

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JUSTIN D. KORBL, a/k/a JUSTIN
D. JOHNSON, ROBBIE MICHAEL KORBL, a/k/a
ROBBIE MICHAEL JOHNSON, and TORREY
ROBERT JOHNSON, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

BARBARA KORBL,

Respondent-Appellant,

and

GORDON JOHNS,

Respondent.

In the Matter of JUSTIN D. KORBL, a/k/a JUSTIN
D. JOHNSON, ROBBIE MICHAEL KORBL, a/k/a
ROBBIE MICHAEL JOHNSON, and TORREY
ROBERT JOHNSON, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

GORDON JOHNS,

UNPUBLISHED

April 11, 2000

No. 217147

Wexford Circuit Court

Family Division

LC No. 96-001673-NA

No. 217211

Wexford Circuit Court

Family Division

Respondent-Appellant,

and

BARBARA KORBL,

Respondent.

Before: Zahra, P.J., and White and Hoekstra, JJ.

PER CURIAM.

In Docket No. 217147, respondent Barbara Korbl appeals as of right from a family court order dating December 11, 1998 that terminated her parental rights to her three minor children (Justin and Robbie Korbl and Torrey Johnson) under MCL 712A.19b(3)(c)(i), (g), (i) and (j); MSA 27.3178(598.19b)(3)(c)(i), (g), (i) and (j). In Docket No. 217211, respondent Gordon Johns appeals as of right from the same family court order, which terminated his parental rights to his two children, Justin and Robbie Korbl, under §§ 19b(3)(c)(i) and (g). We affirm in Docket No. 217147 and reverse and remand for further proceedings in Docket No. 217211.

I. Docket No. 217147; The Respondent Mother

Respondent mother first argues that she did not knowingly and voluntarily waive her rights to the continuation of the October 28, 1997 adjudication hearing that resulted in the court taking jurisdiction over the minor children. This issue is not properly before the Court and constitutes an improper collateral attack on the trial court's exercise of jurisdiction that cannot be asserted in this appeal of right from the termination order. Respondent's claim is also without substantive merit. The allegations in the initial petition sufficiently demonstrated that this matter was of a class that the trial court was authorized to adjudicate and was not clearly frivolous, thus establishing the court's jurisdiction. *In re Hatcher*, 443 Mich 426, 433-434; 505 NW2d 834 (1993).

Respondent mother next argues that she was denied effective assistance of counsel because allegedly inadmissible opinion testimony was admitted without objection. We disagree. The challenged opinion testimony was relevant and material and, therefore, admissible at the termination hearing, notwithstanding its hearsay character. MCR 5.973(A)(4); MCR 5.974(E)(2); *In re Snyder*, 223 Mich App 85, 89; 566 NW2d 18 (1997); *In re Hinson*, 135 Mich App 472, 475; 354 NW2d 794 (1984). Therefore, defense counsel was not ineffective for failing to object to the testimony. *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 161 (1999). Also, the trial court did not abuse its discretion in admitting the 1996 psychological evaluation of respondent mother. The report was relevant for purposes of evaluating respondent's prognosis for change and improvement. MCR 5.973(A)(4); MCR 5.974(E)(2); *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Finally, the family court did not clearly err in finding that each of the statutory grounds for termination were established by clear and convincing evidence. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). This Court reviews the family court's findings of fact and its non-discretionary decision to terminate parental rights for clear error. MCR 5.974(I); *In Re Hall-Smith*, 222 Mich App 470, 472; 546 NW2d 156 (1997).

MCL 712.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) provides that termination is proper where:

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 age of the child.

There is clear and convincing evidence that the conditions which led to adjudication continued to exist. The children were placed in foster care based on respondent mother's emotional abuse of the children, as well as reports of physical abuse during bouts of anger. Respondent mother was often heard shouting obscenities at the children. The children were uncontrollable when they were first placed in foster care and had problems wetting the bed. While respondent mother had not physically hit the children during the supervised visits, respondent mother's emotional and verbal abuse continued during the period of FIA involvement. Moreover, she has consistently denied all of the allegations throughout the proceedings, even when certain conduct has been directly observed by witnesses. Psychological evaluations performed in 1996 and 1997 consistently indicated that respondent mother had a paranoid personality disorder and it was not likely that she would accept responsibility for any of her current or past problems. Given the diagnosis, as confirmed by her actions, it is clear that the reasons that led to adjudication continued to exist and there is no reasonable likelihood that same could be rectified within a reasonable time considering the ages of the children.

