STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of C. W. and C. W., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROBERT WAGNER,

Respondent-Appellant.

UNPUBLISHED
December 21, 2001

No. 232219
Genesee Circuit Court
Family Division
LC No. 98-110097-NA

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

PER CURIAM.

Respondent appeals as of right from an order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(j) and (n)(i)[1]. We reverse.

I

The original petition contained allegations that Eddie Wicks, who was the long-term partner of the children's mother (respondent's former wife), Charlene Cochran, and the father of Cochran's two younger children, sexually abused respondent's children, and that Cochran was negligent in failing to prevent the abuse. Respondent and Cochran were divorced at the time of the original petition and there were no allegations in the petition involving respondent. Respondent was incarcerated at the time, a fact known to the petitioner. The court ordered that neither respondent nor Wicks should have visitation with any of the children. Until that time, the children had been visiting respondent regularly in jail and prison.

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[1] Respondent also argues that the trial court erred in terminating his parental rights under § 19b(3)(g), but the record reflects that the court did not rely on this subsection as a basis for termination.

A supplemental petition alleged that Cochran had admitted taking her four children out of state accompanied by Wicks and that all the children were sometimes with Wicks when he picked Cochran up from work. Although there were again no allegations involving respondent, other than that he was incarcerated, petitioner requested that the parental rights of all three parents as to all four children be terminated. Petitioner's basis for seeking termination of respondent's parental rights is not expressly stated in the petition. Essentially, respondent was swept up in this termination proceeding because of the allegations against Wicks and Cochran.

II

Respondent argues that the trial court erred in finding that the elements set forth in § 19b(3)(j) and in § 19b(3)(n)(i) were established by clear and convincing evidence. We review the trial court's decision regarding termination in its entirety under the clearly erroneous standard. MCR 5.974(I); *In re Huisman*, 230 Mich App 372, 384; 584 NW2d 349 (1998).

MCL 712A.19b(3)(j) provides:

> There 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)(n)(i) provides:

> The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:
>
> (i) A violation of . . . MCL . . . 750.520c [second-degree criminal sexual conduct] . . . .

Respondent stipulated that he had been convicted of second-degree criminal sexual conduct. He contends, however, that there was no evidence that continuing the parent-child relationship would be harmful to the children. We agree and conclude that the decision to terminate was premature.

The court deemed the testimony of the caseworkers regarding respondent's conduct during a jail interview[2] to be "very significant," inasmuch as this evidence, considered in conjunction with respondent's conviction of second-degree criminal sexual conduct for sexual penetration with a twelve-year-old, established that respondent had "a significant, sexual problem" in that he "act[ed] out in inappropriate and illegal and criminal sexual manners." The court found that it would not be in the best interests of respondent's children to continue the parent-child relationship with a parent who is a sexual predator against children[3]. When viewed

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[2] The caseworkers gave differing accounts of what occurred during the interview, but they agreed that respondent appeared to touch or stroke his genitals during their discussion. One said he did so with his hand on the outside of his clothing, the other said that he had his hand in his pocket. A jail guard testified that jail jumpsuits had only breast pockets.

[3] Defendant admitted his inappropriate and illegal conduct; the victim was his sister-in-law, he (continued…)

in the broader context and in light of later events, respondent's conduct referenced by the trial court does not support the conclusion that termination is in the best interests of the children because continuing the parent-child relationship would be harmful to the children.

Respondent's testimony detailed his drug and alcohol abuse prior to his incarceration. He also fully acknowledged his wrongdoing with regard to his sister-in-law and his acceptance of the punishment which resulted. More importantly, he detailed the progress he had made in prison with regard to his problems involving substance abuse and illegal sexual activity in addition to taking advantage of educational and vocational opportunities; among other programs respondent completed the requirements for a G.E.D., both phases of substance abuse therapy, and sexual offenders therapy and he earned a certificate in horticulture technology and a machinist's certificate. He also testified that since paroled he attended AA & NA meetings almost daily, all of his drug screens were negative and he was scheduled to begin further substance abuse and sexual abuse therapy.

As noted, the trial court's ruling on the best interests issue centered entirely on the jail interview incident (which occurred shortly after respondent was arrested on the criminal sexual assault charge) and on the criminal charge itself. While we do not minimize the significance of these facts, they occurred before his rehabilitation efforts in prison of which the court apparently took no note in his decision. Moreover, respondent never had the opportunity to demonstrate to petitioner's satisfaction his fitness to parent his children after his parole and in spite of his earlier behavior. No expert testimony was introduced to indicate that respondent was a danger to his children or that he had not benefited from the substance abuse and sexual abuse counseling he had and was continuing to receive.

It is important to note that this is not a case where the children are "languishing indefinitely in the temporary custody of the court." *In re Trejo Minors*, 462 Mich 341, 351; 612 NW2d 407 (2000). The termination petition against the mother, Cochran, was withdrawn and she has custody of the children. There is no apparent urgency in terminating respondent's parental rights. In addition, because of the conditions of respondent's parole, he will not be allowed to have contact with the children in the immediate future, giving him the opportunity to prove to petitioner's satisfaction that he is not a danger to his children and to take advantage of any assistance programs petitioner has to offer.

Respondent was a certified welder before his incarceration and, as noted, he completed several vocational programs while in prison. He has maintained employment continuously since his parole and changed jobs for better wages and, in the job he obtained just before the hearing, for health and other benefits. He was providing financial assistance to Cochran for the children and was arranging with the friend of the court to formalize his support obligation.

(…continued)

pled guilty and spent over four years incarcerated as a result. However, there was no other evidence that he sexually abused or assaulted any other person and when his eight-year-old daughter was questioned about respondent at the termination hearing she emphatically denied that he had ever abused her in any way. Accordingly, we are unable to conclude on the record before us, as the trial court did, that defendant is a "sexual predator against children."

As noted, respondent had regular visitation with the children until the original petition was filed. The visits could not continue after the trial court ordered that neither Wicks nor respondent could have visitation with the children. However, during the balance of his incarceration, respondent kept in contact with the children through letters and phone calls. He sent them birthday and Christmas gifts, as well. Testimony of the two parole officers who supervised respondent clearly showed his concern that he be reunited with his children. He has apparently complied with the conditions of his parole carefully, including not contacting his children.

A careful review of the record leaves us with the definite and firm conviction that a mistake has been made. *In re Boursaw*, 239 Mich App 161, 176; 607 NW2d 408 (1999). These termination proceedings resulted from the actions of Wicks and Cochran and while respondent may yet prove to be unfit to parent his children, the record shows that the petitioner has not carried its burden of proving that by clear and convincing evidence. The record further shows that the respondent has made significant efforts to remedy his past behavioral misdeeds.

As quoted by this Court in *Boursaw*, *id.*, "'[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . .' *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982)." Closing the door to the possibility of respondent's reunification with his children is not justified where the children are not in foster care, respondent has made significant efforts to right his life, he is under the continuing supervision of the Department of Corrections as a result of his parole status and there is ample opportunity for the petitioner to provide assistance to respondent and to determine when or if he should be permitted contact with his children. As we view the record, the petitioner has failed to establish adequate justification for termination and the trial court's conclusion that there is a reasonable likelihood of harm to the children if reunited with respondent seems conjectural on these facts. *In re Sours Minors*, 459 Mich 624, 636; 593 NW2d 520 (1999).

Reversed.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ Joel P. Hoekstra