STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KO, AS, and HO, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANN OLNEY,

Respondent-Appellant,

and

CHRISTOPHER SEARS,

Respondent-Appellant.

UNPUBLISHED
August 29, 2000

No. 225036, 225295
Jackson Circuit Court
Family Division
LC No. 98-88189

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

In Docket No. 225036, the trial court terminated Ann Olney's parental rights to her three daughters. In Docket No. 225295, the trial court terminated Christopher Sears' parental rights to his daughter, AS. They both appeal as of right. We affirm.

I. Basic Facts And Procedural History

FIA filed a petition in this case on September 8, 1998 after learning that the three children, who were living with Olney at the time, were living in an "unsanitary" home in which "[t]here was a swarm of flies/insects, open garbage and dirty diapers laying around. The rooms were scattered with debrie [sic: debris] and clothes on the floor. There was little food in the home." Additionally, the petition reported that Olney "stated that she could not manage to keep the home clean and perhaps the kids should be in foster care until she could get her life together." According to the petition, Olney had already been referred to several services, including domestic violence counseling, "with minimal progress. . . ." The supplemental petition added that Jennifer Graswick, a homemaker from the Child and Parent Center,

was concerned about Olney's still-dirty home, having observed lighter fluid and medicine on the floor, and that a social worker had visited Olney at home twice, but she was "unmotivated" to make an appointment. A medical examination revealed that the children had scabies and lice and infant HO was failing to thrive.

Olney admitted to the allegations in the original petition but denied the allegations in the supplemental petition. She claimed that even though there was not a lot of food in the house, she had planned to go shopping soon and that the children were not undernourished. In fact, she said, she had taken HO to the doctor on more than one occasion because she was concerned about her failure to gain weight. Olney clarified that she said that it might be a good idea for her children to be placed in foster care because she believed, at the time, that her landlord was going to evict her. Further, she had planned to clean her home, but a police officer "barged" in "without permission looking for someone" else, which triggered the investigation and temporary custody arrangement. Olney said that her babysitter had actually left the lighter fluid on the floor, not her, and expressed a strong interest in keeping her children throughout the proceeding. The trial court then found that there was sufficient evidence to accept the plea of admission.

The trial court continued the adjudicatory hearing to October 14, 1998 so that the fathers could appear. Sears, who was in prison serving a three to ten year prison sentence for assault with intent to commit criminal sexual conduct involving penetration of a five-year-old girl,[1] did not appear. The trial court found that FIA was making reasonable efforts, but that Olney had not corrected the problems in her home. The trial court's order required the children to remain in temporary foster care and directed Olney to undergo a psychological evaluation and participate in counseling as FIA should determine.

The trial court held periodic review hearings throughout 1999, each time finding that FIA was making reasonable efforts to reunite the family and Olney was making progress to rectify the conditions leading to adjudication, but that the children continued to be best served by remaining in foster care. During this time, Olney made frequent visits with her children and completed domestic violence counseling as ordered. Sears, who was in prison until September 1999, had no contact with his daughter. He did not have any contact with his daughter after he was released on parole because he was not permitted to have contact with any children.

In preparation for a November 2, 1999 review hearing, FIA foster care worker Deborah McKay authored a report recommending that the trial court terminate Sears' parental rights because of his conviction for assault with intent to commit CSC on a child, his conditions of parole required him to have no contact with children, he had not made any efforts to contact FIA to arrange care and custody for AS, and he had failed to pay anything toward AS's support. As for Olney, McKay recommended terminating her parental rights as well. Although Olney had participated in a number of different services, she did so inconsistently at times and McKay did not believe that she had benefited from her services. McKay observed that Olney could recite the steps necessary to take care of her children, but

[1] The same FIA report states that Sears viewed the incident as an "unfortunate indiscretion" due to cocaine and alcohol use at the time.

questioned whether she could follow through with those steps. Additionally, since her children were placed in foster care, Olney had become involved in a violent relationship with a man who had been convicted of attempting to murder his wife. Olney had not revealed this relationship to McKay or her domestic violence counselor, even though she had sought an ex-parte personal protection order against this boyfriend. McKay found it noteworthy that Olney had previously claimed that this man would never hurt her or her children and believed that she had purposefully tried to conceal this relationship. McKay suggested that the children were originally removed from Olney's custody because she had become embroiled in a similar situation with another violent man.

