STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANTHONY SANCHEZ-MARRERO, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

FERNANDO MARRERO,

Respondent-Appellant,

and

GLORIA SANCHEZ,

Respondent.

UNPUBLISHED
April 1, 2004

No. 250553
Saginaw Circuit Court
Family Division
LC No. 03-028223-NA

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Respondent-appellant Fernando Marrero (hereinafter respondent) appeals as of right from an order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(h). We affirm.

Respondent first argues that the circuit court lacked clear and convincing evidence to terminate his parental rights under § 19b(3)(h).[1] We review for clear error a circuit court's

[1] Section 19b(3)(h) provides as follows:

> The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

decision that a ground for termination of parental rights has been proven by clear and convincing evidence. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The court's findings of fact qualify as clearly erroneous when this Court's review of the record reveals some evidence to support the findings, but leaves this Court with the definite and firm conviction that the circuit court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

The first portion of § 19b(3)(h) focuses on the incarcerated respondent's capacity to care for his child within a two-year period. In this case, respondent undisputedly will remain incarcerated until February 27, 2010. At the time of the termination hearing, respondent faced at least 6-1/2 more years during which he could not himself provide the child with a normal home. Although respondent suggests that a respondent facing incarceration for greater than two years could supply his child a "normal home" with a willing and acceptable relative in satisfaction of the first portion of § 19b(3)(h), this Court has rejected such a contention. *In re SD*, 236 Mich App 240, 247; 599 NW2d 772 (1999).[2]

The second element of § 19b(3)(h) requires a showing that respondent failed to "provide[] for the child's proper care and custody." Although respondent properly cared for the child for approximately five months between the time of the child's birth and respondent's incarceration, the record contains clear and convincing evidence that respondent failed to supply the child proper care and custody either at the time of or subsequent to his incarceration. Undisputed testimony by respondent and his mother, Mary Marrero, established that at some unspecified time after respondent's incarceration, but before the commencement of this child protective proceeding, (1) respondent inquired of Marrero whether she would care for the child if something happened to respondent and the mother, (2) Marrero agreed to do so, and (3) after the commencement of the child protective proceeding, the circuit court and petitioner placed the child with Marrero, who provided the child proper care and custody.

At no time after respondent became incarcerated, however, did he do anything to alter the fact that the child remained in the care and custody of his neglectful mother.[3] Respondent's own

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[2] In *In re SD*, *supra* at 247, this Court addressed an incarcerated respondent's assertion that the petition had not established the applicability of § 19b(3)(h) because "the children will be able to continue to reside with their mother while he is in prison." This Court rejected the respondent's argument, reasoning that "[e]ven if respondent is paroled in less than four years, there is little if any likelihood that respondent could provide these children with a 'normal home' given the fact that he abused his daughter and there was other evidence that he abused his sons." This Court's analysis clarifies that the first portion of § 19b(3)(h) focuses exclusively on the incarcerated respondent's capability to offer his child a normal home within two years, and respondent offers no authority supporting a contrary proposition. *In re Hamlet (After Remand)*, 225 Mich App 505, 521; 571 NW2d 750 (1997), overruled in part on other grounds in *In re Trejo*, *supra* at 353-354.

[3] The record contains abundant testimony regarding the mother's neglectful care of the child, including her failure to arrange for his medical care and nearly complete failure to provide for his physical and emotional needs. Marrero, with whom the mother and the child lived, at least once informed petitioner of the mother's neglectful care of the child. This Court recently upheld the

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testimony conceded that "to be honest I had seen a lot of these problems develop," such as "[n]ot so much attention paid to [the child]" by the mother, the mother becoming angry at the child because she became overwhelmed by stress, and the mother acting jealous that respondent "was paying too much attention to the child." Respondent also acknowledged that while in jail he received reports from Marrero that the child "wasn't being fed properly or cared for properly" by the mother, the mother failed to properly nurture the child, and the mother had failed to take the child to some scheduled doctor appointments. Marrero testified that the mother never provided her a power of attorney or Medicaid information with which Marrero might obtain health care for the child, and the record contains no indication that respondent ever offered to provide Marrero authority to manage the child's medical care.

This testimony reflects that although respondent obtained Marrero's agreement to care for the child at some unspecified point in the future, respondent did not arrange for the child's care outside the mother's neglectful custody, of which he was aware. Only after the commencement of this child protective proceeding did Marrero have exclusive custody of the child, pursuant to *petitioner's* placement of the child. While respondent cites several cases for the proposition that a child placed by the custodial parent in the temporary care of relatives is not without proper custody or guardianship unless the care being provided is neglectful, these cases are distinguishable because respondent did not himself have custody of the child, which he relinquished to a suitable relative. *In re Systma*, 197 Mich App 453, 455-457; 495 NW2d 804 (1992).[4]

With respect to the last element of § 19b(3)(h), given the undisputed evidence that (1) respondent had no possibility of release for at least 6-1/2 years after the termination hearing, and (2) the child of tender years had a need for a permanent or stable home environment, there was no reasonable expectation that respondent might have the ability to provide the child with proper care and custody within a reasonable time considering the child's age. *In re Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991). We do not possess the definite and firm conviction that the circuit court made a mistake in finding clear and convincing evidence warranting termination of respondent's parental rights pursuant to § 19b(3)(h). *In re Conley*, *supra* at 42.

Respondent further argues that the circuit court erred in determining that termination of his parental rights would serve the child's best interests. Respondent loved the child and appropriately cared for him during the first five months of the child's life. But respondent undisputedly remained incapable of caring for the child for at least 6-1/2 years after the termination hearing. Petitioner's employees testified that the child needed to live in a permanent and stable environment instead of remaining in limbo as a temporary court ward for the next 6-

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trial court's decision terminating the mother's parental rights in which this Court noted the mother's neglect. *In re Sanchez-Marrero*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2004 (Docket No. 250738), slip op at 2.

[4] In *In re Systma*, this Court explained that *In re Taurus F*, 415 Mich 512; 330 NW2d 33 (1982), *In re Curry*, 113 Mich App 821; 318 NW2d 567 (1982), and *In re Ward*, 104 Mich App 354; 304 NW2d 844 (1981), on which respondent relies, were all cases in which the *custodial* parent placed the child in the custody of others, and in which "it was *that* parent whose rights the state sought to terminate." (Emphasis in original).

1/2 years. Under these circumstances, we do not possess the definite and firm conviction that the circuit court made a mistake in concluding that the "child . . . must not be left in limbo," and that nothing within the record shows "that the needs of the child are better served by not terminating the rights of these parents where the grounds exist than by doing so." *In re Trejo, supra* at 356-357; *In re Conley, supra* at 42.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette