

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
November 29, 2011

In the Matter of JANSEN/KENEL, Minors.

No. 303080  
St. Clair Circuit Court  
Family Division  
LC No. 10-000367-NA

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Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to her minor children pursuant to MCL 712A.19b(3)(b)(ii), (g), and (j). Because the trial court did not clearly err in finding that a statutory ground for termination was established by clear and convincing evidence or that termination was in the minor children's best interests, we affirm.

A petitioner must establish at least one statutory ground for termination of parental rights by clear and convincing evidence. *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests. MCR 3.977(K); *In re Archer*, 277 Mich App 71, 73; 744 NW2d 1 (2007). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re BZ*, 264 Mich App 286, 296–697; 690 NW2d 505 (2004).

On appeal, respondent contends that the trial court erred in finding that each of the three cited statutory grounds for termination were supported by clear and convincing evidence. We agree that the lower court erred when it found sufficient evidence under MCL 712A.19b(3)(b)(ii).

MCL 712A.19b(3)(b)(ii) provides for termination upon a finding that:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

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(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable

likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

Here, the minor child testified that her stepfather sexually assaulted her twice, when she was seven or eight years old. The child testified that her mother was not at home at the time and that she did not tell anyone until several years later when she was living in Alabama with her relatives. There is no evidence or testimony suggesting that respondent had the opportunity to prevent the abuse.

It is also questionable whether there was sufficient evidence to support termination under MCL 712A.19b(3)(j). Termination is appropriate under this subrule where the court finds “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.” It appears in this case that petitioner relied solely upon respondent’s incarceration and limited criminal history as the basis for termination under (3)(j) without offering services to address her substance abuse and domestic violence issues. Further, there is no analysis whatsoever concerning whether these problems were likely to continue after her release.

Nevertheless, reversal is not required when there is clear and convincing evidence of at least one statutory ground, regardless whether an alternative ground was not sufficiently established. See *In re Sours*, 459 Mich 624, 640-641; 593 NW2d 520 (1999). Here, there was sufficient evidence presented for termination of respondent’s parental rights under MCL 712A.19b(3)(g) where, “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.”

In 2006, respondent and the children moved to Florida. According to one of the minor children, while residing there, respondent was a drug addict and sold drugs as well. Respondent was arrested for and convicted of drug trafficking in the state of Florida in 2009 and sentenced to 95 months imprisonment. She is currently incarcerated with her earliest release date being April 2016. Just prior to her incarceration, respondent sent the minor children to live with one of the younger child’s relatives in Alabama. There were problems with that placement and the children were relocated to Michigan to reside with the elder child’s paternal aunt. There are now problems with the placement of the children in that environment. Respondent argues that she could provide proper care and custody of the children through another relative until her release.

It is true that incarcerated parents may meet their obligation to provide proper care and custody through an appropriate relative placement. *In re Mason*, 486 Mich 142, 162 n 11; 782 NW2d 747 (2010). However, the relative must be capable of providing appropriate care that meets the children’s needs. See MCL 722.954a(5); *In re Taurus F*, 415 Mich 512, 535; 330 NW2d 33 (1982). And, the court has no *duty* to place a child with relatives. “If it is in the best interests of the child, the [] court may properly terminate parental rights instead of placing the child with relatives.” *In re IEM*, 233 Mich App 438, 453-454; 592 NW2d 751 (1999).

In the present case, the only relative respondent suggested had an extensive history of substance abuse, which he repeatedly attempted to minimize during his testimony. It was reasonable for petitioner and the lower court to determine that the relative would likely not

provide appropriate care and custody for these children, who had already been placed with two inappropriate relative caregivers. Respondent's 2016 earliest release date and the lack of an appropriate relative caregiver distinguish the present case from *In re Mason*, 486 Mich at 162-164. Under these circumstances, respondent failed to provide proper care and custody for the children and could not provide proper care and custody within a reasonable time; therefore, the lower court did not err in finding sufficient evidence under MCL 712A.19b(3)(g).<sup>1</sup>

Finally, respondent argues that terminating her parental rights was not in the children's best interests, MCL 712A.19b(5). She cites their strong bond and her progress; however, the only evidence that respondent made any "progress" was that she was unable to abuse substances while incarcerated. The children suffered through two inappropriate placements and could not be in their mother's care until at least 2016. Permanence was in their best interests. *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991). The lower court did not err when it terminated respondent's parental rights.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Jane E. Markey  
/s/ Kirsten Frank Kelly

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<sup>1</sup> The lower court's failure to cite MCL 712A.19b(3)(h) as a statutory ground for termination appears to be an oversight given that the above subsection required the same evidence as (3)(g) along with evidence that the children would be deprived of a normal home for more than two years due to a parent's incarceration.