# STATE OF MICHIGAN

# COURT OF APPEALS

In the Matter of S. G., T. G., and T. G., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

PHYLLIS DEYOUNG,

Respondent-Appellant.

UNPUBLISHED
June 7, 2002

No. 233859
Iron Circuit Court
Family Division
LC No. 99-001012-NA

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor children under MCL 712A.19b(3)(g) and (j). We affirm.

## I. Facts and Procedural History

Respondent is the biological mother of three minor children, ages fourteen and twelve (the twelve-year olds are twins). The biological father of these minor children was Gerald Gerbig, who past away on October 25, 1999. Respondent and Mr. Gerbig were divorced by the entry of a November 12, 1992 judgment of divorce. The judgment of divorce awarded respondent custody over the minor children, but on August 27, 1997, the Gogebic County Circuit Court modified the judgment of divorce and awarded Mr. Gerbig physical custody of the minor children with respondent receiving reasonable parenting time.

The minor children resided with Mr. Gerbig from August 27, 1997 until March 19, 1999, when the Iron County Family Independence Agency (FIA) removed the minor children from the custody of Mr. Gerbig and placed them in a foster home. A preliminary hearing was held on March 19, 1999, at which time the trial court, *inter alia,* ordered the FIA to notify respondent of the pending matter.[1] Thereafter, a second preliminary hearing was held at which time the trial

[1] According to respondent's testimony at the November 4, 2000 trial, she attended each of the court hearings addressing the petition filed against Mr. Gerbig.

court authorized the filing of a petition against Mr. Gerbig. At that hearing Mr. Gerbig, the only respondent to the initial petition, admitted to certain allegations set forth in the petition. On August 26, 1999, the trial court held a dispositional hearing on the petition. On that date the trial court referred the minor children to the FIA for placement pursuant to MCL 400.55(h). As noted, just two months later Mr. Gerbig passed away.

On November 16, 1999, the FIA signed a petition against respondent requesting the termination of her parental rights pursuant to MCL 712A.19(b)(3)(c)(ii), (g), and (j). A preliminary hearing was held on December 8, 1999, which respondent attended. The trial court authorized the filing of the petition and a bench trial was scheduled for January 28, 2000. Upon completion of trial, the court issued a February 11, 2000, opinion and order terminating the parental rights of respondent. However, the trial court subsequently vacated that opinion and order in light of the failure to properly serve respondent with the petition. As a result, a new trial was held on November 3 and November 4, 2000. Thereafter, the trial court issued a December 6, 2000, opinion and order terminating respondent's parental rights.

In its opinion and order, the trial court terminated respondent's parental rights on the basis of two specific subsections, MCL 712A.19b(3)(g) and (j). The trial court found by clear and convincing evidence that respondent, without regard to intent, failed to provide proper care or custody for the minor children and that there was no expectation that respondent could provide proper care and custody within a reasonable time to the children considering their ages. The court further found by clear and convincing evidence that the children had "fragile psychological conditions" and would be emotionally harmed if returned to their mother. Finally, the trial court found that respondent had failed to establish that it was clearly not in the best interests of the children to terminate her parental rights.

## II. Analysis

### A.

Respondent first argues that the trial court erred in terminating her parental rights without her first being afforded an opportunity to receive and comply with a case service plan. We disagree. Although respondent's argument would have some merit if the trial court had terminated her parental rights pursuant to MCL 712A.19b(3)(c)(ii), a review of the trial court's opinion and order discloses that that statutory provision was not a basis for the trial court's decision.[2] Rather, a review of the trial court's opinion and order reveals that respondent's parental rights were terminated solely on the basis of MCL 712A.19b(3)(g) and (j). Indeed, under the trial court's "findings and conclusions," the court specifically found "by clear and convincing evidence that [respondent] without regard to intent, failed to provide proper care or custody for her children . . . [and] there is no expectation that [respondent] will be able to provide proper care and custody within a reasonable time considering the children's ages." This finding falls explicitly under the requirements of MCL 712.A.19b(3)(g). The court also found "by clear and convincing evidence, that these fragile children would be emotionally harmed if

[2] That statutory provision was, however, a ground asserted in the petition by the FIA as a basis for termination.

returned to their mother based on the expert testimony. This is also based on a progress, or lack thereof, of [respondent] during the pendancy [sic] of this action." This finding comports with a termination under MCL 712A.19b(3)(j). Hence, it is clear that the trial court did not terminate respondent's parental rights under MCL 712A.19b(3)(c)(ii).

The reasons for termination are important because under neither statutory provision relied upon by the trial court is there any requirement that the trial court find that respondent did not comply with a case service plan. Although arguably MCL 712A.19b(3)(c)(ii) has such a requirement, as noted that section was not relied upon by the trial court in terminating respondent's parental rights.

Respondent argues that a case service plan must be prepared before any termination can take place under any circumstance, citing MCL 712A.18f(2), and that none was prepared in this case. However, a plan and an updated plan were created for the children under the initial petition against the biological father, and was referred to by the FIA case worker in respondent's case. Importantly, both the August 25, 1999 updated service plan and the October 22, 1999 case service plan make reference to the respondent's home, her substance abuse problems, and her participation in the service plan and problems caring for the children. Although neither plan separately itemizes what actions respondent must take, the plans are sufficiently specific such that they provided respondent with ample notice as to what she needed to do to improve her situation, as well as the home environment, for the children. Trial testimony and reports from the case worker also revealed respondent's failure to seek any of the help offered by the FIA, including the offering of free telephone communication and transportation to implement visitation. We additionally note that the case service plan and updated case service plan were considered by the trial court before making its decision, as required by MCL 712A.18f(4). Accordingly, respondent's argument is without merit.

**B.**

Respondent also argues that the trial court clearly erred when it found that clear and convincing evidence existed to terminate her parental rights. "In order to terminate parental rights, the [family division of the circuit court] must find that at least one of the statutory grounds for termination . . . has been met by clear and convincing evidence." *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993)(citations omitted). This Court reviews the trial court's findings of fact under the clearly erroneous standard. *In Re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). "A finding is clearly erroneous where the reviewing court has a definite and firm conviction that a mistake has been made." *Jackson, supra* at 25, citing *In Re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

Upon review of the entire record, we conclude that the trial court did not clearly err in terminating respondent's parental rights under MCL 712A.19b(3)(g) and (j). Specifically, the trial court relied on evidence which revealed that respondent had failed to provide any care, let alone "proper care or custody," for the minor children. The evidence before the trial court showed that respondent had very little contact with the children during the course of at least one year, and had taken no reasonable steps to institute any type of regular visitation during the course of these proceedings. Although the trial court noted that respondent and her new husband had made some improvements in their quality of life, it specifically found -- based in large part on credibility determinations -- that she was unable to provide any proper care and custody

within a reasonable time considering the children's ages. Additionally, the trial court accepted expert testimony that each of the minor children were of a fragile psychological state of mind and in need of a stable environment immediately, given their ages. This Court must defer to a trial court's credibility determinations. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). As such, we find that the trial court did not clearly err in finding that at least one ground for termination was established by clear and convincing evidence.

Once the trial court made its findings in that regard, it took the additional required step by finding that termination would not clearly be against the best interests of the children. The trial court relied upon the recommendation of the guardian ad litem, and other evidence in the record, to conclude that respondent had not established that it was clearly not in the children's best interest to terminate her parental rights. The court placed significant emphasis on the ages of the children, their psychological state, and the fact that respondent had not provided a home for the children for a long period of time. The trial court's decision in this regard was supported by both expert and lay testimony. We will not reverse a trial court's decision when it chooses between two sets of competent, competing facts.[3] Thus, the evidence did not show that termination of respondent's parental rights was clearly not in the children's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

**C.**

Respondent also makes several procedural arguments, neither of which require reversal. Respondent first argues that the trial court was required to hold an initial dispositional hearing, separate from the trial itself, prior to terminating respondent's parental rights. However, respondent's argument fails for two reasons. First, because the trial court had already taken jurisdiction over the minor children through the father's admissions, another initial dispositional hearing was not required. See *In re CR*, _____ Mich App _____; _____ NW2d _____ (Docket No. 228856, issued February 26, 2002), slip op at 10. Second, MCR 5.974(D) specifically allows a trial court to terminate parental rights at the initial disposition phase so long as the requirements under that court rule are met. Thus, even if an initial dispositional hearing had been held in this case the trial court could have terminated respondent's parental rights at that hearing because its findings at trial fell under MCL 712A.19b(3) which complied with MCR 5.974(D)(3)(c).

Finally, respondent argues that the FIA was required by law to hold a conference prior to the termination of her parental rights. However, this issue was neither raised before nor decided by the trial court and, therefore, is not properly presented for appellate review, and we decline to address the issue. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

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[3] Respondent argues that two letters contained in the trial court record which are favorable to her reveal that the trial court's finding were erroneous. However, the trial court specifically noted in its opinion and order that there was some evidence in the record that respondent and her new husband had made improvements in their lives. However, the trial court also noted that because of the demeanor of respondent and her husband during their testimony, it did not believe that they had improved their situation as much as they had asserted. Hence, the trial court was aware of and considered this evidence when making its decision. Again, deference must be accorded to the trial court's ability to judge the credibility of the witnesses. *Miller*, *supra* at 337.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray