

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
February 5, 2013

In the Matter of JONES/GIPSON, Minors.

No. 311925  
Bay Circuit Court  
Family Division  
LC No. 11-010970-NA

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Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Respondent-mother appeals the August 8, 2012 order terminating her parental rights to two minor children. For the reasons set forth below, we affirm.

Respondent argues that petitioner failed to present clear and convincing evidence to establish a statutory ground for terminating her parental rights. However, she raises a preliminary claim that, after the children were removed from her custody, the trial court erred when it conditioned her parenting time on her submission of four clean drug tests. According to petitioner, this is contrary to MCL 712A.13a(13), which provides:

If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.<sup>[1]</sup>

We note that respondent's counsel did not object to the condition and her claim is, therefore, forfeited. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). We review forfeited claims for plain error affecting substantial rights. *Id.*

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<sup>1</sup> Until 2012, the section now known as MCL 712A.13(a)(13) was found at MCL 712A.13(a)(11). 2012 PA 115. The substance of the provision is identical. Compare MCL 712A.13(a)(11) (2011) with MCL 712A.13(a)(13).

Respondent's claim fails because, were we to hold that parenting time conditioned on clean drug screens required the children to undergo a psychological evaluation or counseling, any error was clearly harmless, and did not affect respondent's substantial rights. MCR 2.613(A). Respondent has shown no connection between her suspended parenting time and the eventual termination of her parental rights under MCL 712A.19b(c)(i), (g), and (j), and the trial court found clear and convincing evidence apart from respondent's lack of parenting time to terminate her parental rights.

With regard to her claim that petitioner failed to establish grounds for termination, this Court reviews for clear error claims that there was insufficient evidence to terminate parental rights and that the termination was not in the best interest of the child. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A trial court's finding is clearly erroneous if this Court is left with "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). "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." MCL 712A.19b(5).

The trial court terminated respondent's rights pursuant to MCL 712A.19b(3)(c)(i), (g), and (j), which read:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

\* \* \*

(c) 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 either of 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.

\* \* \*

(g) 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.

\* \* \*

(j) 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.

The trial court did not err when it found clear and convincing evidence warranting termination under MCL 7.12A.19b(3)(c)(i). The petition to terminate respondent's parental rights included allegations that respondent lacked housing, she could not properly care for her children, and had significant mental health problems. Based on many of these concerns, the court ordered petitioner to continue temporary custody of the children and ordered respondent to comply with the case service plan. The termination hearing occurred on August 8, 2012, which was far beyond 182 days as indicated under MCL 7.12A.19b(3)(c)(i).

The evidence submitted at the termination hearing supported a finding that the issues at the time of adjudication remained and had no likely resolution. Testimony showed that respondent moved 12 times during the pendency of her case, which established that she did not resolve her housing instability. Though respondent testified she found an apartment as of the termination hearing, she had not signed a lease by the hearing date, nor had she secured adequate funds to lease the apartment. As of the termination hearing, respondent was living with her mother, which she had been told was not suitable for the children. Respondent also failed to comply with the majority of services ordered by the court. She did not attend required parenting classes, she rarely complied with court-ordered drug tests, and her psychological evaluation showed a significant history of drug use and the presence of psychotic behaviors when she was using drugs. Respondent also admitted to noncompliance with the counseling and medical portion of the case service plan because she did not believe she had mental-health problems. Therefore, clear evidence showed that the issues from the initial adjudication remained and there was no reasonable likelihood that they would be rectified within a reasonable amount of time given the ages of the children, which was sufficient to warrant termination under MCL 7.12A.19b(3)(c)(i).

The court also correctly found clear and convincing evidence to warrant termination under MCL 7.12A.19b(3)(g). Termination under this provision was proper for many of the same reasons as the previous provision. Respondent did not have suitable housing, she failed to comply with court-ordered drug screens, she left her children with two unfit persons because she was unable to care for them at the time, and she failed to comply with most of the service requirements ordered by the court. This evidence established that respondent cannot provide proper care and custody for her children and she did not establish an ability to do so in the future. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), citing *In re Trejo*, 462 Mich at 360-363; MCL 7.12A.19b(3)(g).

Further, the trial court did not commit clear error when it found clear and convincing evidence warranting termination under MCL 7.12A.19b(3)(j). As discussed, respondent did not secure a suitable place to live, and evidence showed she had recently tested positive for using alcohol and cocaine. Respondent was repeatedly unable to provide consecutive, clean drug tests, and she lived a promiscuous lifestyle, resulting in multiple children fathered by men respondent could not identify. The children had both race and temper issues when arriving at their foster home, but improved in foster care. Therefore, clear and convincing evidence warranted termination under MCL 7.12A.19b(3)(j).

We further hold that the trial court did not clearly err when it ruled that termination was in the children's best interests. Evidence showed that the children were doing significantly better under the care of the foster parents. The children came to the home with behavioral issues, but

the foster mother testified that she noticed significant improvement in the children's behavior since they entered her home. Both children are currently in counseling and doing well scholastically. In the meantime, respondent has done little to better herself. She became pregnant again, by an unknown father, and used alcohol and marijuana during her pregnancy. The main issues at the beginning of the case were the respondent's lack of housing and inability to provide or care for the children. As noted above, her housing problem continued as of the termination hearing and she failed to comply with most of the service requirements ordered by the court. Moreover, there was evidence that respondent had a drug problem as well as unresolved mental health problems. The record clearly supports the trial court's ruling that termination is in the children's best interests. MCL 712A.19b(5).

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

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SHAPIRO, J. (*concurring*).

I concur with the majority's conclusion that there were several well-demonstrated grounds for termination and that termination was in the best interests of the children given their mother's mental illness, homelessness and inability to care for them or to benefit from services.

I conclude, however, that respondent mother was denied her right to visit with her children once they were removed.<sup>1</sup> This right was completely ignored by the trial court, the prosecution, and the attorney for the minors, all of whom seemed to be unaware of the relevant statute.

MCL 712A.13(11) provides that a trial "court *shall* permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." The statutory language is clear. In the normal course, parenting time is to be frequent. Where the court concludes that parenting time, even if supervised, may be harmful to the child, then the court may fashion appropriate limits and conditions based upon the results of a psychological evaluation of the child. In this case, parenting time was completely withheld though there was never any finding that visitation, even if supervised, would be harmful and no psychological evaluation of the children was obtained. Instead, visitation was denied simply because respondent failed to comply with the order for drug testing. Though there had not been any allegations of drug abuse brought against the mother by DHS, it nevertheless requested mandatory drug testing as a condition of visitation.

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<sup>1</sup> The children were removed pursuant to the respondent mother's own request because she could not provide adequate care given her homelessness.

Unfortunately, respondent rarely appeared for her drug screens. Her failure to do so may have occurred because she was in fact using drugs, though given her nomadic state, other reasons for her non-appearance are not unlikely. As a result of her non-compliance with the drug screens, respondent was not permitted to have any visitation—supervised or otherwise—with her children.

While drug testing can be a proper element of a service plan, making non-compliance with drug screens an absolute bar to even supervised visitation is a violation of MCL 712A.13(11). As a result of this violation, respondent mother was not allowed *any* visitation from the date of the preliminary hearing on September 19, 2011 until termination of her parental rights was ordered 9 months later. Had this case been closer, I would have agreed with respondent that the failure to provide visitation required reversal. However, under the facts of this case, I must agree with the majority that the termination of respondent's parental rights was not the result of this unlawful denial of parenting time.

/s/ Douglas B. Shapiro