

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BRITTANY MAY POMAVILLE
and ASHLEY NICHOLE POMAVILLE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

GARY ALAN POMAVILLE,

Respondent-Appellant.

UNPUBLISHED

January 13, 2004

No. 247168

Macomb Circuit Court

Family Division

LC No. 00-049686

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court's order terminating his parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g) and (j). He asserts termination was unwarranted in that petitioner failed to provide appropriate services under the Americans With Disabilities Act, prematurely terminated his parental rights, and finding that termination was not against the best interests of the children.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993), citing *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000); MCL 712A.19b(5). We review the trial court's determination for clear error. *In re Trejo, supra*, 462 Mich 356-357. A finding is clearly erroneous if, although there is evidence to support it, we are 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), citing *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Further, to be clearly erroneous the decision must be "more than just maybe or probably wrong." *In re Trejo, supra*, 462 Mich 356, quoting *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

Respondent-appellant first argues that the trial court erred in terminating his parental rights because petitioner failed to offer him appropriate services in light of his disability, thereby violating the Americans with Disabilities Act (ADA), 42 USC 12010 *et seq.* We disagree.

To comply with the ADA the FIA is required to make reasonable accommodations for parents with disabilities. *In re Terry*, 240 Mich App 14, 25; 610 NW2d 563 (2000). Respondent-appellant is “developmentally delayed,” cannot read and has an IQ of fifty-four. “[M]ental retardation is a ‘disability’ within the meaning of the ADA.” *Id.* at 24. Accordingly, the reunification services and programs provided by petitioner must have complied with the ADA. *Id.* at 25. “[I]f the FIA fail[ed] to take into account [respondent-appellant’s] limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family.” *Id.* at 26.

We find that the record reveals that petitioner accounted for and reasonably accommodated respondent-appellant’s disability in its efforts to reunify the family by locating parenting classes to accommodate his reading disability, attempting to locate services that would enable respondent to parent his children and referring him to two doctors to evaluate his ability to parent with his disability. *In re Terry, supra*, 240 Mich App 26. Unfortunately, it became apparent that there were no services available that could help respondent-appellant parent his children because he was not capable of attaining the requisite level of parenting skills needed to parent the children. Under the ADA, regardless of the disability, the parent must still be able to attain the minimum parental skills necessary to meet the children’s needs. *Id.* at 28. If the parent cannot meet the minimum basic parental skills, the needs of the child must prevail over the needs of the parent. *Id.* Therefore, the trial court did not clearly err in finding that petitioner made reasonable efforts at reunification.¹

Respondent-appellant next argues that petitioner failed to prove a statutory ground for termination by clear and convincing evidence. We disagree and find that sufficient evidence supported termination of his parental rights under MCL 712A.19b(3)(c)(i), (g) and (j).

First, we find that there existed clear and convincing support that the conditions that led to adjudication, i.e., respondent-appellant’s inability to parent the children and the unsafe condition of the home, continued to exist and were not reasonably likely to be rectified within a reasonable time considering the ages of the children, and thus, termination under subsection

¹ We note that ADA violations may not be raised as a defense to termination of parental rights. *In re Terry, supra*, 240 Mich App 25. Therefore, a claim that the FIA violated the ADA must be raised in a timely manner so that reasonable accommodations can be made. *Id.* at 26. Due to the limited record available on appeal, we are unable to determine whether respondent-appellant timely alleged that the services provided by petitioner were inadequate. Pursuant to MCR 7.210(B)(1)(a), respondent-appellant was responsible for securing the transcripts of all the proceedings in the lower court. See also, *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 304-305; 486 NW2d 351 (1992). However, we need not rely on abandonment of the issue to decide because even if respondent-appellant timely asserted his ADA claim it is unsupported by the record.

(c)(i) was appropriate. MCL 712A.19b(3)(c)(i). The psychological evaluations revealed that respondent-appellant lacked the cognitive skills and IQ to enable him to attain the skill level needed to raise the children, there were no services available that could remedy respondent-appellant's inability to parent his children and respondent-appellant's family would be unable to assist him with parenting the children. In addition, the foster care worker opined that respondent-appellant and the other family members failed to reach the level of cognitive skills and parenting skills required to parent the children and respondent-appellant would never have the ability required to properly parent his children. Further, the instructor of the parenting class also opined that respondent-appellant failed to internalize the information. Although respondent-appellant testified that he has the ability to parent the children and he knows how to care for his children, we find that the psychological evaluations and the foster care worker's opinion provide clear and convincing support that respondent-appellant's inability to parent his children continued to exist and would not be rectified within a reasonable time, if ever. MCL 712A.19b(3)(c)(i).

The evidence also established that respondent-appellant had not yet remedied the unsafe condition of the home. Although respondent-appellant made several repairs to the home, the home was cleaner, and he testified that he planned on repairing the stairs "real soon," more than two years have passed since the initial order of disposition. The home remains unsafe and unsuitable for the children; all of which indicates that it is unlikely that the requisite repairs would be made in a reasonable time. In view of this evidence, we find that the trial court did not clearly err in terminating respondent-appellant's parental rights under subsection (c)(i).

Second, we find that termination under subsection (g) was appropriate because petitioner established by clear and convincing evidence that respondent-appellant, without regard to intent, failed to provide proper care or custody for his children and there is no reasonable expectation that he will be able to provide proper care and custody within a reasonable time considering the children's ages. MCL 712A.19b(3)(g). Brittany is a special needs child who suffers from seizures with physical manifestations and sequelae. The evidence of the unsafe condition of the home and respondent-appellant's lack of awareness of and failure to address Brittany's conditions at the time petitioner removed the children provided clear and convincing evidence of respondent-appellant's past failure to provide proper care and custody to his children. The psychological evaluations and the foster care worker's opinion provided clear and convincing evidence that respondent-appellant would not be able to improve his skills further to enable him to provide proper care and custody to his children within a reasonable time, if ever. Despite respondent-appellant's substantial compliance with the parent/agency agreement (he attended parenting classes, visited the children, completed most of the repairs to the home and completed the psychological evaluations), and his good intentions, the testimony overwhelmingly indicates that due to his developmental disabilities he does not have the ability, nor will he ever attain the ability, to parent the children.² In view of this evidence we find that the trial court did not clearly err in terminating respondent-appellant's parental rights under subsection (g).

² The parent/agency agreement not only required that respondent-appellant attend classes, but that he also "display appropriate parenting skills."

Third, in light of the evidence establishing that respondent-appellant does not possess the requisite capacity to properly parent his children, we cannot say that the trial court clearly erred in finding that there is a reasonable likelihood that the children would be harmed if returned to his home. MCL 712A.19b(3)(j). Therefore, termination under subsection (j) was also appropriate.

Finally, respondent argues that the trial court erred because termination of his parental rights was clearly not in the children's best interests. We disagree.

Although it is apparent from the record that respondent-appellant loves and desires to care for his children, the evidence did not establish that termination of respondent-appellant's parental rights was clearly not in the children's best interests. *In re Trejo, supra*, 462 Mich 354; MCL 712A.19b(5). Rather, the evidence showed that respondent-appellant lacked the cognitive ability to parent his children, there were no services available that could help respondent-appellant attain the skill level needed to parent his children, his family did not have the ability to assist him and the home was unsuitable and unsafe for the children. In view of this evidence, we are not left with a definite and firm conviction that the trial court erred in terminating respondent-appellant's parental rights. *In re JK, supra*, 468 Mich 209-210.³

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Griffin
/s/ Kathleen Jansen

³ Respondent-appellant incorrectly contends that "the rights of the natural parent in the care and custody and management of the child allows a rebuttable presumption that the best interests of the child is served by giving custody to the natural parent." The Michigan Supreme Court has held that once petitioner establishes a statutory ground for termination, "the parent's interest in the companionship, care and custody of the child gives way to the state's interests in the child's protection." *In re Trejo Minors, supra*, 462 Mich 356.