STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KEVIN BOW, JR., KALA BOW, JOSHUA BOW, MARIAH BOW and SAMUEL BOW, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KEVIN BOW,

Respondent-Appellant.

UNPUBLISHED
December 14, 2001

No. 233245
Washtenaw Circuit Court
Family Division
LC No. 00-024892-NA

Before: Bandstra, C.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Respondent appeals as of right the February 27, 2001, order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i) and (g). We affirm.

I

Respondent contends that the trial court erred in finding clear and convincing evidence of statutory grounds to terminate respondent's parental rights. We disagree.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 5.974(I); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Under this standard, the trial court's decision "must strike [the reviewing court] as more than just maybe or probably wrong." *Trejo*, *supra* at 341, quoting *In re Sours Minors,* 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Miller*, *supra* at 337. This Court gives due regard to the trial court's unique ability to assess the witnesses' credibility. *Id.*

The trial court found, based on respondent's admissions and his own testimony, that respondent had sexually abused his eldest son on four occasions by engaging him in sodomy and oral sex. The trial court further found that respondent lacked the insight to appreciate the wrongfulness of his behavior and to avoid committing such conduct again. We find no clear error in these findings. Thus, the trial court did not err in finding grounds to terminate respondent's parental rights under subsection (b)(i) (parent has sexually abused child and there is reasonable likelihood of future abuse) or subsection (g) (parent has failed to provide proper care and custody and there is no reasonable likelihood that parent will be able to do so within a reasonable time).[1]

Respondent also argues that termination was not in the children's best interests. When the petitioner establishes by clear and convincing evidence that a statutory basis or bases for termination exists, the court must order termination of parental rights unless it finds from evidence on the record that termination is not in the child's best interests. MCL 712A.19b(5); *In re Trejo, supra* at 353. This Court reviews the best interests decision for clear error. *Id.* at 356-357. We find that the trial court did not clearly err in finding that the evidence of respondent's close relationship with his children was not sufficient to establish that termination was not in the children's best interests.

Respondent raises several other arguments regarding the trial court's findings regarding the grounds for termination and the best interests factor. None of these arguments have merit. Much of respondent's argument is a protest that MCL 712A.19b(5) and the holding in *In re Trejo* improperly shift the burden of proof to the parent. This argument misconstrues the law. Subsection (5) does not impose a burden of proof on the respondent; it instead mandates automatic termination unless record evidence indicates that termination would not be in the children's best interests. *Id.* The law may create an incentive for a parent to come forward with evidence that termination is not in the children's best interests, but it does not shift any burden to the parent. Respondent's argument is, to a large extent, a dispute of how the trial court weighed the evidence in this case. This Court recognizes that the trial court, while not infallible, is in a better position to weigh evidence and evaluate a witness' credibility. *Fletcher v Fletcher*, 229 Mich App 19, 28; 581 NW2d 11 (1998). Additionally, we find no merit in respondent's argument that the trial court misunderstood the applicable law and procedures.

II

Respondent argues that the trial court committed reversible error by failing to serve him with written notice of the August 11, 2000, hearing. The August 11th hearing was the dispositional phase of the termination proceedings, where the trial court decided what action to take with regard to the children within its jurisdiction. MCR 5.973. We recognize that MCL 712A.19b(2)(c) and MCR 5.974(D) [incorporating by reference MCR 5.920 and 5.921(B)(3)]

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[1] The trial court also referred to subsection (3)(m) as a statutory ground for termionation. Because this ground is clearly not applicable, it appears that the trial court's reference to this subsection was inadvertent. Nonetheless, only one statutory ground for termination is required. See *In re Sours, supra* at 632.

require service of written notice of a termination hearing on the child's parents. However, MCR 5.920(F) provides:

> After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party, except that a summons must be served before trial or termination hearing as provided in subrule (B) [governing service of summons] unless a prior court appearance of the party in the case was in response to service by summons.

In other words, if a parent has been served with a summons for a termination hearing, and if the parent appeared in court in response to that summons, and if an attorney represents the parent, subsequent notices can be served on the party's attorney instead of on the party himself. Here, respondent concedes in his appellate brief that he was served with the summons and the petition to terminate his parental rights. Respondent appeared in court for the adjudicative trial, where he entered admissions to the petition. The August 11, 2000, dispositional hearing was thus a subsequent hearing within the meaning of MCR 5.920(F), and it was sufficient to serve notice on respondent's attorney.

Respondent relies on *In re Adair*, 191 Mich App 710; 478 NW2d 667 (1991) and *In re Brown*, 149 Mich App 529, 542; 386 NW2d 577 (1986) to support his argument that the failure of service was a defect rendering the entire proceeding a nullity. However, *In re Adair* and *In re Brown* involved the non-service of a summons under MCL 712A.12, not written notice of a termination hearing under MCL 712A.19b(2).

We distinguish this case from *In re Atkins*, 237 Mich App 249; 602 NW2d 594 (1999), where we held that service on the parent's attorney under MCR 5.920(F) was not sufficient to notify the parent of a termination hearing. In *In re Atkins*, the respondent was served with the summons and petition under § 12 when the petitioner filed the original petition for temporary wardship of the children. However, the respondent was not served with the new summons and petition when the petitioner later filed an amended petition for permanent custody, i.e., to terminate the respondent's parental rights. *Id.* 250. In contrast, in this case petitioner did not file a new petition between the July 3rd and August 11th hearings. The August 11th hearing pertained to the same petition as the July 3rd hearing; it was simply the second phase of the same proceeding.

III

Respondent argues that the trial court erred in failing to serve his children over age eleven with notice of the hearing pursuant to MCL 712A.19b(h). Respondent lacks standing to raise this issue. This Court has held:

> To have standing, a party must have an interest in the outcome of the litigation that will ensure the party's sincere and vigorous advocacy . . .. The plaintiff must also demonstrate that his substantial interest will be adversely affected in a manner distinct from the citizenry at large, i.e., an actual injury or likely chance of immediate injury different from the public. [*In re AH*, 245 Mich App 77, 81; 627 NW2d 33 (2001).]

This Court held in *In re Terry*, 240 Mich App 14; 610 NW2d 563 (2000) that a respondent mother lacked standing to assert a defect in service on the respondent father because the father's right to service belonged to the father alone. *Id.* at 21.

We conclude that respondent lacks standing to raise a defect in service on the children because that right belonged to the children alone. We are not persuaded by respondent's argument that the failure to serve the children adversely impacted his own right because both he and the children favored preservation of his parental rights. The purpose of the notice requirement is not to bolster the position of whichever party the children happen to agree with, but to give older children the opportunity to make their own views known. Accordingly, the children alone have standing to raise a defect in notice.

Respondent also contends that petitioner failed in its statutory duty to advise the children of the hearing pursuant to MCL 712A.19b(2)(a). Respondent did not raise this issue below, and it is therefore not preserved for appellate review.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage