

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of GENEVIEVE BROOKELYN
HANSEN, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

BILLY JOE HANSEN,

Respondent-Appellant,

and

AMBER MARIE TESCHLER¹,

Respondent.

FOR PUBLICATION

July 21, 2009

9:05 a.m.

No. 289903

Manistee Circuit Court

Family Division

LC No. 07-000083-NA

Before: Owens, P.J., and Servitto and Gleicher, JJ.

OWENS, P.J.

Respondent father appeals as of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i) and (h). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Genevieve Hansen was born October 18, 2007 to Amber Teschler (“Amber”) and Billy Joe Hansen (respondent). Genevieve was Amber’s seventh child. At the time of Genevieve’s birth, Amber had previously lost custody, either temporarily or permanently, of her previous six children. At the time of Genevieve’s birth, respondent was Genevieve’s putative father. He established paternity during the trial court proceedings.

Fifteen days after Genevieve’s birth, Amber was arrested on drug charges. Respondent was unable to care for Genevieve following her mother’s arrest because he had been arrested

¹ Amber Teschler is not party to this appeal.

three months earlier and was in jail awaiting trial on a number of felony traffic charges. Consequently, Amber suggested that Genevieve be placed with respondent's sister and brother-in-law, Kelly and Paul Woroniak, where she remains to this day.

Respondent subsequently pleaded guilty to two counts of operating while intoxicated causing death and was sentenced on June 12, 2008 to two consecutive terms of 7 to 15 years, with 309 days credit. He remained in prison throughout these proceedings. His earliest release date is August 7, 2021, when Genevieve will be thirteen years of age.

The initial petition seeking court jurisdiction of Genevieve and requesting termination of her mother's parental rights was submitted to the court on November 5, 2007. On December 12, 2007 the petitioner withdrew the initial request for termination of the mother's parental rights and the mother entered a plea of admission to parts of the petition. A case plan was put into effect at the dispositional hearing on January 9, 2008. After some initial progress, Amber left the county, went to Mt. Clemens, Michigan for a short period of time, and then moved to Ohio. Amber subsequently provided no verification of compliance with the case service plan and from June 12, 2008 until the termination hearing on December 16, 2008, had no contact with Genevieve. Following the termination hearing on December 16, 2008, the trial court terminated the parental rights of both parents. Amber has not appealed the termination of her parental rights.

Respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(i) (conditions that led to the adjudication continue to exist and there is no reasonable likelihood they will be rectified in a reasonable time considering the child's age) and (h) (the parent is imprisoned for more than two years, has not provided for the child's proper care and custody, and there is no reasonable expectation the parent will be able to do so within a reasonable time considering the child's age). On appeal, respondent challenges the termination of his parental rights only under MCL 712A.19b(3)(h). He does not challenge the termination of his parental rights under MCL 712A.19b(3)(c)(i).

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). The trial court's decision terminating parental rights is reviewed for clear error. MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 355-357; 612 NW2d 407 (2000); *Sours, supra* at 632-633. 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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re Miller* 433 Mich 331, 337; 455 NW2d 161 (1989). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller, supra* at 337.

Although not challenged on appeal, termination of respondent's parental rights was proper under MCL 712A.19b(3)(c)(i) because the conditions that led to the adjudication continue to exist and there is no reasonable likelihood that they will be rectified within a reasonable time. At the time of adjudication, respondent was imprisoned and could not care for Genevieve while Amber was in jail, thus necessitating court involvement to provide for Genevieve's care and custody. At the time of the termination hearing, over twelve years remained of respondent's minimum sentence. Due to his lengthy prison sentence, respondent will not be able to provide

proper care and custody for his child within a reasonable time. Thus, termination of respondent's parental rights under MCL 712A.19b(3)(c)(i) was proper.

Termination of respondent's parental rights was also proper under MCL 712A.19b(3)(h). Genevieve will be deprived of a normal home with respondent for a period far exceeding two years, as respondent's earliest release date is not until 2021, when Genevieve will be at least 13 years old. Also, respondent has not provided for her proper care and custody, nor is there any reasonable expectation that he will be able to do so within a reasonable time considering her tender age.²

Respondent does not contest the length of his future incarceration, but challenges termination under this ground on the basis that he provided proper care and custody of his child while he was incarcerated. The record does not support this assertion. Respondent was incarcerated on August 6, 2007, two months before her birth. Because respondent has remained incarcerated, he has never directly provided care for the child. Moreover, the record does not support respondent's assertion that he provided proper care by facilitating the child's placement with his sister prior to the court's involvement. The petitioner, at Amber's suggestion, placed Genevieve with respondent's sister and brother-in-law after Amber was arrested on drug charges. Other than the minimal financial support respondent provided his sister, there is no evidence that he has provided for the child's proper care and custody.

Finally, in the course of arguing that, even if a statutory ground for termination were proven, termination is not mandatory, respondent briefly argues that the trial court erred by noting that no evidence had been offered that termination was contrary to the child's best interest rather than by affirmatively finding that termination was in the child's best interest, as required by MCL 712A.19b(5), as amended by 2008 PA 199, effective July 11, 2008. We agree that the trial court applied the wrong standard with regard to the best interest issue.

Prior to July 11, 2008, MCL 712A.19b(5) read as follows:

If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interest.

Interpreting that statute, we held in *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005) that when no party presents best-interest evidence, "neither the statute nor the court rule requires the court to make specific findings on the question of best interests, although trial courts usually do." However, that holding does not apply to any termination on or after July 11, 2008, as the legislature amended subsection (5) to require an affirmative finding that termination of parental rights is in the child's best interest before the court may terminate parental rights.

² Even if termination were not proper under MCL 712A.19b(3)(h), we would find that a statutory ground had been proven because respondent did not contest the termination of his parental rights under MCL 712A.19b(3)(c)(i) on appeal. Only one statutory ground needs to be proven in order to terminate parental rights. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).

Therefore, under the prior statute, the court was required to terminate parental rights once a statutory ground for termination was established by clear and convincing evidence, unless the court found that termination of parental rights was clearly not in the child's best interest. The lack of a finding that termination of parental rights would clearly not be in the child's best interest permitted (and required) termination once a statutory ground had been proven.

Since July 11, 2008, termination of parental rights may only occur if the court finds a statutory ground for termination *and* that the termination of parental rights is in the child's best interest. If the court so finds, termination is mandatory and not permissive ("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)). In the case of Genevieve Hansen, instead of applying the current statutory standard, the court stated: "there's been no showing made here today that it is contrary to the best interest of Genevieve Hansen and that Mr. Bill Hansen's rights should not be terminated. The record is silent to that."

While the court clearly erred in applying the wrong best interest test, we find that the court's error does not require reversal under the facts of this case. First, respondent neither properly preserved the best interest determination for appellate review by timely objection in the trial court, nor did respondent raise the issue in the statement of questions presented in his brief. "As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances." *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Furthermore, an issue is not preserved for appeal if it is not raised in appellant's statement of questions presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990); *Marx v Department of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996). Respondent's statement of questions presented cites only the issue: "was the termination of the parental rights of respondent Billy Joe Hansen, proper, given that a relative placement was in place to provide for the proper care and custody of the minor child?" Notwithstanding respondent's failure to preserve and properly raise this issue, we elect to decide it (although not properly set forth in the statement of questions presented, we will review an issue of law for which the record is factually sufficient. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003)).

We find the error to be harmless. 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. While 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. Respondent has never had custody of the child; the child has been in the custody of her paternal aunt and uncle for all of her life, save the first fifteen days; while there were a few in-jail visits when the child was very young, no bond exists between the child and respondent; the aunt and uncle wish to adopt the child and give her permanence; and, while there was no evidence offered in the termination hearing that termination of respondent's rights would be contrary to the child's best interest, there was evidence admitted that termination would be in the child's best interest. Finally, if termination were not ordered, the child could be returned to respondent at age thirteen at the soonest and, if he is not released at his earliest release date, the child could well be an adult

before he is released. To live in limbo, wondering when she may be taken from the only family she has ever known and be placed with respondent when he is released, would be a substantial injustice to the child. She needs and deserves the permanency that termination of her parents' rights and subsequent adoption can give her.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher