

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of A.L., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHAWN HISLOP,

Respondent-Appellant,

and

SANDY LACOSSE,

Respondent.

UNPUBLISHED
February 11, 2003

No. 242460
Cheboygan Circuit Court
Family Division
LC No. 01-001268-NA

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

PER CURIAM.

Respondent Shawn Hislop, the biological father of the minor child, appeals as of right from the trial court's order terminating his parental rights to the child pursuant to MCL 712A.19b(3)(g) and (j).¹ We affirm.

At the time of the child's removal, respondent, who had an organic brain dysfunction, utilized the assistance of his mother, Linda Hislop, the child's grandmother and limited legal guardian, in caring for the child. Petitioner removed the child from the custody of respondent and Hislop after discovering the child's appearance in a sexually suggestive photograph of Hislop that she mailed to Aaron Agelink, a state prison inmate serving a sentence for a criminal sexual conduct conviction.

¹ Sandy LaCosse, the child's mother, consented to the termination of her parental rights, and is not a party to this appeal.

After Hislop relinquished her guardianship of the child, petitioner filed a petition alleging neglect of the child by respondent and the child's mother. The mother admitted the allegations against her and consented to the termination of her parental rights. Although petitioner subsequently withdrew its allegations of neglect by respondent, the trial court ordered respondent's compliance with a treatment plan that petitioner recommended. Within six months, during which respondent participated in various court-ordered treatments, petitioner filed a supplemental petition requesting that the court terminate respondent's parental rights, which the court did after a four-day hearing.

I

Respondent first argues that the trial court deprived him of procedural due process by entering dispositional orders against him following the mother's admissions of neglect of the child, and by holding a hearing regarding the supplemental petition to terminate his parental rights without ever conducting an adjudication trial to ascertain the validity of the allegations against him personally. This Court reviews de novo the constitutional question whether a due process violation occurred. *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002).

We reject respondent's claim of a due process violation because the trial court properly exercised jurisdiction over the child on the basis of the mother's admissions to allegations of her neglect, MCR 5.971, after which the court properly entered dispositional orders concerning respondent, despite that petitioner had withdrawn the allegations of respondent's own neglect of the child. MCL 712A.6; MCR 5.973(A). As this Court explained in *In re CR*, 250 Mich App 185, 202-203; 646 NW2d 506 (2002), the statutes and court rules concerning child protective proceedings permit a family court to make dispositional orders with respect to an adult who is not the subject of a petition alleging the neglect of a minor, so long as the minor has come within the court's jurisdiction:

[O]nce the family court acquires jurisdiction over the children, MCR 5.973(A) authorizes the family court to hold a dispositional hearing "to determine measures to be taken . . . against any adult" MCR 5.973(A)(5)(b) then allows the family court "to order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child." Consequently, after the family court found that *the children* involved in this case came within its jurisdiction on the basis of [the mother's] no-contest plea and supporting testimony at the adjudication, the family court was able to order [the father] to submit to drug testing and to comply with other conditions necessary to ensure that the children would be safe with him even though he was not a respondent in the proceedings. This process eliminated the FIA's obligation to allege and demonstrate by a preponderance of legally admissible evidence that [the father] was abusive or neglectful within the meaning of MCL 712A.2(b) before the family court could enter a dispositional order that would control or affect his conduct. Rather, . . . this alternative process imposed on the family court an obligation to comply with the procedures for termination in MCR 5.974(E) once the FIA filed the petition seeking termination. Thus, the family court's failure to hold an adjudication with respect to [the father] did not bar it from proceeding to terminate his parental rights. [Emphasis in original.]

Accordingly, in this case where the mother had admitted the allegations of neglect against her and petitioner had withdrawn the allegations of neglect against respondent, no procedural error occurred when (1) the trial court subsequently entered dispositional orders directed at respondent, and (2) no adjudication trial occurred with respect to petitioner's supplemental petition seeking termination of respondent's parental rights.

Our review of the trial transcripts reveals that respondent's termination hearing comported with MCR 5.974(E), that provides, in relevant part, as follows:

The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new and different from the offense that led the court to take jurisdiction. The new or different circumstance must fall within MCL 712A.19b(3) . . . , and must be sufficient to warrant termination of parental rights.

(1) Legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights. . . . [T]he proofs must be clear and convincing.

At the termination hearing, the trial court scrupulously distinguished between legally admissible evidence that tended to prove a basis for termination of respondent's parental rights pursuant to MCL 712A.19b(3), and all relevant and material evidence that it could consider in determining the child's best interests pursuant to MCL 712A.19b(5).² Respondent does not contest that he received notice of the March 2002 supplemental petition's allegations against him or notice of the termination hearing.³ Respondent received a lengthy trial where petitioner had to prove a statutory ground for termination by clear and convincing legally admissible evidence, and respondent had the opportunity to testify, call witnesses, and cross-examine petitioner's witnesses. Under these circumstances, we find no basis for respondent's suggestion that he did not receive due process or fundamental fairness before the trial court terminated his parental rights. *In re CR, supra*, 250 Mich App 204-209.

II

Respondent next argues that the record did not contain clear and convincing evidence warranting termination of his parental rights pursuant to MCL 712A.19b(3)(g) and (j). This Court reviews for clear error a trial court's decision that a ground for termination of parental rights has been proven by clear and convincing evidence. MCR 5.974(I); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court's findings of fact qualify as clearly erroneous when this Court's review of the record reveals some evidence to support the

² The record reflects that the court placed different exhibits into separate envelopes labeled "Fact Finding Exhibits" and "Best Interests." On appeal, respondent makes no allegation of any specific evidence that the court improperly considered in reaching its termination decision.

³ The record indicates that respondent attended, with his counsel, all relevant pretrial and dispositional hearings.

findings, but leaves this Court with the definite and firm conviction that the court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

Much evidence demonstrated that, while residing in respondent's care, the child experienced inappropriate exposure to sexual activity. Abundant testimony described the child's appearance in the sexual photograph of Hislop that respondent and his family mailed to Agelink in prison, where he was serving a sentence for a criminal sexual conduct conviction, and from which Agelink spoke on the telephone with the child who apparently referred to Agelink as grandpa. The child also made age inappropriate sexual statements and described having observed sexual activity, and exhibited avoidance and hysterical behavior when confronted with anatomically correct pictures or suggestions that he remove his clothes, which led a psychologist to opine that the child certainly at least had observed inappropriate sexual activity. Respondent reported that his half-brother placed a drumstick in the child's rectum, and further speculated that the child might have witnessed sexual behavior by respondent's father and step-mother.

Although petitioner conceded that respondent cooperatively completed the extensive treatment plan activities it recommended, and much undisputed testimony agreed that respondent and the child loved each other and had a good relationship, abundant evidence also indicated that respondent lacked the capacity to provide the child with a safe home environment and could not improve his parenting skills within a reasonable time. Hislop became the child's limited legal guardian in 1998 because respondent could not adequately parent the child himself, and psychological evaluations of respondent indicated that he heavily relied on Hislop to parent the child. During visits, respondent consistently failed to provide the child parental guidance or interaction, and could not control the child when he misbehaved. Respondent and Hislop apparently made inappropriate suggestions to the child during visits that he would return home soon, causing the child to become depressed and behave aggressively and destructively. Although several witnesses opined that respondent could learn to complete routine daily tasks that might improve his parenting skills, the testimony of the psychological experts agreed that respondent's organic brain dysfunction permanently prevented him from progressing beyond a second- to fourth-grade level of development, that respondent never would have the ability to reason abstractly, and that respondent could not prevent further abuse or neglect of the child because he would not know what to do when unfamiliar situations arose. As one psychologist explained, while respondent appeared capable of distinguishing right from wrong, his limited, concrete thinking process would give him "extreme difficulty recognizing situations that might be harmful to his son, anticipating those and doing something to protect his son." The three psychological experts who evaluated respondent and a social worker who observed respondent's visits with the child all concluded that respondent could not parent the child without assistance. As most witnesses reported, respondent had difficulty maintaining his own health and hygiene.

The foregoing evidence clearly and convincingly established that, irrespective of respondent's intent, he failed to provide the child proper care and custody.⁴ MCL

⁴ Unlike *In re Hulbert*, 186 Mich App 600; 465 NW2d 36 (1990), the supplemental authority cited by respondent, the instant record contained clear and convincing evidence of both respondent's failure to provide the child with proper care and custody and respondent's inability to provide proper care and custody. *Id.* at 605. While this Court noted in *In re Hulbert, supra* at 601, that the record contained no evidence of the respondent parents' actual neglect of the child
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712A.19b(3)(g); *In re Terry*, 240 Mich App 14, 23; 610 NW2d 563 (2000). In light of the facts that (1) the nearly six-year old child had resided in foster care for approximately sixteen months by the time of trial, (2) the child had a strong need for permanency, (3) respondent's intellectual limitations prevented him from ever providing the child proper care and custody without assistance, and (4) the only potential caregiver to assist respondent appeared to be Hislop, with whom the child had resided when petitioner removed him, and who until the last day of trial expressed her intent to marry Agelink, it was clearly and convincingly apparent respondent could not provide the child with proper care and custody within a reasonable time given the child's age. *In re Terry, supra; In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991).⁵

Although respondent and the child loved each other, we further conclude that the trial court did not clearly err in finding that termination of respondent's parental rights served the child's best interests. MCL 712A.19b(5); *In re Trejo Minors, supra*, 462 Mich 356-357. Apart from the facts that the child had experienced exposure to sexual activity in respondent's care and that respondent's mental capacity prevented him from providing the child with a safe and secure environment, other evidence indicated that (1) the child felt anxiety with respect to his relationship with respondent, (2) an increase in respondent's visits with the child correlated with significant changes in the child's behavior, including defiant behavior and inconsolable crying, (3) when placed in foster care the child had a speech impediment that since had improved dramatically, and (4) after his removal the child exhibited diminished aggression in play therapy.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

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other than the mother's failures "to keep the child on an apnea monitor for the full time as advised by a doctor and . . . to give the child a proper dosage of medicine," the instant record clearly and convincingly established that respondent permitted the child's exposure to sexual activity. Furthermore, unlike the experts in *In re Hulbert, supra* at 602-605, who "essentially opined that respondents' 'borderline' mental conditions *may* render them unfit or 'ineffective' parents" (emphasis in original), the instant psychological experts and the social worker who supervised a visit between respondent and the child unequivocally, and unanimously, concluded that respondent, whose mental capacities had not expanded between 1996 and 2001, could not parent the child without assistance.

⁵ Although only one statutory ground for termination need exist, MCL 712A.19b(3), we note that the abundant evidence of the child's exposure to sexual activity and of respondent's inability to reason abstractly and anticipate situations potentially harmful to the child clearly and convincingly established the reasonable likelihood that, "based on the conduct or capacity of the child's parent, . . . the child will be harmed if he or she is returned to the home of the parent." MCL 712A.19b(j).