

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of SG and CJP, Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KIMBERLY ANN GREEN,

Respondent-Appellant.

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UNPUBLISHED

May 27, 2003

No. 244157

Oakland Circuit Court

Family Division

LC No. 2002-660708-NA

Before: Whitbeck, C.J., and White and Donofrio, JJ.

PER CURIAM.

Respondent Kimberly Green appeals as of right from the trial court order, entered following the initial dispositional hearing, terminating her parental rights to the minor children SG and CDP under MCL 712A.19b(3)(b)(i), (g), (j), (k), and (n)(i). We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E)

I. Basic Facts And Procedural History

This matter came to the attention of petitioner Family Independence Agency (FIA) in December of 2001 as a result of a burn inflicted on SG by Green. Following an investigation, the FIA filed a permanent wardship petition seeking termination of Green's parental rights to SG.<sup>1</sup> A pretrial hearing was held on January 17, 2002. Because Green was incarcerated, she was not present and the matter was adjourned.

Green gave birth to CJP on February 1, 2002. Shortly thereafter, the FIA filed a petition in Wayne County asking the court to take temporary custody of CJP, and the trial court authorized the petition and took temporary custody of CJP. An amended petition was then filed

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<sup>1</sup> This petition also included allegations that SG's father, James Green, hit SG in the arm causing a bruise. Because Green and James Green are divorced and live separately, and because SG is in the custody of James Green, the allegations against James Green were resolved separately from those of respondent, and are not the subject of this appeal.

seeking termination of Green's rights to CJP.<sup>2</sup> The matter regarding CJP was then transferred to Oakland County and was consolidated with the matter regarding SG.

The matter next came before the trial court in March of 2001 for an initial pretrial hearing, at which Green was present. At that hearing, the trial court reviewed the procedural status of the transfer petition and verified that Green understood that both petitions sought termination of her parental rights to the children. The trial court also noted that parenting time for both children would continue to be suspended. Green did not make any argument regarding why parenting time should not be suspended and did not inquire about the availability of any services to work toward reunification.

Trial commenced in July of 2002. SG testified that he went to visit Green on the weekend of December 1, 2001. During that visit, Green took SG to a convenience store and, later, they watched a movie. While SG and Green were watching the movie, Green's mother, who also lived in the home, went to bed leaving SG and Green alone. SG stated that, at some point, Green lit a cigarette and he responded by telling her not to smoke because she was pregnant. However, the lighter would not go out so, according to SG, he took it from Green and blew it out. SG testified that his thumb touched the top of the lighter and he said, "Ouch, that burnt." He then gave the lighter to Green who touched it against his arm. SG testified that Green did this to show him that the lighter was not hot. According to SG, the lighter left a mark on his arm.

SG testified that, on December 6, 2002, he met with a counselor at his school. He told that counselor that Green burned his arm with the lighter. SG spoke with Protective Services worker Michelle Gouin about this incident on December 12, 2002. A picture was taken of SG's arm at that time, showing the burn and this picture of the burn was admitted into evidence. SG testified that his mother called him about a month later and asked him not to tell the Protective Services worker or Green's probation officer. SG testified further that, while Green was on parole, she took him alone to see Thurman Poff at his house. On cross-examination, SG reiterated that Green took the lighter after he had blown it out and placed it against his arm, to show him that it was not hot.

James Green, SG's father, testified that SG had lived with him "his entire life, basically." He also testified that he took SG weekly to see Green when she was in prison, and that after she was paroled, SG visited with her at her mother's home. When SG returned from visiting Green on the weekend of December 1, 2002, James Green noticed that SG had a burn on his arm. James Green indicated that Green's visits with SG were to be supervised, that it was his understanding that Green's mother was supervising the visits, and that he became aware that at times the visits were not supervised.

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<sup>2</sup> This petition also addressed the parental rights of CJP's putative father, Thurman Poff. While the matter regarding Poff proceeded in conjunction with the matter regarding Green, ultimately they were resolved as separate matters, with Poff's case continuing beyond August 15, 2002. The trial court eventually terminated Poff's rights to CJP, but that termination is not the subject of this appeal.

Pam Pscheidl, Green's parole officer, testified that Green was convicted in 1993 of second-degree murder, following the death of a nine-and-one-half-month-old child in her care, and sentenced to ten to thirty years in prison. Green was released on parole in April 2001. The special conditions of Green's parole were: (1) that she not have written, verbal, electronic or physical contact with any child age sixteen or under, including her own child(ren), unless supervised by an adult responsible for the child and approved by the officer; (2) that she not live in a residence where any child age sixteen or under stays or is cared for; (3) that she not provide care for any child sixteen years old or younger; and (4) that she not work in any residence without prior written permission of the officer and without first advising the home owner that she was on parole.

In addition, Ms. Pscheidl testified that Green's parole also was subject to the standard conditions of parole, including: (1) that she report to her parole officer; (2) that she not change her residence without advising the officer; (3) that she not associate with known felons; (4) that she submit to drug testing whenever instructed to do so; (5) that she not have a weapon or imitation of a weapon or ammunition; (6) that she maintain full-time, verifiable employment; and (7) that she not engage in any criminal behavior.

Pscheidl testified that Green's taking SG to the convenience store alone was unsupervised contact and would be a violation of her parole. Further, being alone with SG while her mother was asleep would also be considered a violation of Green's parole. Pscheidl indicated that she and Green discussed her visits with SG "very frequently." According to Pscheidl, Green reported to her office twice a month and they discussed Green's visits with SG during almost every report. Pscheidl indicated that, during these discussions, she emphasized that Green was not to have contact with SG alone. Pscheidl testified, "She would ask me specific permission to take him to the zoo and I gave examples of how she was not to be with him alone." Pscheidl testified further that if Green had asked permission to take SG to the convenience store alone, she would have told her that she could not do so. Pscheidl indicated that she had given Green examples of what would be considered unsupervised contact that were similar to the trip to the convenience store.

According to Pscheidl, Green was clear that her mother was to be supervising her visits with SG and Green knew that it was not sufficient for another adult to merely be present in the house; being alone with SG while her mother slept was not considered to be supervised contact. Similarly, Pscheidl testified that having a telephone conversation with SG, without another adult present on the phone, would be unsupervised contact. Regarding the other conditions of Green's parole, Pscheidl testified that Green did not satisfactorily comply with the requirement that she not associate with any known felons because CJP's father, Thurman Poff, was another parolee. Indeed, Green asked for permission to associate with Poff and provided file material to Pscheidl in connection with that request. Pscheidl denied Green permission to associate with Poff, in part based on a review of information indicating the nature of Poff's offenses.

Pscheidl testified that she charged Green with several parole violations, including that she engaged in criminal behavior by burning SG's arm with a cigarette lighter and that she changed her residence without permission and without advising Pscheidl. Following the filing of the violation charges, Green was returned to prison. Pscheidl testified further that Green was found guilty of both counts at the preliminary hearing before the parole board. However, at a

subsequent hearing, SG was not present, so the charges relating to the burning incident were dismissed.<sup>3</sup> At the parole violation hearing in January of 2002, the parole board found probable cause to believe that Green committed the offense of changing her residence without permission. Green was remanded to prison as a result of the violation. Green was required to remain in prison until at least December of 2002.

On cross-examination, Pscheidl testified that Green was scheduled to have a parole hearing the week of August 12, 2002. Pscheidl acknowledged that if Green were to be released on parole, the conditions of her parole possibly could change, depending on the recommendations of the parole board. Pscheidl testified that she specifically indicated to Green that there was to be an adult present at all times while she was visiting SG. Pscheidl acknowledged that, at that time of the burn incident, Green's mother was present in the house, although not in the same room. Pscheidl also acknowledged that she had not discussed with Green what would be meant by unsupervised phone contact. Pscheidl testified that phone contact would be supervised if SG's father stood by while Green was having the conversation with him.

During questioning by counsel for the children, Pscheidl testified that the purpose of the August 2002 parole hearing was to determine whether Green would again be released on parole. If the board determined not to parole Green again, she could be kept until the original thirty-year maximum sentence was served. Pscheidl indicated that she had not specifically discussed with Green the scenario of another adult leaving the room or being asleep as being unsupervised contact.

