

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

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In the Matter of JOANNA GRIFFIN, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANGELA STURM,

Respondent-Appellant.

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UNPUBLISHED  
October 7, 2004

No. 249697  
Wayne Circuit Court  
Family Division  
LC No. 02-409017

In the Matter of JOANNA GRIFFIN, Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RONALD J. GRIFFIN,

Respondent-Appellant,

and

ANGELA STURM,

Respondent.

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No. 249698  
Wayne Circuit Court  
Family Division  
LC No. 02-409017

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

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(b)(ii), (g), (j), and (k)(iii).<sup>1</sup> We affirm.

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. MCL 712A.19b. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). We review the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J); *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Jackson, supra* at 25. Once a statutory ground for termination has been met by clear and convincing evidence, the parent against whom termination proceedings have been brought has the burden of going forward with some evidence that termination is clearly not in the children's best interests. *Terry, supra* at 22. If no such showing is made and a statutory ground for termination has been established, the trial court is without discretion; it must terminate parental rights, unless the court finds from evidence on the whole record that termination is clearly not in the children's best interests. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCL 712A.19b(5).

On appeal, respondents argue that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree. MCL 712A.19b(3)(b) provides that the trial court may terminate a parent's parental rights to a child if it finds, by clear and convincing evidence, that:

(b) The child . . . has suffered physical injury or physical . . . abuse under . . . the following circumstances:

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(ii) The parent who had the opportunity to prevent the physical injury or physical . . . abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

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(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

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<sup>1</sup> We note that on appeal, respondent-mother challenges termination of her parental rights under MCL 712A.19b(3)(b)(iii), and respondent-father challenges termination of his parental rights under MCL 712A.19b(3)(b)(i). However, the record reveals that the trial court did not cite those subsections in support of terminating respondents' parental rights. Accordingly, we decline to address those subsections on appeal.

Additionally, respondent-father initially argues that he has a constitutionally protected interest in raising his child. But that interest does not preclude termination of his parental rights upon a showing that a statutory ground for termination has been established by clear and convincing evidence. *Santosky v Kramer*, 455 US 745, 769; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

provide proper care and custody within a reasonable time considering the child's age.

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(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if . . . she is returned to the home of the parent.

(k) The parent abused the child . . . and the abuse included . . .

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(iii) Battering, torture, or other severe physical abuse.

This case arises out of severe injuries sustained by the minor child, Joanna, when she was just seven weeks old. While visiting at the home of his father and stepmother, respondent-father noticed that Joanna's right leg was red and swollen. Respondents called the office of Dr. Verna Turkish, Joanna's pediatrician, but it was late in the evening and the office was closed. A prerecorded message advised callers to go to the hospital in the event of an emergency. Respondents, who felt that they had been mistreated when they had taken Joanna to the University of Michigan Hospital one week earlier, and who did not believe that Joanna's injury constituted an emergency, took Joanna to her pediatrician the following day. Dr. Turkish testified that Joanna's upper right leg was 1½ times its normal size and that she was in acute pain and very fussy when anyone tried to touch her extremities. Dr. Turkish advised respondents to take Joanna to the University of Michigan Hospital because she suspected child abuse.

At the hospital, it was discovered that Joanna had a spiral fracture to her right leg and a metaphyseal bucket fracture to her left leg. According to Dr. Elaine Pomeranz, the attending emergency room physician and an expert on child abuse, Joanna's injuries were consistent with child abuse: the injury to Joanna's right leg involved a twisting mechanism, such as someone holding the thigh on one end and twisting it with enough force to cause a fracture; the injury to Joanna's left leg involved the leg being grabbed and forcefully pulled, resulting in a small piece of the leg being pulled away from the rest of the bone. Further, callous formation on the left leg indicated that the injury was at least three days old. Respondent-mother explained that the injuries may have been caused accidentally when Joanna got her leg caught in the bars of her crib or when she was strapped down for X-rays at the hospital the previous week. Drs. Turkish and Pomeranz discounted respondent-mother's explanation as unlikely in light of Joanna's young age and limited mobility. Respondents failed to cooperate in the police investigation into Joanna's injuries; however, they subsequently complied with an investigative subpoena issued by the prosecutor's office.

Following a trial, the trial court found that MCL 712A.19b(3)(b)(ii), (g), (j), and (k)(iii) were proven by clear and convincing evidence, and terminated respondents' parental rights on those grounds. MCL 712A.19b(5).

Respondents first contend that the trial court's termination of their parental rights under § 19b(3)(b)(ii) was clearly erroneous. We disagree. To warrant termination under § 19b(3)(b)(ii),

the trial court must find, by clear and convincing evidence, that the child suffered physical injury or physical abuse; the parent who had the opportunity to prevent the physical injury or physical abuse failed to do so; and there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home. *In re Sours Minors*, 459 Mich 624, 634-635; 593 NW2d 520 (1999).

It is uncontroverted that both of Joanna's legs were fractured. As such, the trial court did not clearly err in its determination that Joanna suffered physical injury or physical abuse, the first element of § 19b(3)(b)(ii). But respondent-mother challenges the finding of abuse, contending that the evidence did not conclusively establish that Joanna did not suffer from osteogenesis imperfecta, or "brittle bone disease," because a proper family history was not taken from respondent-father. But Dr. Pomeranz admitted that while she did not personally question respondent-father, she inquired about the family history from both sides of the family, and no indicators of the disease were revealed. Further, Joanna's X-rays showed bones with normal density and a normal-looking skull, with no indication of osteogenesis imperfecta. In the absence of physical evidence or other symptoms to support a diagnosis of osteogenesis imperfecta, Dr. Pomeranz concluded that Joanna did not suffer from the disease. The trial court did not clearly err in relying on Dr. Pomeranz's testimony in finding that Joanna did not suffer from osteogenesis imperfecta.

Respondent-mother also points to another fracture suffered by Joanna after she was removed from respondents' care, presumably to demonstrate that Joanna had a propensity to fracture her bones, consistent with a diagnosis of osteogenesis imperfecta. But Drs. Pomeranz and Turkish both testified that the hairline fracture Joanna suffered in October 2002 while in her paternal great-grandmother's care when she slipped off the couch and onto her knees was a common accidental injury in an older infant consistent with the explanation of the injury. Accordingly, respondent-mother's contention that the trial court clearly erred in concluding that the child suffered abuse is without merit.

Concerning whether respondents had the opportunity to prevent the physical injury or physical abuse and failed to do so, respondent-mother argues that she did not have the requisite opportunity to prevent the injury, and argues that there was no evidence that she was aware of Joanna's injuries before respondents brought her to the emergency room. But X-rays revealed fractures to both of Joanna's legs, with callous formation indicating that the fracture to the left leg was at least two or three days old, but up to several weeks old.

Dr. Pomeranz testified that the fracture to the left leg was not clinically visible, and required an X-ray to be diagnosed. But while this might support respondent-mother's argument that she was not aware of any abuse before injury to the right leg manifested itself, Dr. Pomeranz also testified that a broken leg is extremely painful. Dr. Turkish testified that the injuries suffered by Joanna would have become symptomatic and caused her pain within a few hours of occurrence. Further, respondent-mother reported to medical personnel that Joanna had been very fussy and had eaten less than usual in the days before they brought her to the hospital. Because this evidence indicates that there were signs of Joanna's injuries that respondents did not address, the trial court did not clearly err in finding that respondents had the opportunity to prevent the physical injury or physical abuse and failed to do so.

The final element of § 19b(3)(b)(ii) is whether there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in respondents' home. Here, the violent nature of the injuries suffered by seven-week-old Joanna, the fact that she was primarily in respondents' care and respondents failed to protect her, and respondents' unwillingness to cooperate with the police investigation of Joanna's injuries supported the trial court's finding that there was a reasonable likelihood that Joanna would suffer injury or abuse in the foreseeable future if placed in respondents' home. Moreover, this Court recognizes the special opportunity the trial court has to assess the credibility of the witnesses. MCR 2.613(C). And the trial court specifically commented on respondent-father's testimony at trial, stating that "his attitude, his demeanor in court, his – the objective information that I know of in terms of how he responded and reacted to this injury was one really that can be described as nothing other than just indolence." The trial court concluded from respondent-father's testimony that he would be unlikely to prevent injury to the child in the future. Accordingly, the trial court did not clearly err in terminating respondents' parental rights under § 19b(3)(b)(ii).

Respondents next contend that the trial court's termination of their parental rights under § 19b(3)(g) was clearly erroneous. We disagree. To warrant termination under § 19b(3)(g), the trial court must find, by clear and convincing evidence, that the parent, without regard to intent, failed to provide proper care or custody for the child, and there is no reasonable expectation that the parent would be able to provide proper care and custody within a reasonable time considering the child's age.

Here, Joanna, at seven weeks old, had fractures to both legs. Dr. Pomeranz concluded that Joanna's injuries presented a classic case for child abuse. Therefore, the trial court did not clearly err in finding that the evidence established the first element of § 19b(3)(g), that respondents, without regard to intent, failed to provide proper care or custody of the child.

Termination under § 19b(3)(g) also requires clear and convincing evidence that there is no reasonable expectation that the parent would be able to provide proper care and custody within a reasonable time considering the child's age. Respondent-mother contends that this second element was not established where the evidence showed that she promptly sought medical treatment once she and respondent-father noticed Joanna's red and swollen leg. But the evidence showed that respondents, after calling Dr. Turkish's office and discovering that it was closed, elected to wait until the next day to take Joanna to the doctor. Because respondent-mother did not believe the injury was life-threatening and was upset over the treatment she and respondent-father received at the University of Michigan Hospital the previous week, respondent-mother did not believe it was necessary to take Joanna to the emergency room. But Dr. Turkish described Joanna's leg as 1½ times its normal size, and described the child as being in acute pain and very fussy anytime someone tried to touch her extremities. Dr. Turkish also testified that respondents told her that Joanna had been irritable and crying and eating less than usual for the past two days. The evidence supported a finding that respondents unreasonably delayed in seeking treatment for Joanna. Additionally, evidence that respondents were not cooperative in the police investigation of Joanna's injuries supported the trial court's finding that there was no reasonable expectation that respondents would be able to provide proper care and custody within a reasonable time considering Joanna's age.

Respondent-father argues that petitioner could not establish that he did not provide proper care and custody of Joanna within a reasonable time where petitioner failed to provide him with

any services. He further maintains that he took steps to provide proper care and custody of Joanna by securing housing and employment. But respondent-father's argument does not take into account the fact that Joanna was injured or abused and he was unable to protect her. Respondent-father also argues that there is no evidence that he abused Joanna. But parental rights may be terminated on the basis of neglect where, although one parent does not personally abuse the child, that parent permits an environment to continue where the child will likely be abused. *In re Parshall*, 159 Mich App 683, 690; 406 NW2d 913 (1987). Therefore, respondent-father's arguments are without merit, and the trial court did not clearly err in terminating respondents' parental rights under § 19b(3)(g).

Respondents next contend that the trial court's termination of their parental rights under § 19b(3)(j) was clearly erroneous. We disagree. To warrant termination of parental rights under § 19b(3)(j), the trial court must find, by clear and convincing evidence, that there is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if returned to the home of the parent.

Here, seven-week-old Joanna was brought to the hospital with two broken bones, both caused by violent twisting or pulling of her legs. On the basis of Joanna's young age and limited mobility, Drs. Pomeranz and Turkish believed that Joanna's injuries were caused by child abuse, and were not accidental: respondents had no reasonable explanation for the injuries. When informed by Dr. Turkish that child abuse was suspected and that Joanna should be taken to the hospital immediately, respondents returned home first to pack some things before going to the hospital. When the police sought to question respondents about Joanna's injuries, they failed to cooperate in the investigation. In light of the injuries suffered by Joanna while in respondents' care, respondents' delay in seeking treatment for Joanna, and respondents' unwillingness to cooperate in the investigation of those injuries, the trial court did not clearly err in finding that there was a reasonable likelihood, based on respondents' conduct, that the child would be harmed if returned to respondents' home. Therefore, the trial court did not clearly err in terminating respondents' parental rights under § 19b(3)(j).

In sum, evidence that the injuries were caused by child abuse, that there were two distinct injuries arising on two separate occasions, that respondents delayed treating Joanna's injuries despite their severity, and that respondents were the child's primary caretakers, supported the court's termination of respondents' parental rights under §§ 19b(3)(b)(ii), (g) and (j). MCR 3.977(G)(3); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In light of the evidence supporting termination of each respondent's parental rights under those grounds, even if the trial court erred in relying upon § 19b(3)(k)(iii) as respondents allege,<sup>2</sup> such error was harmless. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Finally, respondents argue that the trial court clearly erred in not finding that termination of their parental rights was clearly not in the child's best interests. We disagree. We review the

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<sup>2</sup> We note that the trial court conceded that it could not determine the perpetrator of the child abuse, stating "[w]e can only speculate as to who inflicted this injury or why or under what circumstances."

trial court's finding regarding whether termination is clearly not in the child's best interests for clear error. *Trejo, supra* at 356-357. MCL 712A.19b(5) provides in pertinent part:

If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

In determining whether the child's best interests precludes termination of parental rights, a trial court may consider evidence introduced by any party or may conclude, based on the whole record proffered to establish the ground for termination, that termination is clearly not in the child's best interest. *Trejo, supra* at 356. The child is to be the primary beneficiary of the analysis. *Id.*

Here, seven-week-old Joanna suffered a spiral fracture to her right leg caused by someone holding the thigh on one end and twisting it with enough force to cause a fracture, and a metaphyseal bucket handle fracture to her left leg caused by someone pulling it away from the rest of the bone. The trial court did not clearly err in finding that termination of respondents' parental rights would not be contrary to the child's best interests.

We affirm.

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