

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of MARCUS TAYLOR-LOVEJOY,
Minor.

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

UNPUBLISHED
February 28, 2006

Petitioner-Appellee,

v

TAHASHEFA J. LOVEJOY,

Respondent-Appellant.

No. 263682
Wayne Circuit Court
Family Division
LC No. 03-422172-NA

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Respondent Tahashefa J. Lovejoy appeals as of right from the trial court's order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(ii), (g), and (j). We reverse and remand.

After the minor child sustained brain damage diagnosed as having been inflicted by being violently shaken, petitioner filed a petition requesting that the trial court exercise jurisdiction over the child and terminate respondent's parental rights. Respondent argues that the allegations in the petition were not sufficiently proven at trial because the person who injured the child was never identified, and further, that a statutory basis for termination was not established by clear and convincing evidence.¹

The existence of a statutory ground for termination under MCL 712A.19b(3) must be proven by clear and convincing evidence. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). This Court reviews for clear error a trial court's determination that clear and convincing

¹ We disagree with petitioner's argument that the latter of these issues was not properly preserved below. The question whether there was clear and convincing evidence of a statutory ground for termination was an ultimate issue decided by the trial court and, therefore, properly may be considered on appeal. Cf. *In re Rose*, 174 Mich App 85, 88; 435 NW2d 461, rev'd on other grounds 432 Mich 934 (1989).

evidence supports a statutory ground for termination. MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

We agree with petitioner that the allegations in the petition that respondent has a history of delinquency, that respondent left the child with Tasha Maples while respondent was working, that arrangements were subsequently made to have Maples leave the child with respondent's boyfriend, Samuel Fluker, that the child stopped breathing while being cared for by Fluker, that Fluker admitted shaking the child (albeit gently in an attempt to get the child to respond), and that the child was taken to the hospital and diagnosed with shaken baby syndrome were all sufficiently proven at the trial. Nonetheless, we conclude that the trial court clearly erred in finding that the allegations, considered in conjunction with the evidence presented at trial, established a statutory ground for termination by clear and convincing evidence.

Termination is appropriate under § 19b(3)(b)(ii) when a parent had the opportunity to prevent physical injury to the child, but failed to do so. Here, expert medical testimony indicated that the child's injury may have been inflicted anytime between six hours and two weeks before the child stopped breathing. As the trial court acknowledged, however, there was no clear evidence indicating whether the child was injured before or after he was taken to Maples's home, or who may have been responsible for the injury. Further, there was no evidence that would lead a reasonable person to believe that either Maples or Fluker were inappropriate caregivers and might harm the child if left in their care. Indeed, although the evidence showed that the child stopped breathing while in Fluker's care, the trial court specifically found that he was not responsible for the child's injury. The trial court also expressly indicated its unwillingness to conclude, based on the evidence at trial, that respondent herself inflicted the injury. In light of this evidence and the trial court's findings, we find that the trial court clearly erred in concluding that respondent had an opportunity to prevent the child's injury and failed to do so.

Under § 19b(3)(g), termination is appropriate where it is established that the parent failed to provide proper care and custody of the child and would not be able to do so within a reasonable time considering the child's age. We again observe that the trial court could not determine from the evidence that respondent inflicted the child's injury. Further, the evidence did not show that respondent had reason to know that either Maples or Fluker were inappropriate caregivers. Although the trial court indicated concern that respondent could not say with certainty with whom the child was at all times before his injury, we note that the evidence shows that respondent knew the child was with Maples, and merely expressed some uncertainty at the time of the trial, which took place approximately 20 months after the incident, regarding whether she had left the child with Maples on Friday evening or Saturday morning. Moreover, while the trial court correctly noted that respondent initially refused to accept the child's diagnosis and resulting limitations, the evidence indicates that respondent eventually accepted the diagnosis, consistently attended all of the child's medical and physical therapy appointments, accepted advice and information from the child's foster care worker, and was informed, cooperative, appropriate, and loving with the child. Given this evidence, we conclude that the trial court clearly erred in finding that § 19b(3)(g) was proven by clear and convincing evidence.

We reach this same conclusion with respect to § 19b(3)(j), which permits termination of a respondent's parental rights where "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." MCL 712A.19b(3)(j). Indeed, because the evidence did not clearly show how or

when the child was injured, who may have been responsible for the injury, or that respondent left the child with a caregiver who she had reason to know was inappropriate, the evidence did not clearly and convincingly support termination of respondent's parental rights under § 19b(3)(j).

Accordingly, we reverse the trial court's order terminating respondent's parental rights to the child and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Donald S. Owens