There is also clear and convincing evidence to support termination of her parental rights under subsection (3)(g). Termination under subsection (3)(g) is proper when:

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 age of the child.
[MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g).]

In this case, respondent mother was clearly not providing proper care or custody for the children when they were removed from her care. Since that time, she has consistently denied that there ever was or is a problem with regard to her behaviors or parenting. Even with counseling and medication, there has been no change in her behavior because, to her, there has never been a problem. Given this inability to address problems and accept responsibility, she would not be able to provide care or custody for the children within a reasonable period of time. Termination of her parental rights under subsection (3)(g) was therefore appropriate.

Termination of respondent mother's parental rights was also proper under subsection (3)(i) when:

Parental 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. [MCL 712A.19b(3)(i); MSA 27.3178(598.19b)(3)(i).]

In this case, it was uncontroverted that respondent mother's parental rights to another child, Dirk Lee Forster, were terminated on September 22, 1988, following allegations of serious neglect. The testimony at trial established that respondent mother is simply not capable of rehabilitation. Accordingly, termination of her parental rights under subsection (3) (i) is also appropriate.

Lastly, termination of respondent's parental rights was also appropriate under subsection (3)(j), which provides:

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. [MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(j).]

The court correctly noted that while respondent was able to physically dominate the children before, she would no doubt be less able to do so in the future given the children's size. The children were observed to physically hit respondent mother during visits. If returned to her care, their uncontrollable behavior would no doubt degenerate to how it was prior to their removal and physical violence could correspondingly escalate. According to their foster mother, it can take anywhere from ten minutes to four hours to make the children do things as directed. Respondent is unable to control them during supervised visits and it is unlikely that she would be able to do so on her own. Because respondent mother is incapable of change, the risk of emotional and perhaps physical harm to the children is high if returned to her care. Accordingly, termination of her parental rights under subsection (3)(j) was also appropriate.

In sum, there was clear and convincing evidence to support termination of respondent mother's parental rights under subsections (3)(c)(i), (g), (i) and (j). Respondent mother failed to present any evidence that termination of her parental rights was clearly not in the children's best interests. As such, termination was mandatory. *In re Hall-Smith*, 222 Mich App at 472-473. Thus, the family court did not err in terminating respondent mother's parental rights to the minor children.

II. Docket No. 217211; The Respondent Father

Respondent father argues that the trial court committed clear error in finding by clear and convincing evidence that termination was proper under MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) and MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g). We agree.

Termination under subsection (3)(c)(i) is appropriate if the "conditions that led to adjudication continue to exist, and there is no reasonable likelihood that the conditions will be rectified within a

reasonable time considering the age of the children.” The trial court found termination of respondent father’s parental rights appropriate under this subsection because:

- (1) he was an uninvolved passive parent who did not become involved in the children’s lives until the court asserted formal jurisdiction in 1997;
- (2) during early dispositional hearings respondent father refused to acknowledge that there was any problem with the way respondent mother raised the children and respondent father did not attempt to become the custodial parent until adjudication of the termination petition;
- (3) respondent mother is able to exert psychological dominance over respondent father, to the detriment of the children; and
- (4) it was unlikely that respondent father would be able to provide a proper home and nurturing for the children, within a reasonable time considering their ages.

We have considered the evidence supporting the trial court’s conclusions and we are left with a definite and firm conviction that the trial court erred in terminating respondent father’s parental rights. While it is significant that the respondent father was uninvolved in the children’s lives prior to the time the court asserted jurisdiction over them in 1997, this fact is not legally relevant to the question of whether respondent father’s parental rights should be terminated. Rather, the critical issue is whether respondent father became involved with the children after the court asserted jurisdiction over the children and whether his involvement was appropriate under the circumstances.¹

Claire Little, a visitation supervisor for the FIA, testified that initially William Johnson, respondent mother and respondent father attended supervised visitations with the children. Johnson and respondent mother often argued and upset the children. Respondent father did not participate in any contentious behavior in front of the children. However, Little concluded that respondent father did not interact very well with the children. Generally, he just watched the children play. Respondent father did not initiate contact with the children and conversed with them only if the children initiated conversation with him. Little testified that respondent father was present for most of the supervised visits permitted with the children.

Tamara Brehm, a visitation coordinator for FIA, supervised visits between the respondents and the children for over one year. Brehm testified that respondent father visited the children alone on three occasions. Brehm noted that these visits went well; there was no extreme behavior; and respondent father had an ability to interact productively with the children and parent them correctly if respondent mother was not around.²

Deanna Rosser, a certified social worker qualified as an expert in family therapy, counseled both respondents. Rosser worked with respondent father from December, 1997, up to the October, 1998 termination hearing. Rosser testified that respondent father was very committed to the therapy and made progress with regard to his behavior and his concepts of parenting.

Rosser opined that respondent father recognizes that he must stand up to respondent mother when interacting with her and noted that respondent father made progress in this area. Rosser also noted that respondent father felt increasingly positive in his interactions with his children and that he had arranged to have someone available to assist in caring for them in the event he was awarded custody. Significantly, Rosser opined that respondent father was capable of providing an adequate environment for his children.

In light of this evidence, we find insufficient proof upon which to support a finding of termination under subsection (3)(c)(i).

Termination under subsection (3)(g) is appropriate 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 age of the child. In finding termination of respondent father’s parental rights under this section, the trial court relied upon the evidence supporting termination under subsection (3)(i). The trial court further found that respondent father:

“should have, as a reasonable parent observing the manner in which is [sic] sons were being raised intervened and sought custody for their protection and proper rearing. Having failed to do so, and [having] failed to demonstrate an ability to provide actual care or custody for these children in the past, there is no reasonable expectation that he will do so in the future.”

We again find the evidence relied upon by the trial court to support termination of respondent father’s parental rights under subsection (3)(c)(i) insufficient to support termination under subsection (3)(g). Likewise, respondent father’s failure to intervene and seek custody of his children prior to the court taking jurisdiction over the children cannot form a basis on which to terminate his parental rights. It is respondent father’s conduct after the court has asserted jurisdiction over the children that is crucial to the determination of whether to terminate respondent’s parental rights. We find that the trial court clearly erred in concluding that as of the October, 1998 termination hearing there existed no reasonable expectation that respondent father would be able to provide appropriate care and parenting of the children within a reasonable time.

When respondent father began therapy with Deanna Rosser, he expressed the view that respondent mother was a good mother and that the children belonged with her. Rosser found that respondent mother exerted a great deal of psychological determination over respondent father. Significantly, however, Rosser opined that by the time of the termination hearing, respondent father had progressed in this area and had recognized that he needed to assert himself when interacting with respondent mother. Respondent father indicated that, if ordered by the court, he would keep the children away from respondent mother. Again, Rosser opined that respondent father was capable of providing an appropriate environment for the children and she noted that respondent father had taken significant steps toward accomplishing this goal.

On this record we find clear error in the trial court's conclusion that, on the date of the termination hearing, existed clear and convincing evidence to support the termination of respondent father's parental rights.

Conclusion

The judgment of the trial court in Docket No. 217147 is affirmed. The judgment of the trial court in Docket No. 217211 is reversed and this matter is remanded for further proceedings consistent with this opinion.

/s/ Brian K. Zahra

/s/ Helene N. White

¹ The trial court found that respondent father became only "slightly more involved" with the children after the court took jurisdiction over them. There is sufficient evidence to suggest that at the time the court took jurisdiction over the children, Justin and Robbie believed Mr. William Johnson to be their father and did not know that respondent father was in fact their father. Accordingly, respondent father should not have been expected to immediately become extensively involved with the children, as such activity could have been traumatic to the children.

² Brehm also testified to her concerns that if the respondent father was awarded custody of his children, respondent mother would ultimately become the primary caregiver. While this is a legitimate concern and a matter to be monitored by petitioner it does not warrant termination of respondent father's parental rights.