from his service plan and had stopped participating. Mason testified that Ramsdell was poorly handling his parenting time visits, and allowed inappropriate persons with criminal backgrounds to stay in his home. Mason testified that the son was “in great need of permanency” because he had been in foster care for nearly three years, and because his grandfather’s health was deteriorating. The trial court ordered the Department to file a termination petition.

In August 2011, the grandfather asked that the trial court place his grandson in a different home because of his declining health. The trial court placed the son in a foster home, and ordered Ramsdell to continue drug screens and individual counseling.

After stipulated adjournments, the trial court scheduled the termination hearing for February 22, 2012. On February 13, 2012, a trial court convicted Ramsdell of possessing cocaine, and sentenced him to serve ten months’ imprisonment. The trial court rescheduled the termination hearing to April 2012, so that Ramsdell would be able to attend.

B. TERMINATION HEARING

At the termination hearing, Jamie Jager, a case aide who supervised Ramsdell’s visits with his son from November 2010 to July 2011, testified that Ramsdell arrived late to 16 of his 23 visits. Jager testified that Ramsdell interacted very little with his son, and would talk on or text with his cellular telephone during visits. Jager testified that Ramsdell also engaged in inappropriate behavior and conversations with his son, and called his son names. She did not observe any improvements throughout the course of Ramsdell’s visitation schedule.

Jager also testified that she had to intervene in one visit. She testified that Ramsdell and the son would play-wrestle during visits, but that Ramsdell could “snap really fast” and lose his temper. Jager testified that in May 2011, when the son was five years old, Ramsdell grabbed the son’s neck with his hands and shoved him. Jager testified that this left bruises “for quite some time,” and that Ramsdell then told his son that “I’m sick of you abusing me and I can’t wait to get you back so I can abuse you.” She testified that the son was “hysterical,” and that when she asked Ramsdell to leave, he told his son that “I’m done with this, I never want to see you again.” The trial court admitted photographs of the son’s injuries into evidence.

Megan Begg, the son's foster care worker, testified that Ramsdell stopped submitting drug screens in February 2010, when they were no longer a requirement of his parole. Rebecca Bartz, Ramsdell's foster care supervisor, testified that Ramsdell refused to participate in drug screens in June 2011. Bartz also testified that Ramsdell allowed inappropriate people to live in his home, and did not want to change that behavior. She testified that the son would be at a physical and emotional risk of harm if he was returned to Ramsdell's care, and that the Department had provided Ramsdell with an "ample amount of time and services . . . to rectify the situation and . . . he has not."

Ramsdell's therapist, Brian Johnson, testified that he saw Ramsdell intermittently from October 2009 until September 2011. Johnson testified that Ramsdell's counseling visits became infrequent in May 2011, and that after September 2011, he did not schedule any appointments.

The son's therapist, Tracy Gustafson, testified that it would be in the son's best interests for the trial court to terminate Ramsdell's parental rights. She noted that the son had been in foster care for half of his life and needed permanency. She testified that the son had special needs for structure, routine, and clear expectations, and that his needs were not being met because he did not know who his permanent family would be. Gustafson testified that the son's lack of permanency could lead to further anxiety issues, and negatively affect his mental and emotional health.

C. THE TRIAL COURT'S OPINION

The trial court entered a written opinion and order terminating Ramsdell's parental rights. In its written opinion, the trial court found that the Department had proven MCL 712A.19b(3)(g) and (j) by clear and convincing evidence, and that termination was in the son's best interests.

The trial court noted that it had originally removed the son from Ramsdell's care because of his "drug lifestyle." The trial court found that Ramsdell continued to be involved in a drug lifestyle, was incarcerated at the time of the hearing, and that from 2008 to 2012 the situation had worsened. Specifically, the trial court found that Ramsdell had failed to participate in and benefit from drug screens and counseling. It found that Jager's testimony illustrated that Ramsdell was "completely out of touch with how to love, nurture and raise a little boy," and that Ramsdell was "self-absorbed, abusive, disrespectful, a bully, impatient, neglectful and a highly inappropriate father." The trial court listed the services that the Department had offered, but found that Ramsdell failed to benefit from those services.

The trial court also found that Gustafson's testimony about the son's struggles with anxiety and anger issues was clear and convincing evidence that the son needed structure and permanence, and that termination was in the son's best interests. It ordered Ramsdell's parental rights terminated.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

To terminate a parent's parental rights, the trial court must find that the Department has proved at least one of the statutory grounds for termination by clear and convincing evidence.¹ This Court reviews for clear error a trial court's decision to terminate a parent's parental rights.² A finding is clearly erroneous if, although there is evidence to support it, we are definitely and firmly convinced that the trial court made a mistake.³

To preserve an issue for appellate review, the parent must raise it before the trial court.⁴ Ramsdell argues on appeal that the trial court did not comply with the Michigan Supreme Court's decision in *In re Mason*,⁵ but he did not raise this issue before the trial court. Thus, we will review the issue for plain error affecting Ramsdell's substantial rights.⁶ An error is plain if it is clear or obvious.⁷

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

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent's 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.

A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child with proper care and custody.⁸

Ramsdell primarily argues that the trial court did not comply with *In re Mason* because it failed to consider that Ramsdell may have been able to provide his son with proper care and custody by placing him with his grandfather. Though incarcerated, a parent may be able to

¹ MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

² MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

³ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁴ *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

⁵ *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010).

⁶ *In re Utrera*, 281 Mich App at 8; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁷ *Id.*

⁸ *In re JK*, 468 Mich at 214.

provide proper care and custody for his or her child if the parent voluntarily places the child with relatives.⁹ Thus, a parent's incarceration alone is not grounds to terminate parent's rights under this ground.¹⁰ However, that is not the situation presented here.

Contrary to Ramsdell's assertion in his appellate brief, the grandfather was no longer able to care for the son. Because of the grandfather's deteriorating health, the grandfather requested that the trial court place the son elsewhere, and the trial court placed the son in foster care. Thus, the son was not in the care of relatives at the time of termination. We conclude that the trial court did not plainly err when it did not consider this issue because *In re Mason* is not applicable.

More importantly, the trial court did not base its decision to terminate Ramsdell's parental rights on his incarceration alone. Instead, the trial court found that Ramsdell had been unable to provide his son with proper care and custody because of his drug lifestyle. It found that Ramsdell's drug lifestyle had not changed or had grown worse, and that Ramsdell was likely to be frequently incarcerated as a consequence of that lifestyle. The trial court also found that Ramsdell would not be likely to provide the son with proper care or custody within a reasonable time because he had failed to comply with or benefit from his service plan. Witnesses testified that Ramsdell stopped participating in drug screens and individual counseling. Thus, we conclude that the trial court did not clearly err when it found that clear and convincing evidence supported terminating Ramsdell's parental rights on this ground.

C. MCL 712A19b(3)(j)

MCL 712A.19b(3)(j) provides that the trial court may terminate parental rights if:

[t]here 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.

Ramsdell argues that the trial court did not comply with the requirements of *In re Mason* under this ground either. The Department is obligated to make reasonable efforts to reunite even an incarcerated parent with his or her child.¹¹ However, Ramsdell does not state a factual basis for his assertion that the trial court did not engage in efforts to reunify Ramsdell with his son while he was incarcerated. If an appellant does not assert the factual basis for his position, he has abandoned it on appeal.¹² We conclude that Ramsdell has abandoned this issue because he does not state the factual basis for his position.

Further, we reject Ramsdell's argument since there is no plain or obvious error in the record to support his assertions. To the contrary, the trial court ordered Ramsdell to participate

⁹ *In re Mason*, 486 Mich at 161.

¹⁰ *Id.* at 160.

¹¹ *In re Mason*, 486 Mich at 152.

¹² MCR 7.212(C)(7); *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008).

in services and visitation while he was incarcerated, and rescheduled hearings so Ramsdell could be present. There is no indication that the trial court did not attempt to reunite Ramsdell with his son while he was incarcerated. We conclude that the trial court did not clearly deny Ramsdell his opportunity to participate in the case.

Ramsdell also argues that the trial court erred when it used evidence of his lengthy criminal record to support its conclusion that Ramsdell would harm his son if his son was returned to his care. A parent's criminal history alone does not constitute grounds for termination.¹³ However, for the reasons stated in our analysis under subdivision (3)(g), we conclude that the trial court did not base its decision on Ramsdell's past criminal history. The trial court instead used Ramsdell's frequent incarcerations to support its conclusion that his behavior had not changed and that he was unlikely to rectify it within a reasonable time.

Further, the trial court's extensive findings about Ramsdell's conduct during visitation and his propensity to abuse or neglect his child because of his drug lifestyle and lack of parenting skills—which were not likely to be rectified because of Ramsdell's failure to participate in, or benefit from, services—also support termination under this ground. Thus, we conclude that the trial court did not clearly err when it concluded that clear and convincing evidence supported termination under this statutory ground.

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

If the Department has established a statutory ground for termination by clear and convincing evidence and the trial court finds from evidence on the whole record that termination is in the child's best interests, the trial court must order the parent's rights terminated.¹⁴ The parent does *not* have the burden to show that termination is against the child's best interests.¹⁵ We review for clear error the trial court's decision regarding the child's best interests.¹⁶

B. LEGAL STANDARDS

To determine whether termination is in a child's best interests, "the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home."¹⁷

¹³ *In re Mason*, 486 Mich at 165.

¹⁴ MCL 712A.19b(5); MCR 3.977(H); *In re Trejo Minors*, 462 Mich at 351.

¹⁵ *Id.* at 365.

¹⁶ *Id.* at 356-357.

¹⁷ *In re Olive/Metts*, ___ Mich App ___, slip op p 3; ___ NW2d ___ (2012) (internal quotations omitted).

C. ANALYSIS

Ramsdell argues that the evidence was not clear and convincing that termination was in the son's best interests because the trial court previously found that Ramsdell participated in his service plan. Although the trial court found at the first termination trial that Ramsdell had completed many of the court ordered requirements, the trial court later found that there was clear and convincing evidence that Ramsdell had not benefitted from those classes.

We conclude that the trial court's finding was not clearly erroneous. Witnesses testified that Ramsdell stopped participating in his service plan in the year between the first and second petitions to terminate Ramsdell's rights. Johnson testified that Ramsdell started coming to therapy only infrequently in May 2011, and stopped attending entirely in September 2011. Begg testified that Ramsdell stopped submitting drug screens in February 2010, and Bartz testified that Ramsdell refused to participate in drug screens in June 2011. Thus, the trial court's findings at the second hearing do not conflict with its findings at the first hearing.

We conclude that the trial court's determination that termination was clearly in the son's best interests was also not clearly erroneous. The trial court appropriately considered that Ramsdell's parenting abilities were deficient and did not improve over the course of his supervised visits. Further, the trial court appropriately considered that the son had a strong need for permanency, stability, and finality. The son had spent half his life in foster care, and suffered from anger and anxiety issues that the son's counselor directly linked to the son's lack of stability and particular needs for permanence and routine. Gustafson testified that in her opinion, continued instability in the son's life posed a danger to his mental and emotional health. Thus, although Ramsdell and his son may have had a bond, we conclude that the trial court did not err when it determined that termination was clearly in the son's best interests.

We affirm.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly