

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of D'CARLOS KATUO McCRARY,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CARLOS TOSHIO McCRARY,

Respondent-Appellant,

and

DONNA MARIE McCRARY,

Respondent.

In the Matter of D'CARLOS KATUO McCRARY,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DONNA MARIE McCRARY,

Respondent-Appellant,

and

CARLOS TOSHIO McCRARY,

Respondent.

UNPUBLISHED
October 28, 2004

No. 253330
Wayne Circuit Court
Family Division
LC No. 03-418831

No. 253544
Wayne Circuit Court
Family Division
LC No. 03-418831

Before: Borrello, P.J. and Murray and Fort Hood, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(b)(i) and (ii), (g) and (j). We affirm in part, and reverse in part. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

This case came to petitioner's attention when the three-month-old minor child was brought to Children's Hospital with a left rim subdural hemorrhage, a severe head injury. The treating pediatric neurosurgeon opined that the type of injury sustained by the baby would have been caused by a force similar to that experienced by an unrestrained occupant in a high-speed motor vehicle accident or by being dropped to the ground from a second or third story window. The expert explained that the injury was similar to that which would be experienced if somebody held the child by his feet and forcefully slammed him on a bed or couch. During the medical evaluation, the minor child was also found to have an old nondisplaced fracture of the skull. Petitioner contended that the injuries sustained by the minor child were done at the hands of the child's father and that the child's mother, having the ability to protect the child, failed to do so.

Relative to the father, Carlos Toshio McCrary, the trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). There was clear and convincing evidence that respondent father was the sole caretaker during the window of time within which the expert testimony concluded the injury occurred. Furthermore, the evidence did not show that termination of respondent father's parental rights was clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The minor child, while still a young infant, suffered a severe and permanent injury at the hands of his father. We adopt the findings of the trial court that expert testimony clearly proved that respondent father had abused the child while in his care and custody and affirm the trial court's termination of his parental rights.

However, we find that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence with respect to respondent mother. The trial court terminated respondent mother's parental rights pursuant to MCL 712A.19b(3)(b)(ii), (g) and (j), which provide:

(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:

* * *

(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:

* * *

(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.

* * *

(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 record reveals that the injury resulting in a catastrophic disability to the minor child did not instantaneously manifest itself to respondent mother or to the initial treating physician. The record reveals that after respondent father told her that the minor child fell from the crib, respondent mother took the child to a doctor, who saw no outward signs of neglect. MCL 712A.19b(3)(b)(ii) mandates that the parent have an opportunity to prevent physical abuse. Because nothing in the record indicates to us that respondent mother was on notice of respondent father's abuse of the child, we cannot conclude that there was clear and convincing evidence that her parental rights should be terminated. Additionally, we note that the record reveals that as the child's condition worsened, respondent mother sought appropriate medical attention, albeit at times not in the timeliest manner. However, nothing in the record leads us to conclude that respondent mother knew of respondent father's abusive behavior before medical experts and police officers informed her that her husband had abused her child and then lied. Further, we cannot conclude from the record that respondent mother ever took steps to insulate respondent father from responsibility or to cover up any abusive behavior. Rather, the record reveals that because respondent mother worked, she left the care of the minor child to her husband.

We therefore cannot conclude, as did the trial court, that respondent mother knew that the child was not safe while in respondent father's care but continued to leave the child alone with him. Respondent mother did not have the opportunity to prevent the physical abuse of the child and did not fail to provide proper care or custody for the minor child by leaving him with respondent father when respondent mother was not on notice regarding any physical abuse. MCL 712A.19b(3)(b)(ii) and (g). Furthermore, because respondent mother was not on notice of the abuse and respondent father, not respondent mother, physically abused the child, it cannot be said that there is a reasonable likelihood that the child would be harmed if returned to respondent mother's home. MCL 712A.19b(3)(j). Because petitioner failed to establish by clear and convincing evidence the existence of one or more statutory grounds for termination of respondent mother's parental rights, we need not address the question whether termination of respondent mother's parental rights was in the child's best interests. MCL 712A.19b(5). The trial court clearly erred in terminating Donna Marie McCrary's parental rights to her child.

Affirmed in part, and reversed in part.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood