STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JOSIAH ALAN SPENCE, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JACQUELINE A. JOHNSTON,

Respondent-Appellant,

and

REGINALD ALAN SPENCE,

Respondent.

UNPUBLISHED
December 22, 2009

No. 291786
Calhoun Circuit Court
Family Division
LC No. 08-001427-NA

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Respondent Jacqueline A. Johnston appeals as of right from the trial court order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(a)(ii), (c)(i), and (g). Respondent raises three issues. First, she alleges the trial court deprived her of her right to counsel when it discharged appointed counsel at the permanency planning hearing. Second, respondent maintains that the statutory grounds for termination were not established by clear and convincing evidence.[1] Third, respondent maintains the trial court erred when it failed to determine whether termination of her parental rights was in the best interest of the child, pursuant to MCL 712A.19b(5). For the reasons set forth below, we conclude there is no merit to any issue raised by respondent. We affirm.

[1] Respondent presents the specifics of this issue in issues II, III and IV of her brief on appeal.

I. Respondent's Right to Counsel

Respondent argues that she was deprived of her Constitutional right to counsel when the trial court discharged her attorney at the permanency planning hearing. As a result of this action, no counsel represented respondent at the termination of parental rights hearing.

The constitutional guarantee of due process extends the right to counsel to respondents in termination proceedings. If financially unable to secure counsel, a respondent has the right to request and receive a court-appointed attorney. *In re Powers,* 244 Mich App 111, 121; 624 NW2d 472 (2000). However, a respondent in a child protective proceeding can, by her actions, waive or relinquish her right to counsel by failing to communicate with her attorney or by failing to appear at the proceedings. *In re Hall,* 188 Mich App 217, 222; 469 NW2d 56 (1991).

In this case, respondent requested and received appointed counsel at the hearing on April 30, 2008. Respondent then failed to appear at the permanency planning hearing on January 28, 2009. Respondent's attorney stated on the record at that hearing that his last contact with respondent was November 25, 2008. Because respondent had failed to show any interest in her case and had not had contact with her attorney in over two months, the court discharged the attorney. The court left open the possibility of re-appointing counsel should respondent appear and reassert her right to counsel. However, respondent failed to appear at the termination of parental rights hearing on April 22, 2009. At that time, the caseworker had not had contact with respondent since December 5, 2008, when respondent left a telephone message for the worker. In addition, attempts to locate respondent since that time had been unsuccessful. When the caseworker attempted to locate respondent at her last known residence in January of 2009, she discovered that respondent had moved and not left a forwarding address.

Based upon the foregoing events, we conclude that respondent's due process rights were not violated because she relinquished her right to counsel. Respondent failed to appear at critical hearings and did not communicate with her appointed counsel. At the time of the termination hearing, respondent had not participated in the process in any fashion for over four months. Further, although respondent could have, she did not appear before the court to request the re-appointment of counsel.

II. The Evidence Supporting the Statutory Grounds for Termination

Next, respondent contends that the statutory grounds for termination of her parental rights were not proven by clear and convincing evidence. In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. *In re Trejo,* 462 Mich 341, 356-357; 612 NW2d 407 (2000). This Court reviews that finding under the clearly erroneous standard. MCR 3.977(J); *In re Sours Minors,* 459 Mich 624, 633; 593 NW2d 520 (1999).

Here, the record established that Josiah was born with cocaine in his system. At the time, respondent admitted to using drugs during her pregnancy. Prior to Josiah being removed from respondent's care, respondent was offered several services in an effort to prevent removal. Respondent failed to participate in services, and she neglected to keep petitioner apprised of her

whereabouts. When Josiah was removed from respondent's care in April of 2008, respondent again was offered several services, including a psychological evaluation, parenting classes, parenting time, random drug screens, substance abuse assessment, counseling, and domestic violence counseling. Except for submitting to the psychological examination, respondent failed to comply with the services offered to her. At the time of the termination hearing, respondent had not seen her child in nearly six months. She had stopped coming to parenting time after being refused visits because she continued to test positive for controlled substances. Respondent had not cooperated in the random drug screens and the ones she did provide were positive. Respondent did not communicate with her caseworker and she had moved without providing her new address to the caseworker.

These facts conclusively establish that respondent had deserted her child months before the termination hearing. As the lower court concluded, respondent had shown no interest in being a parent to Josiah. Because respondent continued to test positive for controlled substances, missed 50 random screens, and had not participated in any substance abuse treatment, it was also clear that at the time of termination respondent had not adequately addressed, let alone conquered, her drug addictions. Further, because respondent had not participated in and benefited from the services offered, it was reasonable to conclude that the circumstances would not improve within the foreseeable future. Under these circumstances, there was clear and convincing evidence to support termination of respondent's parental rights.

Respondent also argues that reasonable efforts were not made to avoid termination of her parental rights. Respondent reasons that, had she been offered adequate services, she eventually would have been able to parent her child. Petitioner must make reasonable efforts to promote reunification and to avoid termination of parental rights. However, petitioner need only offer reasonable services; it has no duty to provide every conceivable service. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008); MCL 712A.18f(4). In this case, petitioner provided respondent with a wide range of services. Respondent made little to no effort to comply with the service plan. To the extent that respondent argues that more intensive drug treatment was warranted, it should be noted that respondent was admitted to an inpatient program but checked herself out after four days. The problem was not that petitioner failed to provide adequate services, but rather, respondent failed to comply with the services offered.

III. Best Interest Finding

Finally, respondent argues that the trial court's failure to make specific findings with respect to the best interests of the child constituted error requiring reversal. Before July 11, 2008, MCL 712A.19b(5) required a trial court to terminate parental rights once a statutory ground for termination was established by clear and convincing evidence, unless the court found that termination was clearly not in the child's best interests. The legislature amended MCL 712A.19b(5), effective July 11, 2008, to provide as follows: "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 . . . ." Applying the plain language of the amended statute to this case, the lower court was required to affirmatively find that termination of respondent's parental rights was in Josiah's best interests. The lower court did not make such a finding on the record. However, we conclude that this error does not warrant reversing the order terminating respondent's parental rights.

In *In the Matter of Hansen,* 285 Mich App 158; ___NW2d ____ (2009), this Court considered whether a trial court's erroneous application of the predecessor to MCL 712A.19b(5) constituted error requiring reversal. This Court concluded that, while the lower court clearly erred in applying the wrong standard, the error was harmless and the Court would not reverse the trial court's order terminating the respondent's parental rights. This Court held:

> MCR 2.613(A) provides that a trial court's error in issuing a ruling or order, or an error in the proceedings is not grounds for this Court to reverse or otherwise disturb the judgment or order, unless this Court believes failure to do so would be inconsistent with substantial justice. In this case, we believe substantial justice is served by affirming the decision of the circuit court. Although the court did not affirmatively find that termination of respondent's parental rights would be in the child's best interest, the record is replete with evidence that would justify that finding, had the court applied the correct standard. [*Id.* at 165.]

Applying the analysis employed by this Court in *Hansen,* we conclude that, while the trial court erred in failing to affirmatively find that termination of parental rights was in Josiah's best interests, this was harmless error. The record convincingly established that respondent had not addressed in any meaningful way her longstanding addiction. Further, respondent had abandoned her child six months before the termination hearing. Respondent's wholesale failure to participate in the process evidenced a lack of motivation to change. Josiah was doing excellent in his placement and had reached all his developmental marks. There was ample evidence to support a finding that termination of respondent's parental rights was in Josiah's best interest. Thus, any error committed by the trial court when it failed to specifically address the child's best interests was harmless.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra