

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AUTUMN LEE PAINTER,
Minor.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

UNPUBLISHED
June 20, 2006

Petitioner-Appellee,

v

JERRY PAINTER,

Respondent-Appellant.

No. 264508
Oakland Circuit Court
Family Division
LC No. 03-686536-NA

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to the minor child under MCL 712A.19b(3)(n). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After the child tested positive for drugs at birth, she was removed from the mother's care. At the time, respondent was serving a five-year probation term for his conviction of second-degree criminal sexual conduct involving his minor cousin. Under the terms of his probation respondent could not be left alone unsupervised with any child under age 16 and was required to undergo sexual offender therapy. Because of his criminal sexual conduct conviction, petitioner requested that respondent's parental rights be terminated at the initial dispositional hearing.

After conducting a termination hearing, the referee found statutory grounds for termination but concluded that termination was premature given a favorable psychological evaluation of the respondent. After conducting a second termination hearing, the referee again recommended against termination, finding that respondent had "done everything he could in an effort to obtain meaningful employment and find a place of his own and develop some sense of stability," he successfully completed sex offender treatment, he was able to maintain suitable employment, his visits with the child were "absolutely, appropriate" and the psychological evaluations indicated that there was no significant risk of respondent acting out sexually with his child.

Petitioner sought review of the referee's recommendation. After review, the trial court determined that it would have reached a different result and terminated respondent's parental rights to the child under MCR 3.991.¹ The trial court found that respondent was unable to provide the child with her basic needs because of his lack of consistent employment, respondent was a convicted sex offender who sexually assaulted a young family member, and respondent would not be permitted to have unsupervised contact with his young child until 2007.

Respondent first argues that the trial court erred in concluding that the evidence failed to establish that termination was clearly not in the child's best interest. We disagree.

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* at 356-357.

Despite evidence establishing that a bond existed between respondent and the child, that respondent complied with services and the terms of his probation, including completing sexual offender therapy and parenting classes, and that he made continued efforts towards reunification by regularly attending visits with the child, we find no clear error in the trial court's determination that the evidence failed to establish that termination was not in the child's best interest. Despite the favorable opinions of respondent's evaluating psychologist and therapist concerning respondent's risk of re-offending, respondent committed a serious crime, for which he was serving a lengthy probation term, the conditions of which prevent him from having unsupervised contact with the child until sometime in 2007. We find that such a significant delay in respondent's ability to parent the child would unreasonably hinder the child's permanency and stability, especially given her tender age.

We further find no clear error in the trial court's finding that respondent was unable to provide the child with her basic needs, given evidence of his past failure to maintain consistent employment or housing. We recognize that respondent testified that he had obtained employment and was in the process of obtaining a home for the child by the time of the second termination hearing. However, the evidence also showed that respondent was unemployed at the time of the first best interest hearing in June 2004 and remained unemployed in September 2004. A psychological evaluation indicated that he had worked inconsistently at low paying jobs, had few job skills, had difficulty maintaining his own residence, and relied on family members for

¹ Under MCR 3.991, a trial court judge must enter an order adopting the referee's recommendation unless the judge would have reached a different result had he or she heard the case or if the referee committed a clear error of law, which likely would have affected the outcome, or cannot otherwise be considered harmless. In such instances, the judge may adopt, modify, or deny the recommendation of the referee, in whole or in part.

housing. The psychologist opined that it was “questionable” that respondent would be able to maintain a suitable home and financially care for the child given his limited intelligence and job skills. Further, although the testimony indicated that respondent was appropriate during his visits with the child, the evaluating psychologist had concerns about his ability to provide a stable home environment for the child. Given the foregoing, the evidence did not clearly establish that respondent possessed the ability to physically support or effectively parent the child.

“Subsection 19b(5) attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child’s right and need for security and permanency.” *In re Trejo, supra* at 354. The primary beneficiary of the court’s opportunity to find that termination is clearly not in the child’s best interest afforded under the best interest provision is intended to be the child. *In re Trejo, supra* at 356. Here, although the record contained evidence against termination, particularly concerning a bond between respondent and the child, that evidence did not “clearly overwhelm” respondent’s recent history of serious sexual abuse involving a minor, his questionable ability to physically provide for the child given his history of inconsistent employment and unstable housing, and his inability to reunify with the child for a minimum of two years due to the terms of his probation, which would unduly hinder the child’s permanency and stability. *In re Trejo, supra* at 364. Accordingly, we find no clear error in the trial court’s determination that the evidence failed to establish that termination of respondent’s parental rights was clearly not in the child’s best interests. *In re Trejo, supra* at 354; MCL 712A.19b(5).

Respondent next argues that the trial court erred in assigning him the burden of producing additional documentation of his employment. We disagree. “[S]ubsection 19b(5) does not expressly assign any part the burden of producing best interest evidence.” *In re Trejo, supra* at 353. As such, “the court may consider evidence introduced by any party when determining whether termination is clearly not in a child’s best interest” and “permits the court to find from evidence on the whole record that termination is clearly not in a child’s best interests.” *Id.*

Respondent’s argument that the trial court improperly placed on him a burden of production is based on language contained in the court’s opinion that he was unable to “furnish proof that he was able to maintain suitable employment.” A careful review of the court’s opinion, however, reveals that the trial court never made such a finding. Instead, the court used the phrase in summarizing petitioner’s argument and, regarding respondent’s employment, the court found; “[t]he court has reviewed testimony indicating that [respondent] is clearly unable, despite being given numerous chances, to provide his child with even her most basic needs including a safe place to live, security and the necessities of life because of his lack of consistent employment.” Accordingly, contrary to respondent’s contention, the trial court never placed any burden of production upon him concerning his employment status whatsoever. Instead, it is apparent from the trial court’s opinion that it properly considered the entire record in determining whether respondent was able to maintain suitable employment, including his own testimony about his current employment status. *In re Trejo, supra* at 353.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Patrick M. Meter