

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MARK LEE MAXWELL JR.,
Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

MARK LEE MAXWELL SR.,

Respondent-Appellant,

and

LACRYSTAL D. GEORGE,

Respondent.

UNPUBLISHED

October 12, 2004

No. 240638

LC No. 00-389633

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Respondent, Mark Lee Maxwell, Sr., appeals as of right from the order terminating his parental rights to the minor child, Mark Lee Maxwell, Jr., under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue), (h) (imprisoned for such a period that the child will be deprived of a normal home) and (j) (harmed if returned). We affirm.

I. FACTS

On January 30, 1998, LaCrystal George (“LaCrystal”)¹ gave birth to a son, Mark Lee Maxwell, Jr. Respondent, Mark’s father, was seventeen at the time of his son’s birth. In the first year of his life, Mark Jr. resided with his mother and maternal grandmother. During this time,

¹ By separate order, the parental rights of LaCrystal were also terminated. George appealed that order which this Court affirmed in an unpublished memorandum opinion. *In re Maxwell*, unpublished memorandum opinion of the Court of Appeals, decided August 20, 2002 (Docket No. 237455).

respondent regularly visited Mark Jr. Then, on December 9, 1998, respondent entered the home of an acquaintance, assaulted the fourteen-year-old resident and stole several items. On January 5, 1999, respondent entered a guilty plea to first-degree home invasion and unarmed robbery.² He was sentenced on January 20, 1999 to serve five to twenty years' imprisonment for the home invasion conviction, to be served concurrently with his sentence of five to fifteen years' for the unarmed robbery conviction.

On May 5, 2000, LaCrystal left her son with his maternal grandmother. He was supposed to simply stay for the weekend. When several weeks passed and LaCrystal did not return for her son, the maternal grandmother contacted protective services. On May 24, 2000, a petition was filed seeking temporary custody of Mark Jr. With respect to LaCrystal, the petition alleged that she abandoned her son, physically abused him and failed, on several occasions, to obtain medical care for the child. With respect to respondent, the petition simply alleged that he was incarcerated and had not established paternity. On September 18, 2000, respondent signed an affidavit of parentage.

On March 16, 2001, the FIA filed a supplemental petition seeking termination of LaCrystal's and respondent's parental rights. With respect to respondent, the petition alleged that he was incarcerated and that neither he nor his family visited or supported the child. At the pretrial on June 25, 2001, petitioner moved to amend the petition to add as grounds for terminating respondent's parental rights, MCL 712A.19b(3)(h).³ This motion to amend the petition was subsequently granted.

On August 8, 2001, the termination hearing was held before a referee. The referee recommended the termination of LaCrystal's parental rights, but not respondent's. As to respondent, the referee was "very impressed" with respondent's efforts. On August 21, 2001, the referee filed a report and recommendation of referee wherein he recommended termination of LaCrystal George's parental rights. Following this recommendation, the FIA requested a review of the referee's recommendation by a judge of the circuit court.

On September 4, 2001, the circuit court entered an order "modifying" the report and recommendation of the referee. By this order, the circuit court, citing MCR 5.923(A), directed the referee to require production of respondent's department of corrections disciplinary records and his presentence report.

On November 28, 2001, the referee held a hearing per the circuit court's "remand." At that time, respondent objected to further proceedings claiming that the circuit court lacked the authority to remand to take additional evidence. Over counsel's objections, the hearing continued. The parties discussed what records were required to be produced in conformity with

² At the time respondent committed these offenses, he was on probation for a prior conviction for receiving and concealing stolen property and fleeing a police officer.

³ (imprisonment for such a period that child will be deprived of a normal home for a period exceeding 2 years.)

the circuit court's orders and the referee heard arguments from the parties. The referee then reaffirmed its recommendation that respondent's parental rights not be terminated.

Once again, petitioner filed a request for review of the referee's recommendation. On January 9, 2002, an order was entered on the request for review, terminating respondent's parental rights. Then, on February 26, 2002, another order was entered terminating respondent's parental rights. On April 2, 2002, respondent filed a claim of appeal. On October 9, 2003, respondent filed a motion to remand for findings of fact and conclusions of law. On November 10, 2003, this Court entered an order granting the motion to remand and directing the lower court to "settle or complete the record with respect to the trial court's findings of fact and conclusions of law."

On December 19, 2003, the circuit court issued an opinion delineating its findings of fact and conclusions of law. A "hearing" was also held on that day, however, it was simply for the purpose of reading the opinion into the record. The circuit court relied upon the department of corrections records produced upon the FIA's initial request for review. Upon reviewing these records, the circuit court concluded that it would have reached a different result than that reached by the referee, thus, the court terminated respondent's parental rights. The circuit court noted that respondent had a history of criminal convictions. His presentence report for the home invasion conviction noted that he viciously attacked a sleeping fourteen year old. The circuit court also found that respondent lacked remorse and also noted respondent's "seven major misconduct charges" while incarcerated and that LaCrystal had, at one time, sought and received a protective order against respondent. Respondent's substance abuse beginning in 1998 and prior gang membership also persuaded the circuit court. From these findings, the court concluded that termination of parental rights was warranted pursuant to MCL 712A.19b(3)(c)(i), (h) and (j).

II. STANDARD OF REVIEW

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 Hamlet (After Remand)*, 225 Mich App 505, 522; 571 NW2d 750 (1997). 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). 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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In order to be clearly erroneous, the finding must strike this Court as more than just maybe or probably wrong. *In re Sours Minors*, *supra* at 633.

III. ANALYSIS

The lower court terminated parental rights pursuant to MCL 712A.19b(3)(c)(i), which provides:

- (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:

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) 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 child's age.

Contrary to respondent's argument, the record indicates that at the time of termination, 182 days had elapsed since the issuance of an initial dispositional order. In the original petition, it is alleged that respondent was incarcerated and it was unknown whether he established paternity. At the adjudication/disposition hearing, the court found that there was evidence of abandonment, physical abuse and lack of medical care by the mother. It therefore found that the allegations in the petition had been substantiated and the child was made a temporary court ward.

Respondent argues that his incarceration was not a "condition that led to adjudication" because the referee simply found that the allegations against the mother had been substantiated. However, the plain language of the statute compels us to look at the conditions that **led** to adjudication not the conditions that resulted in adjudication. Respondent's incarceration and the concomitant inability to care for his child led to adjudication. Had respondent not been incarcerated he would have been available to care for his child after LaCrystal abandoned Mark Jr. and would have been able to protect his son from physical abuse and medical neglect.

At the time of termination, respondent was still incarcerated and unable to provide for his son. Before his incarceration, respondent sporadically helped to support Mark Jr. by dropping off diapers, clothes or milk. However, respondent has been incarcerated for all but the first eleven months of Mark Jr.'s life. Additionally, he never lived with Mark Jr. and never provided him with consistent financial or emotional support. During his incarceration, respondent had only three visits lasting six hours each with Mark Jr. Therefore, the circuit court correctly determined that respondent's incarceration and resulting inability to provide his son with emotional or financial support or to protect him from physical abuse and medical neglect continued to exist. Further, the circuit court correctly determined that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the child's age in light of respondent's testimony in August 2001 that his earliest release date was April 2003 and that his release date had already been postponed once due to poor behavior.

Defendant also argues that his due process rights were violated because the circuit court based its decision on improperly introduced department of corrections reports. However, only one statutory ground for termination must be established in order to terminate parental rights and the circuit court did not rely on the allegedly improper evidence to support her findings under MCR 712A.19b(3)(c)(i). *In re Trejo*, 462 Mich. 341, 350, 354, 364-365; 612 NW2d 407 (2000). Thus, we need not decide whether termination was also proper under the remaining statutory grounds. *Id.*

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter