

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 12, 2013

In the Matter of Z. L. M. JAVOR, Minor.

No. 311353, 311354
Iosco Circuit Court
Family Division
LC No. 2011-006668-NA

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

In these consolidated cases, respondent-mother Coleman and respondent-father Javor each appeal as of right the trial court's order terminating their parental rights to their minor daughter. The trial court terminated Coleman's parental rights under MCL 712A.19b(3)(g) (failure to provide proper care and custody), (i) (rights to siblings terminated because of previous serious neglect or abuse), (j) (the child is reasonably likely to be harmed if returned to the parent's home), and (l) (rights to siblings terminated as a result of another proceeding). The trial court terminated Javor's parental rights under MCL 712A.19(b)(3)(g) and (j). We affirm.

I. FACTS

A. BACKGROUND FACTS

In 2009, Coleman voluntarily relinquished her parental rights to two children. Coleman gave birth to another child in November 2011. The child tested positive for marijuana when she was born, and the hospital requested that Child Protective Services (CPS) take her into protective custody immediately. The Department of Human Services (the Department) petitioned the trial court for immediate termination of Coleman's parental rights on these grounds, and immediate termination of Javor's rights on the basis of his mental health and substance abuse problems. The trial court authorized the petition, finding that the child was at a risk of harm.

At the adjudication in February 2012, Javor pleaded that he had a history of alcohol abuse, prescription medication abuse, and attempted suicide, and that he was unable to properly care for a child because of his conduct. Coleman pleaded that she voluntarily relinquished her rights to two of her children in 2009, that she tested positive for marijuana while pregnant with the child, and that she knew that marijuana was harmful for her. The trial court ordered both parents to participate in services.

B. PROCEEDINGS

The trial court began the initial dispositional hearing in April 2012. Much of the testimony at the hearing focused on the parents' substance abuse problems. The Department admitted several police reports as evidence that both Coleman and Javor have extensive histories of assaults and intoxicated and disorderly conduct. Probation Officer Gail Wait testified that Javor did not successfully complete three terms of probation for domestic violence and attempted assault because of his alcohol consumption. Deputy Sheriff Matt Klosowski testified that when CPS removed the child at the hospital, Javor both appeared and smelled intoxicated.

Joyce Humerickhouse, a CPS worker, testified that Coleman and Javor were each required to have two sequential clean drug screens before the Department would allow visitation. Surveillance officers Terry Frank and Sereina Lowell testified about their attempts to locate Coleman and Javor for drug screens. Frank testified that of 28 checks, he was able to conduct seven drug tests. Lowell testified that of 15 checks, she was able to conduct four drug tests.

Kelli King, a CPS worker, testified that Coleman began visiting the child in April, after two clean drug screens. However, King was concerned because Coleman did not attend substance abuse or mental health counseling. Coleman testified that she did attend substance abuse counseling.

King testified that the Department did not allow Javor to visit the child because he did not complete drug screens. Paul Wright, a community mental health worker, testified that Javor's alcohol consumption adversely affected his treatment and medication. Wright testified that Javor's medication was changed in 2011, and that Javor showed progress with controlling his anxiety and paranoia. King testified that Javor attended counseling and in-patient substance abuse treatment, but did not attend drug screens. Glen Swartz, Javor's counselor, testified that Javor admitted drinking the day after he was released from his substance abuse program. Javor testified that he was an alcoholic; he admitted that he drank the day before the hearing.

King testified that Coleman and Javor attended parenting classes. Javor testified that he is very good with children. Coleman testified that she released her parental rights to her other children in 2009 because she was homeless and starving, but that her housing situation had improved. Coleman testified that she would be able to take care of the child.

Dr. Wayne Simmons, who conducted both parents' psychological evaluations, testified that neither parent was able to care for the child. Dr. Simmons explained that it is extremely important that a child between ages of zero and three years old form an attachment to its primary caregiver for the child to have proper mental and emotional development. He testified that Coleman knew basic parenting skills, but did not learn from experience, and likely would not "reorganize[e] herself" quickly enough to assist the child's development during that critical period. Dr. Simmons testified that Javor suffered from auditory and visual hallucinations, including command hallucinations, which are "the most dangerous psychiatric phenomena." Dr. Simmons testified that Javor would have "[c]atastrophic problems" parenting a child, and that he lacked the connectivity crucial to parenting.

C. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

The trial court found that Coleman has a “serious drug problem” and is an addict. It found that she does not have the skills and maturity necessary to parent a child, finding that she places her personal pleasure ahead of logic, her well-being, and the well-being of her children. The trial court also found that Coleman did not improve her parenting ability since the child’s removal, and that she continued to make poor choices and abuse marijuana. It found that there was no reasonable likelihood that Coleman would be able to improve within a reasonable time.

The trial court found that Javor has severe mental health problems, including hallucinations and suicide attempts. It found that Javor has an extensive criminal record for drug abuse and domestic violence, and that Javor continues to consume alcohol, despite attempts at in-patient rehabilitation. It found that Javor exhibited “a blank stare, a flat affect, and limited visual contact,” and that blank stares cause infants to become distressed, react negatively, and may cause attachment disorders. The trial court concluded that it was not reasonably likely that Javor could resolve his alcohol abuse and serious psychological issues within a reasonable time.

The trial court found that both Coleman and Javor tested positive for drugs and alcohol, and frequently missed visits. It determined that both parents would be unable to provide proper care for the child, and that caring for the child in their present state would have a “devastating effect” on her development. It found that it was very likely that the child would be harmed if she was returned to her parents, and that there was no reasonable likelihood that they would change within a reasonable time. After concluding that termination was in the child’s best interests, the trial court ordered both parents’ rights terminated.

II. DOCKET NO. 311353

In Docket No. 311353, Javor argues that the trial court improperly admitted the police reports as evidence, and erred when it found that clear and convincing evidence supported terminating his parental rights.

A. THE POLICE REPORTS

1. ISSUE PRESERVATION AND STANDARD OF REVIEW

The Department argues that Javor waived this issue because the trial court admitted the police reports by stipulation. The record does not support the Department’s assertion. Javor challenged the relevance of the police reports because the incidents did not involve children, and there is no stipulation to the reports’ admissions in the record.

We conclude that Javor did not waive this issue, and preserved his challenge to the general relevance of the police reports. This Court reviews for an abuse of discretion preserved

challenges to the trial court's evidentiary rulings.¹ The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.²

However, to preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal.³ It is particularly important that the appellant preserve challenges to the relevance of evidence on the grounds of its prejudicial effect, because the trial court has the best opportunity to contemporaneously assess the relative weight of the evidence's probative value and prejudicial effect.⁴ Javor did not argue below that the prejudicial effect of the reports outweighs their probative value, which is part of the issue he presents on appeal.

To the extent that Javor argues that the prejudicial effect of the reports outweighs their probative value, we conclude that this issue is unpreserved. We review unpreserved issues for plain error affecting a party's substantial rights.⁵ Error is plain if it is clear or obvious.⁶

2. LEGAL STANDARDS

The trial court may terminate the parents' parental rights at the initial dispositional hearing under limited circumstances.⁷ One of the requirements to terminate the parents' rights at the initial hearing is that the trial court finds on the basis of "clear and convincing *legally admissible* evidence" that the facts in the petition are true and establish a statutory basis for terminating the parent's parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n).⁸

The trial court may only admit relevant evidence.⁹ Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.¹⁰ But even when the evidence is relevant, the trial court may not admit it if the danger of its prejudicial effect substantially outweighs its probative value.¹¹ The prejudicial effect of the evidence substantially

¹ *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008).

² *Id.*; *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

³ *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2012).

⁴ *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

⁵ *Id.*; *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

⁶ *Id.* at 763.

⁷ MCR 3.977(E).

⁸ MCR 3.977(E)(3) (emphasis supplied).

⁹ MRE 402.

¹⁰ MRE 401.

¹¹ MRE 403.

outweighs its probative value when evidence is only marginally probative, but the trier of fact may give it undue or preemptive weight.¹²

3. APPLYING THE STANDARDS

Javor argues that the trial court abused its discretion in this case because (1) the police reports were not relevant, and (2) the prejudicial effect of the reports outweighs their probative value. We disagree.

The trial court did not abuse its discretion when it determined that the police reports were relevant. The petition alleged that Javor's substance abuse and mental health problems rendered Javor unable to care for his child and made it reasonably likely that the child would be harmed if returned to his care. The majority of the reports document numerous instances in which the police responded to domestic assault dispatches because of Javor's conduct. Most of the reports indicate that Javor became intoxicated and domestically assaulted his father. In two of the reports, Javor unexpectedly assaulted unrelated victims. And two of the reports indicate that Javor violated the terms of his probation by using alcohol. Because the petition in this case sought to protect the child from the potential harms of Javor's substance abuse and violent behaviors, we conclude that these reports are relevant because they clearly tend to make these facts of consequence more likely to be true.

Further, the trial court did not plainly err in assessing the reports' relative probative value and prejudicial effect. The police reports illustrated Javor's long history of alcohol abuse and domestic assault, and thus were more than only marginally probative concerning whether Javor abused substances and whether returning the child to his home would place her at a risk of harm.

We conclude that the trial court did not abuse its discretion or clearly err when it admitted the police reports.

B. STATUTORY GROUNDS

1. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination.¹³ The trial court's factual findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.¹⁴

¹² *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008); *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

¹³ MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

¹⁴ *Id*

2. MCL 712A.19b(3)(g) AND (j)

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.

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.

Javor argues that the evidence did not support terminating his parental rights because the trial court did so solely on the basis of his mental illness, and he was capable of caring for the child despite his mental illness. We do not agree with Javor's characterization of the evidence or the trial court's findings.

We conclude that the evidence at the dispositional hearing supported the trial court's findings in this case. A parent's mental illness can affect that parent's ability to parent a child.¹⁵ Dr. Simmons conducted Javor's psychological evaluation and testified that Javor experiences one of the most dangerous psychic phenomenon—command hallucinations. Though Wright testified Javor might be able to control his illness with proper medication, he also testified that the medications did not mix well with alcohol. Further, Dr. Simmons testified Javor exhibited a lack of connectivity, and that a lack of parental bond could affect the child's mental and emotional development, particularly during her first three years. The evidence supported the trial court's factual findings that Javor experienced dangerous psychic phenomenon. Further, the trial court found that Javor demonstrated a blank stare and a flat affect. The trial court did not clearly err when it found that both of these conditions would affect Javor's ability to parent the child, and placed her at a risk of harm if returned to his care.

The trial court also found that Javor has a history of substance abuse and violent behavior. The trial court may properly consider both of these conditions when determining whether it is reasonably likely that the child will be harmed if returned to the parent's home.¹⁶ As illustrated by the police reports discussed above, Javor engaged in multiple instances of domestic violence and assault, typically while intoxicated. Javor attended an in-patient residential treatment program for substance abuse, but admitted that he began drinking the day after leaving the program. Javor also admitted that he drank the day before the hearing. The trial court did not clearly err when it determined that Javor abused alcohol and that it was not reasonably likely that he would be able to address this problem within a reasonable time.

¹⁵ See *In re Utrera*, 281 Mich App at 23, 25.

¹⁶ See *In re AH*, 245 Mich App 77, 87; 627 NW2d 83 (2001).

The trial court considered that Javor did not comply with his service plan. 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.¹⁷ There was extensive evidence that Javor did not comply with the court-ordered treatment plan in this case. Multiple witnesses testified that Javor was simply unable or unwilling to remain sober. Javor did not participate in drug screens and, as noted above, his substance abuse treatment was not successful.

We conclude that the record amply supported trial court's findings and we are not convinced that the trial court made a mistake when it determined that clear and convincing evidence supported terminating Javor's parental rights under MCL 712A.19b(3)(g) and (j). The extensive testimony at the dispositional hearing established that it was not reasonably likely that Javor would be able to rectify his substance abuse and mental health issues within a reasonable time given the very young age of the child, and these issues made it reasonably likely that she would be harmed if returned to his care.

III. DOCKET NO. 311354

In Docket No. 311354, Coleman argues that the trial court erred when it found grounds to remove the child at the initial preliminary hearing, and erred at the dispositional hearing when it found that clear and convincing evidence supported terminating her parental rights.

A. PRELIMINARY HEARING

Coleman first argues that Coleman's conduct was not abuse, and so it was improper for the trial court to initially remove the child. When a direct appeal was available, a parent may not challenge the court's initial assumption of jurisdiction over the child in a collateral attack after the court has terminated the parent's parental rights.¹⁸ A parent may directly appeal from the trial court's order removing the child.¹⁹ We conclude that Coleman's attempt to challenge the trial court's initial assumption of jurisdiction after the court terminated her parental rights is an impermissible collateral attack because Coleman could have appealed from the original jurisdictional order. Thus, we decline to consider this issue.

B. STATUTORY GROUNDS

1. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings and ultimate determinations concerning the statutory grounds for termination.²⁰ The trial court's factual

¹⁷ *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

¹⁸ *In re Hatcher*, 443 Mich 426, 437, 444; 505 NW2d 834 (1993).

¹⁹ MCR 3.993(A)(1).

²⁰ MCR 3.977(K); *In re Mason*, 486 Mich at 152.

findings are clearly erroneous if the evidence supports them, but we are definitely and firmly convinced that it made a mistake.²¹

2. MCL 712A.19b(3)(g) AND (j)

As discussed above, 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.

And 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.

Coleman argues that there was no evidence that she abused *prescription* substances. The petition alleged that Coleman abused marijuana—a substance for which Coleman did not have a prescription. Thus, whether Coleman abused a prescription substance was not at issue in this case.

The trial court found that Coleman abuses substance and is an addict. It also found that Coleman does not have the necessary skills and maturity to parent a child, and that Coleman continues to make poor choices. We reiterate that the trial court may properly consider a parent's history of substance abuse when determining whether it is reasonably likely that the child will be harmed if returned to a parent's home.²² 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.²³

Here, Coleman admitted that she smoked marijuana while she was pregnant with the child, despite knowing that it was harmful. Multiple witnesses testified that Coleman did not submit to drug tests or substantially participate in her service plan. Dr. Simmons testified that Coleman's problems were likely to harm the child's development. Further, Dr. Simmons testified that he previously treated Coleman for substance abuse, but she was unable to make significant progress over a lengthy period of time.

²¹ *Id.*

²² See *In re AH*, 245 Mich App at 87.

²³ *In re JK*, 468 Mich at 214.

Coleman also argues that Dr. Simmons’s testimony was not credible because he mistook the age of the child by about six months. This Court generally defers to “the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.”²⁴ We will not interfere with the trial court’s determination that Dr. Simmons’s testimony was credible. This testimony supported the trial court’s determination that Coleman would not be able to address her substance abuse problems within a reasonable time given the child’s young age.

We conclude that the record supported the trial court’s findings that Coleman could not provide the child with proper care and custody, and that the child would be at a risk of harm if it returned her to Coleman’s care.

3. MCL 712A.19b(3)(i) AND (l)

MCL 712A.19b(3)(i) provides that the trial court may terminate a parent’s rights if

[p]arental rights to 1 or more siblings of the child have been terminated due to *serious and chronic neglect* or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.^[25]

MCL 712A.19b(3)(l) provides that the trial court may terminate a parent’s rights if

[t]he parent’s rights to another child were terminated as a result of proceedings under . . . this chapter or a similar law of another state.

These statutory sections only apply if the parent’s rights were involuntarily terminated.²⁶

Here, Coleman relinquished her parental rights to her previous children voluntarily. Thus, these statutory sections did not apply. The trial court’s error is harmless if it could have terminated the parent’s parental rights under another statutory section—such as MCL 712A.19b(3)(m), which applies when a parent has voluntarily relinquished parental rights to a previous child.²⁷ But MCL 712A.19b(3)(m) additionally requires proof of specific forms of high-severity abuse, such sexual abuse, murder or attempted murder, or abandonment.²⁸ The trial court’s findings of fact do not contain any details about Coleman’s previous termination from which we could conclude that her rights were terminated for “serious and chronic neglect” under MCL 712A.19b(3)(i), or that the trial court’s mistake was harmless under MCL 712A.19b(3)(m). We conclude that the trial court erred when it determined that these statutory sections supported terminating Coleman’s parental rights.

²⁴ *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); MCR 2.613(C).

²⁵ Emphasis supplied.

²⁶ See *In re Jones*, 286 Mich App 126, 128; 777 NW2d 728 (2009).

²⁷ *Id.* at 129.

²⁸ MCL 712A.19b(3)(m)(i)-(ix).

However, the trial court need only establish a single statutory ground to terminate a parent's parental rights.²⁹ Because the trial court did not err when it determined that the Department established MCL 712A.19b(3)(g) and (j) by clear and convincing evidence, the trial court had sufficient statutory grounds to order Coleman's parental rights terminated.

We affirm.

/s/ Kathleen Jansen
/s/ William C. Whitbeck
/s/ Stephen L. Borrello

²⁹ *In re Olive/Metts Minors*, 297 Mich App 35, 41; ___ NW2d ___ (2012); *In re CR*, 250 Mich App 185, 207; 646 NW2d 506 (2002).