The November 2, 1999 termination petition alleged the factual matters McKay noted in her October 1999 report and added that Olney's psychological evaluation revealed that she "appears quite passive dependent" and that it was unlikely that future she would be "assertive, someone who takes charge, including taking charge of the well being of the children." Like the three preceding dispositional orders, the November 2, 1999 order made the same findings of fact concerning FIA's efforts to reunite the family, but noted for the first time that "[p]rogress toward alleviating or mitigating the conditions that caused the children to be placed or to remain in temporary foster care was not made."

At the formal trial on the termination petition on January 7, 2000, McKay reiterated her concerns about Olney, emphasizing that she did not believe Olney had made sufficient progress to conclude that she had broken her pattern of entering into abusive relationships. Social workers Mary Ann Rojek and Diana Midgely reported that Olney had made personal progress in her ability to express her feelings and understand violent relationships, but neither could guarantee that Olney would not return to an abusive boyfriend in the future. Psychologist Frank Vangoethem briefly testified that, based on a single interview with Olney two years earlier, he saw little chance that she would change the type of partner she chose if, only a few months before the hearing, she was still in an abusive relationship. Rojek, Midgley, and Vangoethem did not offer an opinion on termination.

McKay also stated that Olney had followed through with visiting her daughters, but that those visits were "chaotic," the girls did not "listen" to Olney, and Olney did not seem to know "how to interact with them as a parent" and use effective parenting skills. McKay was uncertain whether Olney had corrected the conditions leading to adjudication because she had not visited Olney's home recently; she did, however, think that Olney had "gained some" housekeeping skills. During the period when Olney had unsupervised, overnight visitation with the girls, McKay was concerned that Olney was not getting the children ready for school on time and that she might not have enough food for them. She concluded that terminating Olney's parental rights was in the children's best interests because they needed permanence and stability.

Olney testified that she had improved her housekeeping skills, had a home fit for her children, and had a good job. She explained that she only moved in with her most recent abusive boyfriend because she was living in a shelter and needed a place for her and her children to live; apparently she did not know he was abusive when she moved in with him. She realized that she could provide for her children without a man and knew how to identify "red flags" in a relationship. Olney said that she did not reveal her most recent experiences with abuse to McKay or any of her counselors because she was afraid that the trial court would not return her children to her and, furthermore, she did not originally

know that the abusive boyfriend was on parole for a violent offense. Olney admitted that, in addition to her most recent boyfriend, she had been living with his friend, who was also on parole for a crime that may have included child abuse. She acknowledged the effect her choice of partners had had on her daughters, but believed that she could provide for her children in the future and pledged that she would seek out additional therapy.

Olney said she still occasionally visited with Sears, whom she believed was wrongly convicted of the assault with intent to commit CSC. Olney would not, however, let her children spend time with Sears before his parole ended, and then only with supervision. However, after hearing McKay explain that Sears had admitted the CSC conduct, she said that she did not believe that he had been framed and did not want her children around him. She said that, in retrospect, she would have done things differently, but believed it was in her children's best interests for the court to return them to her.

McKay also testified that she believed that Sears was not able to participate in any services while incarcerated and had not attended the first hearing while on parole due to advice from Olney's mother. However, he had attended subsequent hearings and expressed an interest in reuniting with Olney and AS following his parole. She recommended terminating his parental rights because the two years Sears would be on parole without contacting AS would be too long to leave the little girl "in limbo" because she needed a "stable life." She also had concerns about Sears' ability to be a parent because of the nature of his conviction.

Sears did not testify but, in closing arguments, said that he took responsibility for the crime he had committed and hoped to make amends for his actions.

The trial court's findings of fact generally summarized the case's procedural history and the testimony at trial as outlined above. Ultimately, the trial court concluded that Olney loved her children and wanted to parent them, but that she could not parent them "in a safe and appropriate manner." The trial court briefly commented on Sears' circumstances and stated that "[t]here has not been a treatment plan for Mr. Sears due to his CSC of a minor conviction and the prohibition of contact with a child." The trial court then found clear and convincing evidence of the alleged statutory grounds for termination and concluded that "[i]t has not been clearly shown that termination of the parents rights is not in the children's best interests."

II. Standard Of Review

"We review a trial court's decision regarding termination in its entirety for clear error." *In re Huisman*, 230 Mich App 372, 384; 584 NW2d 349 (1998), overruled on other grounds *In re Trejo*, __ Mich __; __ NW2d __ (2000).

III. Terminating Olney's Parental Rights

A. Proper Care And Custody

MCL 712A.19b(3) (g); MSA 27.3178(598.19b)(3)(g) provides that a trial court may terminate a respondent's parental rights if there is clear and convincing evidence that

> [t]he 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.

Evidence of Olney's unclean home, insufficient food for the children, failure to get them ready for school on time or pack lunches for them to take to school unless reminded, and HO's poor health were clear and convincing evidence that Olney had failed to provide proper care and custody for her children in the past. The evidence concerning Olney's future ability to care for the children was much more varied. She did complete parenting classes, had evidently cleaned her home, seemed attentive to her children, and there was no evidence that she lacked food for them. However, the evidence also suggested that Olney lacked the parenting skills necessary to provide "proper" care for her children, that she could not control their behavior, was responsive but not "nurturing" to her children, and had an uncertain future when it came to personal relationships with potentially threatening men. There was no evidence that she would be able to improve her skills further within a reasonable time considering the children's ages. Thus, we conclude after examining all the evidence that the trial court's decision to accept the evidence supporting termination on this issue was not clear error.

B. Failure To Correct Conditions Leading To Adjudication

MCL 712A.19b(3) (c); MSA 27.3178(598.19b)(3)(c) provides that a trial court may terminate a respondent's parental rights if there is clear and convincing evidence that:

> The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . :
>
> > (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

The parties disagree about the nature of the original allegations in this case. Olney claims that the petition solely concerned her home's cleanliness while the FIA contends that the petition actually incorporated a concern about Olney's violent relationships. The trial court found that "[t]he basis for this court taking jurisdiction over the minor children included the dirty, unsanitary and unsafe conditions of the home." The trial court listed some of the unsafe conditions and also mentioned HO's poor health before saying, "There were also issues and concerns about domestic violence in the home." The trial then recounted Olney's statement concerning placing her children in foster care.

Case law does not define what constitutes a condition that "led to the adjudication." The language of the statute suggests that one way to determine what condition "led to the adjudication" is to look at what act or circumstances precipitated the FIA's initial decision to *file* a petition. At first glance, this Court's discussion of the conditions leading to adjudication in *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993), appears to broaden the meaning of this statutory language considerably. In *Jackson*, this Court rejected the petitioner's argument that there was insufficient evidence for termination on this statutory ground because the petitioner's argument focused solely on one allegation in

the original petition. *Id*. Instead, the *Jackson* Court wrote that the probate court properly considered other evidence of the petitioner's conduct and stated that a "probate court may apprise itself of all relevant considerations." *Id*. However, in deciding to affirm, the Court still emphasized that the probate court properly considered "[t]he conditions that led to *the filing of the initial petition . . . .*" *Id*. (emphasis added). Thus, this statute appears to treat the factors that provoked the FIA to file the initial petition as the primary focus for termination under this provision.

With this definition in mind, Olney's factual argument that domestic violence was not a condition leading to adjudication appears accurate by the narrowest of margins. Although *Jackson*, *supra*, did not necessarily confine review of this issue to the allegations in the petition, they are logically relevant to determining what induced the FIA to act. Though the initial petition noted that Olney had had previous contact with FIA, which resulted in a recommendation that she seek domestic violence counseling, the initial petition emphasized the dirty conditions in her home. In fact, the police officer and other person mentioned in the petition as expressing a concern about Olney on September 7, 1998 did not refer to her history of domestic violence at all and, apparently, no men were in her home at that time, much less anyone acting in a violent manner. Therefore, domestic violence was not a "circumstance that led to the adjudication" because it did not precipitate FIA's original petition.

While the original petition does mention the dirty conditions in Olney's home, the allegations also included a concern about her ability to feed her children as well as her statement that it might be best to place her children in foster care, which she later explained was because she feared eviction. This suggests that conditions leading to adjudication were actually broader than a dirty home; the conditions leading to adjudication included an inability to provide food, stable housing, and a clean home so the trial court did not clearly err in mentioning these factors. Still, there was no evidence at the time of the trial on the termination petition proving that Olney's home was still dirty. McKay, despite her concerns, had also observed adequate food in Olney's home. Olney was the only witness to provide any evidence concerning her future ability to avoid eviction and have a stable home. Her testimony that she had a job and a home contradicts any inference that she had failed to correct these conditions leading to adjudication. Thus, the trial court erred when it found *clear and convincing* evidence to terminate on this ground.

Nevertheless, this error was harmless because the trial court properly found two other grounds (see discussion, *infra)* for termination. See *In re SD*, 236 Mich App 240, 246; 599 NW2d 772 (1999).

C. Harm To Children If Returned To Parent

MCL 712A.19b(3) (j); MSA 27.3178(598.19b)(3)(j), permitted the trial court to terminate Olney's parental rights to the children if the petitioner provided clear and convincing evidence that "[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." Contrary to Olney's implicit contention, by referring to a parent's "capacity," the statute did not require the FIA to prove that Olney would physically abuse her children. Rather, if some aspect to her personality or circumstances prevented her from protecting her children in her own home, then termination was proper.

The record does reveal that Olney has not been able to protect her children from abuse in the past. At least one former boyfriend abused the children and none of the experts was able to say with any degree of certainty that Olney would avoid abusive relationships in the future. Olney's claims that she understood "red flags" in relationships and would protect her children in the future must be viewed in light of the testimony of her therapist and counselors that she was essentially skilled at saying what was correct and expected without following-through on those principles. Olney's complete refusal to believe that Sears had sexually assaulted a child followed by a quick and total reversal in her opinion after hearing McKay testify that Sears admitted to the conduct may have been genuine, but it may also demonstrate how facile she is at saying what other people want to hear. This was, in fact, an issue that the trial court said was "[o]f most concern."

While the trial court would have been entitled to reject the views of the therapist and counselors' and accept Olney's claims that her children would be safe with her based on its assessment of these witnesses' credibility, it did the opposite, rejecting Olney's testimony. See *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). In light of the conflict in the record concerning whether Olney had made a significant change in her pattern of associating with abusive men, it is impossible to say that the trial court clearly erred when finding sufficient evidence to terminate her parental rights on this basis.

D. Bests Interests Of The Children

MCL 712A.19b(5); MSA 27.3178(598.19b)(5) provides:

> 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.* [Emphasis added.]

In *Trejo, supra*, our Supreme Court recently clarified how this best interest factor operates. Chief Justice Weaver, writing for the majority, explained:

> Subsection 19b(5) attempts to strike the difficult balance between the policy favoring the preservation of the family unit and that of protecting a child's right and need for security and permanency. While the operation of subsection 19b(5) imbues the court with some discretion, that discretion is significantly diminished from the prior law, which permitted the court to not terminate, even where at least one ground for termination was established. Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. [Majority slip op at 14.]

In so ruling, the Supreme Court rejected a line of cases holding that once the petitioner proved one or more statutory grounds for termination by clear and convincing evidence, there was a mandatory presumption in favor of termination unless the respondent-parent provided evidence that termination

was clearly not in the child's best interests. *Id*. at 11, 13, n 10, citing *In re Hall-Smith, supra* at 472 and its progeny.

The evidence in the record as a whole suggests that KO and AS had a deeper bond with Olney than HO, who was an infant when FIA removed her from Olney's custody. It also suggests that placement away from Olney did have some negative consequences for the children, including the absence of a permanent home, non-family placement, and difficulty adjusting. However, in light of the concern about Olney's ability to protect the children from abuse, it is impossible to conclude that the trial court clearly erred when determining this best interest factor.

IV. Terminating Sears' Parental Rights

A. Proper Care And Custody

There are several problems with Sears' arguments that terminating his parental rights to AS for failing to provide proper care and custody was clear error. First, there is no evidence in the record to support his assertion that he actually provided care and custody for AS from her birth until he was incarcerated, regardless of the quality of that care and custody.

Second, a parent's obligation to provide proper care and custody for his or her child is ongoing. MCL 712A.19b(3) (g); MSA 27.3178(598.19b)(3)(g) does not provide an exception for parents who are incarcerated. The only evidence in the record concerning Sears' efforts to provide proper care and custody came from McKay, who said that he did not pay for AS's support. McKay also recalled that Sears had not approached her about making alternate arrangements for AS during the time he was incarcerated or on parole, even though he ultimately envisioned himself being reunited with Olney and his daughter. While Sears may not have made Olney's home dirty, or caused any of the other problems there, he certainly did not make any effort to ensure that his daughter had a better place to live. He was not merely blamed for Olney's shortcomings, he also failed to provide proper care and custody.

Finally, given the length and strict terms of Sears' parole and the absence of an alternate plan for care and custody, there is no doubt that Sears cannot provide proper care and custody within an appropriate time considering AS's age if his concept of proper care and custody is being reunited with her. Furthermore, contrary to Sears' argument, the trial court did not deny him adequate time in which to demonstrate his ability to be a good father; he did not provide evidence that he made any effort to fulfill his duties as a father, even through a token support payment, for the three months he was on parole before termination or at any time during his little girl's four years of life. Thus, the trial court properly terminated his parental rights under this provision.

B. Harm To Child If Returned To Parent

Nor was terminating Sears parental rights under MCL 712A.19b(3) (j); MSA 27.3178(598.19b)(3)(j) clearly erroneous because there is a reasonable likelihood that AS would be harmed if returned to his custody. Sears is correct to the extent that he argues that none of the evidence in the record can predict with complete accuracy whether he will molest another child, much less AS. However, Sears does not acknowledge that MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(j) is

concerned with future harm. Evidence of past abuse or failure to protect is useful when illustrating a parent's "conduct or capacity," which in turn proves whether there is a "reasonable likelihood" of future harm befalling the child. However, the terms "conduct or capacity" are very broad and do not intrinsically rely on the parent's "conduct or capacity" involving or concerning the parent's child, or even any child, under the plain language of the statute. Accordingly, the absence of evidence that Sears abused AS in the past does not diminish the logical inference that his admitted past "conduct," sexually molesting a child, clearly proves a "reasonable likelihood" that AS could be similarly harmed in the future if returned to him.

C. Bests Interests Of The Child

There is no evidence in the record regarding AS's attachment to Sears or how her best interests would be served by eventually allowing her to reunite with him. While Sears' argument that termination was not in AS's best financial interests is novel, he provides no authority showing that financial interests are a significant concern under MCL 712A.19b(5); MSA 27.3178(598.19b)(5). Furthermore, he abandoned his argument that the trial court violated MCR 5.974(A)(1) by failing to brief the issue adequately. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because of the very serious nature of his criminal offense and the strict terms of his parole, it is impossible to say that the trial court clearly erred when determining this best interest factor.

Affirmed.

/s/ William C. Whitbeck
/s/ Jeffrey G. Collins

I concur in result only.

/s/ Michael J. Kelly