FIA Child Protective Services worker Michelle Gouin testified that she investigated the burn incident. During her investigation, she interviewed SG several times. Her first interview with SG was in December of 2002 at his school, at which time the burn was visible on SG's forearm. This burn seemed to be consistent with the story that SG told her about how he suffered the burn. As part of her investigation, Gouin also interviewed Green, Pscheidl, and SG's father, James Green. Gouin indicated that, in the course of the investigation, Green admitted that she took SG to the convenience store alone. Gouin also testified that, during the interview on December 5, 2002, SG told her that he had had a visit with Green over the previous weekend. SG stated that he arrived at Green's mother's house in the afternoon, but Green did not get there until seven hours later. According to SG, Green then took him to the convenience store so that she could make a phone call to her boyfriend. Gouin stated that, "apparently there were some issues with the truck and the boyfriend had her truck and that's why she couldn't be there when [SG] arrived for the visit." Gouin testified that SG told her that Green took him to the convenience store to make the phone call and buy him a Slurpee, and then they returned home.

Gouin indicated that SG explained that he and Green were downstairs alone watching movies and his grandmother was upstairs in bed. During that time, Green was smoking and lit a cigarette. SG told Green that she should not be smoking because she was pregnant. The

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<sup>3</sup> There are references during the course of this matter that indicate, without dispute, that at the time of trial, Green faced criminal charges in Macomb County Circuit Court arising out of her burning of SG's arm.

cigarette lighter would not go out, so SG took it and blew it out. His finger touched the top of the lighter and he said that the lighter was hot. According to Gouin, SG then told her that Green said the lighter was not hot, took the lighter from him and put it on his arm, saying, "See, it's not hot." Ms. Gouin indicated that SG told her that after the lighter burned his arm, he got up and was running around the kitchen saying that the lighter was hot and that "it burned, it burned, it burned."

Gouin was asked her opinion with regard to Green's parental rights to SG and CJP, and in response, she testified that she believed Green's parental rights should be terminated. Regarding SG, Gouin indicated that the basis for this belief was the physical abuse he sustained and that when Green "had opportunity to establish a relationship and be on time for visitation and that type of thing, that's important to an 11 year old, she let him sit while she was chasing after her boyfriend." Gouin indicated further that she believed that it would be in SG's best interests to have Green's parental rights terminated, that Green would not be able to provide a suitable home considering SG's age, that Green's behavior constituted a risk to SG, and that there was a reasonable likelihood that SG would be harmed if returned to Green's home. Gouin stated:

I believe not only is there a potential for physical harm again, even if it's just out of carelessness, that she is not listening to her son in the instance that he told her the lighter was hot; she disregarded his statement and went away – ahead and put the lighter on his arm.

I also think he stands substantial risk of further mental injury by sitting around and waiting for his mother when plans are made and if she knows – he knew that she was to be there at three o'clock to visit and she doesn't show up until after 10:00 he knows that he's not the most important thing at that point in time in his life.

Gouin also testified about her opinion with regard to the extent of the bond between Green and SG. Gouin explained that, during her interview of Green, she asked Green about being late for the visit with SG. In response, Green indicated that she had a hard time feeling connected to SG, possibly because of the years of their separation and not being with him growing up. According to Gouin, Green's being late for his visits had a negative effect on SG's self-esteem, and SG felt very bad that Green would prefer to be with her boyfriend than to be spending time with him. SG only visited Green every other weekend and it was a "constant disappointment to him when she would be late."

Regarding CJP, Ms. Gouin reiterated her opinion that Green's rights should be terminated. She explained the basis of her opinion as follows: (1) since his birth, Green has been unable to care or plan for him; (2) with her prior conviction for second-degree murder of an infant, it would be dangerous to put an infant in her care; (3) because of the nature of her conviction, if she is paroled, she will likely not be able to have contact with a child without supervision and there is no way that a mother can be supervised twenty-four hours a day, seven days a week when caring for an infant child, which is what would be required. Gouin also explained, "First of all, out of carelessness or disregard for the child's well-being, she may again do something like burning the child and more importantly, should something else seem more

important to her than the child's well-being, she may indeed leave this child or not be where the child is supposed to be at, at proper times." Gouin testified that the cause of death of the baby that died in Green's care was Shaken Baby Syndrome. Gouin concluded by indicating her belief that it would be in CJP's best interests for Green's parental rights to be terminated.

On cross-examination, Gouin testified that there were no prior allegations or history of physical abuse and that, other than the burn in question, SG had no unexplained burns or marks on his body, nor any broken bones. Gouin also testified that SG indicated that every time he visited Green, she was late and he would have to sit and wait for her to return home. Gouin indicated that CJP was taken into custody shortly after he was born and Green had not been able to have contact with him and had not been able to plan for him. Gouin acknowledged that she had not provided Green with a suggestion or opportunity to have a family member plan for CJP; she indicated that she assumed that the Wayne County worker would have done so. Gouin testified that Green did not want her parental rights to SG terminated but that she had not spoken to Green about her rights to CJP.

During questioning by counsel for the children, Gouin testified that Green was with SG during the first three years of his life, and then she was incarcerated. During Green's incarceration, SG's father took him to see her on a "somewhat regular basis" until the couple was divorced. Thereafter, Green's mother took SG to see Green, at most monthly. After Green was paroled, SG visited her every other weekend but Green was late for these visits. Gouin indicated that there were no Protective Services referrals during the first three years of SG's life or as a result of his visits with Green.

Following testimony by Thurman Poff regarding his rights to CJP,<sup>4</sup> the FIA rested. Green did not present any testimony or evidence on her own behalf. At the conclusion of the testimony, the trial court issued its ruling, finding "based on the totality of the record as to both children," that the children came within the provisions of 712A.2(b) and that there was clear and convincing evidence that Green's parental rights should be terminated pursuant to 712A.19b(3)(b)(i), (g), (j), (k), and (n)(i). In so ruling, the trial court noted that "physical abuse to another child had occurred, specifically the child that was killed in 1992, which places any further children at risk to continue in [Green's] care and custody, also as evidence [sic] by the terms of parole which said she could be around nobody under 16 without supervision." Green appeals as of right.

## 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 met by clear and convincing evidence.<sup>5</sup> This Court reviews the trial court's findings of fact for clear error.<sup>6</sup> A finding is clearly erroneous when the reviewing court is left with the firm and definite conviction that a mistake was made.<sup>7</sup> Once the

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<sup>4</sup> Poff's case is not the subject of this appeal.

<sup>5</sup> *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993).

<sup>6</sup> MCR 5.974(I); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

<sup>7</sup> *Jackson*, *supra* at 25.

petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order the termination of parental rights unless it finds from evidence on the whole record that termination is clearly not in the child's best interests.<sup>8</sup> The trial court's decision regarding the child's best interests is reviewed for clear error.<sup>9</sup>

### III. The Trial Court's Decision

#### A. Termination At the Dispositional Stage

Green argues that the trial court erred in terminating her parental rights at the initial disposition stage of proceedings, because the FIA had not made reasonable efforts to work with her or to provide her with services. Where a petitioner seeks termination of parental rights at the initial dispositional hearing, there is no requirement that the petitioner make reasonable efforts to work with the respondent toward reunification.<sup>10</sup> Green also argues that she was denied due process by the trial court's termination of her rights without having conducted a psychological evaluation. We conclude that Green was afforded all the process due her under the applicable statutes and rules. The absence of a psychological evaluation is pertinent only to the issue of the sufficiency of the evidence presented; it is not relevant to due process.

#### B. Sufficiency Of The Evidence

We conclude that sufficient evidence was presented to support the trial court's finding that MCL 712A.19b(3)(b)(i), (g), (j), and (n)(i) had been established by clear and convincing evidence.<sup>11</sup> We do note that the trial court erred in determining that termination was also warranted under MCL 712A.19b(3)(k), because the infant that died while in Green's care was not a sibling of the two children who are the subjects of this proceeding. However, given that the trial court properly found other grounds for termination, this error was harmless.<sup>12</sup>

#### C. Hearsay Testimony

Green asserts that the trial court erred in admitting the testimony of the protective services worker about statements SG made during the investigation. However, hearsay evidence is admissible on the issue of termination<sup>13</sup> and much of the worker's testimony was offered on the issue of whether termination was warranted and whether it would be in the best interests of the children. Moreover, even if the testimony were considered on the question of adjudication,

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<sup>8</sup> MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 353-354; 612 NW2d 407 (2000).

<sup>9</sup> *Trejo*, *supra* at 356-357.

<sup>10</sup> MCL 712A.19b(4); MCR 5.974(D).

<sup>11</sup> *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993).

<sup>12</sup> See *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

<sup>13</sup> *In re Snyder*, 223 Mich App 85, 89; 566 NW2d 18 (1997).

any error in admitting it was harmless given the child's own testimony regarding the incident in question.<sup>14</sup>

Affirmed.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Pat M. Donofrio

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<sup>14</sup> See *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996); *People v Miller*, 165 Mich App 32, 50; 418 NW2d 668 (1987).