

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KLP and RKM, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KAREN L. PRESBIE and RICKY K. MOORE,

Respondent-Appellants.

UNPUBLISHED

May 10, 2002

No. 235021, 235730

Macomb Circuit Court

Family Division

LC No. 40,782

Before: C.J. Whitbeck and Markey, Kelly J.J.

PER CURIAM

In these consolidated appeals, respondents appeal as of right from orders terminating their parental rights to their two minor children pursuant to MCL 712A.19b(3)(g) and (3)(j). We affirm.

I. Basic Facts and Procedural History

Petitioner Family Independence Agency (FIA), received a referral advising that respondent Karen Presbie was frequenting crack houses, leaving the children for extended periods of time with neighbors and that respondent Ricky Moore was abusing alcohol. The ensuing investigation substantiated the referral against both Presbie and Moore for failure to protect, improper supervision and physical neglect.

The family court conducted a preliminary hearing on the FIA's request for a petition and after taking testimony, accepted the allegations contained in the petition. The matter was set for a pretrial and the children were removed from their home and placed with relatives. At the pretrial hearing, both Presbie and Moore entered pleas of no contest to an amended petition, and the family court assumed jurisdiction over the children.

When it became apparent that reunification of the family would not be possible, a termination petition was filed and a hearing was held before the family court. After evaluating the testimony and exhibits, the family court terminated both parents' parental rights pursuant to MCL 712A.19b(3)(g) and (3)(j). The family court found that it was not until the termination hearing began and Presbie was on the verge of permanently losing custody of her children that

she began to make some progress on the conditions contained in the Parent/Agency Agreement. The family court also noted two “highly diluted” drug screens, which the family court determined was indicative of tampering, and Presbie’s concomitant inability to abstain from using controlled substances despite numerous referrals to assist her in overcoming her addiction.

In making its factual findings, the family court also referred to Presbie’s sporadic attendance at scheduled visitations with the children including her failure to appear at all on occasion. The family court thought it significant that, out of twenty-nine visits, Presbie attended less than half. Considering the children’s age and the history of the case, the family court noted that the children had been in foster care for a majority of their lives. Indeed, the youngest child only resided with his natural mother for two months out of the two short years he had been alive. Also significant to the family court’s findings was that Presbie’s mother had guardianship over another of her children, and both children within the family court’s jurisdiction in these proceedings were removed from Presbie shortly after their birth, placed into foster care, returned to Presbie and Moore, and then removed again. The family court also found that Presbie failed to obtain suitable housing and continued to abuse substances.

Finally, the family court noted that Moore did not show any interest in his children and never made any attempts to cooperate or participate in any planning or reunification efforts. In addition, the family court found that Moore refused to visit at the FIA and similarly refused supervised visits in the presence of relatives. After finding that the requisite statutory grounds existed by clear and convincing evidence coupled with the absence of evidence, to indicate that termination would not serve the children’s best interests, the family court entered an order terminating both Presbie’s and Moore’s parental rights to their minor children.

II. Standard of Review

This Court reviews a family court’s factual findings in an order terminating parental rights for clear error. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Powers*, 244 Mich App 111, 117; 624 NW2d 472 (2000). A finding is clearly erroneous if, upon review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *In re Powers, supra* at 117-118. In accord with this standard, the appellate court must give due deference to the family court’s determinations regarding the credibility of the witnesses brought on to testify before it. MCR 2.613(C); *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). Once the family court discerns clear and convincing evidence supporting one of the statutory grounds for termination of parental rights exists, then the family court must terminate parental rights unless it finds, based on the entire record before it, that termination is clearly not in the best interests of the child. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000).

III. Grounds for Termination

The family court terminated respondents’ parental rights pursuant to MCL 712A.19b(3)(g) and (3)(j)¹ which provide in pertinent part:

¹ A review of the record reveals that as a result of some confusion or oversight, some of the
(continued...)

(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:

* * *

(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 . . . is returned to the home of the parent.

A. Termination of Presbie's Parental Rights

Presbie argues that she substantially complied with all of the conditions set forth in the Parent/Agency Agreement and that the family court clearly erred in terminating her parental rights. We disagree and find termination of Presbie's parental rights was proper under subsection 19b(3)(g). Although we acknowledge her progress in meeting several of the conditions, we nevertheless consider, as did the family court, that she made little progress until termination of her parental rights appeared imminent. The record well supports the family court's finding that, despite referrals and attempts by the FIA long before institution of termination proceedings, Presbie only undertook to comply with the Parent/Agency Agreement after termination proceedings began. Presbie's failure to make progress upon the conditions set forth in the Parent/Agency Agreement until termination of her parental rights appeared imminent indicates that she is not equipped to meet the children's needs now, or in the foreseeable future.

The record is clear that Presbie was "transient" or homeless for an entire year after her children were placed in foster care. Further, after her children were removed, Presbie failed to strive toward obtaining and maintaining suitable housing and also failed to seek a dependable

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provisions under which the prosecutor sought to terminate respondents' parental rights were not replicated in the termination petition. The petition to terminate respondents' parental rights did not reflect that the prosecutor would seek termination in accord with MCR 712A.19b(c)(i) (182 days or more elapsed since the issuance of the initial dispositional order, and the court finds that the conditions that led to the adjudication exist and there is no reasonable likelihood that they will be rectified within a reasonable time considering the children's age) and (c)(ii) (other conditions exist that caused the children to come within the court's jurisdiction and although receiving recommendations as to how to rectify the conditions, the parent fails to do so within a reasonable time and there is no reasonable likelihood that conditions will be rectified considering the children's age.) Considering the oversight, the prosecutor stated that it would seek termination in accord with only MCL 712A.19b(3)(g) and (3)(j). The family court, however, did indicate that it found clear and convincing evidence to terminate respondents' parental rights pursuant to these two provisions.

source of income. Moreover, Presbie admitted that after her children were removed, she used controlled substances to cope with her situation. Even after termination proceedings were underway, Presbie submitted to three drug screens, two of which revealed a “highly diluted” specimen, indicating tampering. Perhaps most telling, however, is that after her children were placed in foster care, Presbie failed to consistently maintain scheduled visitations often leaving her children waiting in vain to see her. The trial court did not commit clear error by finding that Presbie was not in substantial compliance with the Parent/Agency Agreement.

All of the testimony presented at trial demonstrates that these children have been in foster care for the majority of their respective, lives waiting for their mother to attain an acceptable level of parenting skill. Indeed, not only must the family court concern itself with the time that it would take for one to improve fundamental parenting skills, but the court must also consider how long the child can wait for the improvement. *Matter of Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991). These children have waited long enough. The trial court properly terminated Presbie’s parental rights in accord with subsection (3)(g).

B. Termination of Moore’s Parental Rights

Unlike Presbie, testimony adduced at trial established that Moore resided in his own home. The caseworker acknowledged that Moore resided in his own home, the home was clean and otherwise suitable for the children. Notwithstanding this uncontroverted testimony, the Parent/Agency Agreement required Moore to provide verification of a suitable home through rent receipts or evidence of mortgage payments thus enabling the FIA to determine whether his residence was permanent. He did not produce this documentary verification. Further, the uncontroverted testimony presented at trial established that Moore had stable employment. Nevertheless, the Parent/Agency Agreement required Moore to demonstrate financial stability by providing verification of income, which Moore failed to do.

The conditions in the Parent/Agency Agreement requiring Moore to provide verifications when the unequivocal testimony adduced at trial established that Moore had suitable housing and stable employment, resulted in the impermissible shifting of the burden of proof from the petitioner to respondent. In termination proceedings, the burden of proof always remains with the party seeking to terminate the respondent’s rights to the child at issue. *In re Boursaw*, 239 Mich App 161, 178-179; 607 NW2d 408 (1999). Thus, in light of the uncontroverted testimony establishing that Moore had housing suitable for the children, placing the burden upon Moore to produce verification effectively relieves the burden of proof properly placed upon the petitioner to prove otherwise. Simply put, the law does not require a respondent to prove that he has suitable housing or financial stability; the burden of proof always rests squarely with the FIA, as the party seeking termination, to prove that he does not. *Id.* On the contrary, the burden of going forward with the evidence to demonstrate that termination clearly would not serve the child’s best interests remains with the party facing termination. *Id.* at 180. Consequently, the trial court clearly erred to the extent that it relied upon Moore’s failure to provide verification of suitable housing and income in finding the requisite clear and convincing evidence to terminate his parental rights.

Notwithstanding this apparent error, the Parent/Agency Agreement required Moore to attend domestic violence counseling, complete a parenting class, provide verification of completion, submit to a drug and alcohol assessment, appear at all court hearings, construct a

safety plan for his children's return and maintain scheduled weekly visits with the children at the FIA. The testimony established that Moore failed to comply with these conditions despite referrals from the FIA for these services, save for physically appearing at all court hearings. In addition, Moore adamantly refused to visit with his children at the FIA. When the FIA attempted to arrange supervised visits with relatives, Moore similarly declined and failed to visit his children. Moore also failed to inquire concerning the well being of his children, or send them cards, gifts, money or pictures.

Consequently, despite the trial court's impermissible shifting of the burden of proof, the evidence is nevertheless otherwise clear that, beyond physically appearing at all court hearings, Moore did not avail himself of any of the other services offered through the FIA and at all pertinent times refused to cooperate to regain custody of his children. The record is abundantly clear that Moore failed to visit with his children or otherwise actively participate in *any* reunification efforts to secure his children's return. Accordingly, Moore, without regard to intent, failed to provide proper care for his children. In light of Moore's failure to participate in any meaningful way to secure his children's return to his custody in conjunction with the length of time that these children have remained in foster care, the record reveals that there is no reasonable expectation that Moore will do so within a reasonable time considering the age of his children. Thus, the trial court did not err by terminating his parental rights pursuant to subsection (3)(g).

C. Termination Pursuant to 19b(3)(j)

Termination of both respondents' parental rights was likewise proper under subsection 19b(3)(j). One of the reasons that these children were placed in foster care was recurring domestic violence between Presbie and Moore. Testimony adduced in the proceedings revealed that domestic violence compelled Presbie to vacate the home on October 31, 1999. Considering the history of domestic violence between Presbie and Moore, and Moore's refusal to participate in a domestic violence class, the record well supports the trial court's determination that the children would suffer harm if returned to either parent's custody.

Additionally, testimony adduced at the termination hearing demonstrated that Presbie struggles with substance abuse. One of the major issues relevant to the children's initial removal was Presbie's addiction to controlled substances and her frequent visits to crack houses, which prompted her to leave her children in the care of neighbors or relatives for extended periods. Presbie even testified that when her children were removed from her care, instead of seeking assistance to overcome her addiction, she perpetuated her dependency on controlled substances while her children remained in foster care. In fact, according to Presbie's own testimony, although she initially quit ingesting drugs in January, 2000, she relapsed in June of the same year. On review of the entire record, we find that the family court did not clearly err by finding that termination was proper in accord with subsection 19b(3)(j).

IV. Guardianship vs. Termination

During the termination hearing, Presbie's mother advised the family court that she wanted to assume guardianship of both minor children. The record indicates that Presbie's mother already has guardianship of one of Presbie's children, and awarding guardianship to the children's maternal grandmother would ensure that all of the siblings remain as one family unit.

On appeal, Presbie does not argue that guardianship would serve the children's best interests. Similarly, in its opinion, the family court did not mention this testimony with respect to its best interest assessment. Accordingly, this issue is not properly presented for our review. Nevertheless, we note that MCL 712A.1(3) does not necessarily require a court to place a child with relatives. *In re IEM, supra* at 453. Indeed, the best interests of the child control; if termination, as opposed to placing the child with relatives, better serves the child's interests, then termination of parental rights is appropriate. *Id.*

Affirmed.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly