STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JOLENE BARENS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARILEE A. KLEEMAN,

Respondent-Appellant.

UNPUBLISHED
July 13, 2004

No. 250179
Luce Circuit Court
Family Division
LC No. 97-000867-NA

In the Matter of JAMIE BARENS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARILEE A. KLEEMAN,

Respondent-Appellant.

No. 250180
Luce Circuit Court
Family Division
LC No. 97-000868-NA

Before: Gage, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

Respondent appeals as of right from the probate court's order terminating her parental rights in her two daughters pursuant to MCL 712A.19b(3)(c)(i) and (j).[1] We reverse.

[1] Termination was also requested under MCL 712A.19b(3)(c)(ii) and (g), but the court found these statutory grounds were not established.

I. Basic Facts and Procedural History

Respondent has had ongoing relations with petitioner Family Independence Agency (FIA) since her arrest for selling marijuana in 1989. Since that time, the FIA has twice successfully petitioned the court to assume jurisdiction over the minor children. Respondent unquestionably has a history of mental illness involving issues of self-control.

However, the proceedings relevant to the termination of parental rights began with the court's exercise of jurisdiction over the minor children on September 13, 2000.[2] Shortly after this adjudication, the minor children were allowed to return to respondent's home. Then, on January 8, 2001, respondent went to Jolene's school and spoke with the school counselor, Kristen Derusha. Respondent purportedly stated to Derusha that, "[n]ow we need to take care of your husband. I hope someone puts a bullet in him and someday somebody will." Because the FIA perceived the statement as a "death threat," it filed a motion to supplement its petition for jurisdiction over the minor children. Following hearings, the court granted the FIA petition on November 7, 2001, finding the FIA proved that respondent engaged in a pattern of inappropriate behavior creating a risk of psychological and physical harm to her children. The court noted the pattern of behavior was evidenced by one admitted suicide threat, and numerous threats and statements regarding death since 1988. The court observed that respondent made threats when under stress, and that respondent deflects onto others blame for her own actions. The court summarized respondent's mental condition, stating that, "respondent has a pattern of speaking before she thinks sometimes and many times not understanding the harm that may be caused by such statements and threats." The court concluded that respondent's pattern of behavior creates a risk of psychological and physical harm to the children.

The minor children were placed in foster care, and respondent was granted at least two supervised visits a week. In April 2002, the FIA decided it would petition the court to terminate respondent's parental rights. However, before the FIA filed this petition, the court conducted a dispositional review hearing in September 2002. Following the hearing, the court granted respondent's request for unsupervised visitation. Nonetheless, the FIA petitioned to terminate respondent's parental rights in October 2002. Following extensive hearings, the court granted the FIA petition to terminate respondent's parental rights on June 17, 2003.

II. Termination of Parental Rights

On appeal, respondent contends that the trial court's decision to terminate parental rights was not supported by clear and convincing evidence. We agree.

A. Standard of Review

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[2] Since this case involves whether the conditions that led to the adjudication continue to exist, evidence relating to events occurring after the adjudication is particularly relevant under MCL 712A.19b(3)(c)(i).

> We review for clear error both the trial court's decision that a ground for termination of parental rights has been proved by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interests. A circuit court's decision to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. [*In re JK*, 468 Mich 202, 219-210; 661 NW2d 216 (2003) (internal citations omitted).]

B. Analysis

In this case, respondent's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(i) and (j), which provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> (c) 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 either of the following:
>
> (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.[3]
>
> * * *
>
> (j) 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.

If permanent termination of parental rights is sought, the petitioner bears the burden of showing a statutory basis for termination by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 351, 355; 612 NW2d 407 (2000). "Clear and convincing evidence" is

> evidence which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. Uncontroverted evidence can fail to be clear and convincing, and contradicted evidence can be clear and convincing. [*Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000).]

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[3] The November 7, 2001, petition for jurisdiction merely supplemented the basis for the court's jurisdiction.

In regard to MCL 712A.19b(3)(c)(i), the court found the following conditions that led to the adjudication continued to exist.

> One, the mental illness admitted by respondent not adequately treated which affects and influences her conduct placing the children at risk of abuse and neglect including the earlier suicide statements and threats, and inability to follow through with her treatment to the extent of successfully addressing and counseling—that maybe should say in counseling—the issues identified by the Court and Dr. Shaul.
>
> Two, a repetitive behave—a repetitive pattern of behavior of respondent creating risks of physical and psychological harm and actual psychological harm to her children.

The court further found that there is no reasonable likelihood that these conditions will be rectified within a reasonable time considering the children's ages. The court based this finding on testimony from respondent's counselor, Dr. Moore, that respondent required an additional thirty to fifty counseling sessions to treat her mental illness.

The FIA petition to terminate parental rights concerns respondent's alleged failure to make significant progress in treating her mental condition. In this context, the first question presented is whether the FIA established by clear and convincing evidence that respondent failed to make significant progress in treating her mental condition since the adjudication.

A good deal of evidence was presented concerning respondent's mental condition. The FIA's position that respondent's mental condition has not significantly improved is based upon Dr. Shaul's psychological evaluation of respondent, and Dr. Shaul's April 2001 testimony. Dr. Shaul diagnosed respondent with a "mixed personality disorder characterized by acute exacerbation of delusions, distrust, hostility and aggressive behavior, anxiety and depression, and loss of adaptive ego functions under stress." The evaluation also stated that, when respondent was under stress, her judgment, orientation to reality and ability to control her thoughts, feelings and behavior could seriously be impaired. Dr. Shaul testified that this disorder may be difficult to treat, and that, in respondent's case, lack of motivation and lack of trust would impede progress at therapy. Dr. Shaul's testimony in this respect is clarified by the following discourse with the court:

> *The court:* There may be other problems in her life, but we're here because of the children and her relationship with the children and you believe that the key to that relationship that would enable the Court to maybe allow additional, whether it's parenting time or eventual reunification or whatever, the key of that all goes back to the trust and motivation issues as really what you—the results you came to in your evaluation?
>
> *Dr. Shaul:* Exactly, yes. And, she would need, I think, an individual contact with a therapist to help her understand maybe her perception of the FIA and the Court and these other places in order to gain a sense of commitment to the process and understand that these people are not her enemies. You know, it's very much wrapped up into a lot of things that she's had to deal with on an

> individual basis, as well. So, that's why I would recommend that she attend individual therapy, as well as family therapy and I see them very closely related and you're not going to be successful with one without dealing with the aspects of the other.

Dr. Shaul further stated that respondent's progress in dealing with her condition could be measured by progress reports from her therapist and the evaluations by FIA case-workers. Dr. Shaul made clear that FIA case-workers could observe respondent's progress with therapy because they had frequent contact with respondent.

At the termination hearings, the FIA presented the testimony of four FIA employees and respondent. FIA worker Chris Stabile had never had any contact with respondent or the minor children. FIA worker Lori Miller stated that she had not had contact with respondent since April 2001. FIA worker Judith Engel had one contact with respondent since February 2001. Last, current FIA case-worker Karen Bontrager had only two direct contacts with respondent from June 2002 to November 2002.

Dr. Shaul indicated that progress of respondent's condition could be measured by FIA employees who had ongoing continual relationship with respondent. The period relevant to determining whether respondent had made significant progress in therapy was from the ending of the adjudication, September 2000, to the filing of the FIA petition to terminate parental rights, October 2002. However, none of the FIA witnesses had significant contact with respondent during the latter half of this period. The lapse in contact with respondent corresponds to a lapse in evidence concerning a period crucial to determining whether respondent made progress in therapy. Absent evidence from the FIA that respondent failed to make progress during this period, there is insufficient evidence to come to a clear conviction, without hesitancy, that respondent had not made progress in therapy.

This conclusion is further warranted given that respondent presented substantial evidence of significant progress made in therapy. Dr. Moore testified that respondent made monumental progress in dealing with her mental condition. And although Bontrager testified that the FIA does not "feel" respondent has made sufficient progress, Bontrager admitted that respondent began to trust her and the FIA more than she had before therapy. Further, Bontrager admitted that respondent complied with the "bare-bones" of the parent-agency agreement. "[C]ompliance with the parent-agency agreement is evidence of her ability to provide proper care and custody" *In re JK, supra* at 214 (emphasis omitted). Indeed, compliance with the parent-agency "negates any statutory basis for termination." *Id*. at 210. Also, the September 2002 order granting respondent's motion to allow for two unsupervised visits a week indicates that respondent made progress in dealing with mental condition since November 2001.

In addition, the court relied on Dr. Moore's testimony that respondent required thirty to fifty more counseling sessions to treat her condition. However, Dr. Moore testified that he did not believe therapy was "necessary for her to safely and effectively parent her children living in her home." Further, Dr. Moore testified that "I don't think there's a danger for her children because of who she [respondent] is." The court erred in finding that thirty to fifty counseling sessions were necessary before respondent could provide proper care and custody. Therefore, the court clearly erred in terminating respondent's parental rights on the basis that she failed to make significant progress in therapy.

The court also found under MCL 712A.19b(3)(j) "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." However, the court noted that evidence supporting termination of parental rights under MCL 712A.19b(3)(c)(i) also established grounds for termination under MCL 712A.19b(3)(j). Thus, the court's conclusion under MCL 712A.19b(3)(j) rests upon its erroneous finding that respondent failed to make progress in therapy. Moreover, no evidence was presented that respondent acted inappropriately in the children's presence since May 2000. The FIA driver who observed the visitations never saw any inappropriate behavior and stated that respondent and children appeared to be "very close." Even the court noted that the family had suffered a number of "incomprehensible" traumas, and said that they expressed the most "consistently powerful love and affection" the court had seen "in any case in 10 years." Also, the minor children in this case are no longer in their early tender years. Indeed, Jolene (dob: 02-25-1988), and Jamie (dob: 08-14-1990), are currently teenagers, and to that extent, not as vulnerable to the risk of neglect involved in this case. See *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991) (noting that the ages of the children should be taken into account). Therefore, the court erred in finding that the FIA established MCL 712A.19b(3)(j) by clear and convincing evidence.

We disagree with the analysis of our dissenting colleague, which all but disregards the statutory basis for the termination of parental rights. Rather than adhering to the temporal strictures of MCL 712A.19b(3)(c)(i), the dissent marshals record evidence of all past neglect, characterizes[4] it in a light most favorable to the FIA, and relies on it to conclude that respondent lacks the capacity to protect her children from physical and emotional harm. As previously stated, MCL 712A.19b(3)(c)(i) focuses on evidence arising after the relevant adjudication, not before it. Nothing underscores the dissent's failure to adhere to the temporal strictures of MCL 712A.19b(3)(c)(i) more than its claim that the literal weight of the lower court record equates with the value of its contents. Had the dissent been able to provide even a colorable argument within the strictures of the statute, the opinion would not have so extensively discussed events that occurred well before the relevant adjudication, while giving only cursory treatment to events that occurred after the adjudication. Only by ignoring the language of the statute and marshaling irrelevant evidence of past neglect from prior proceedings is the dissent able to conclude that the trial court's decision to terminate parental rights was proper.

We also note that the dissent's sole reliance on respondent's testimony "denying all responsibility for her poor parenting and failing to recognize any link between her suicidal threats and the removal of her children," to conclude that respondent's mental condition had not improved, further illustrates the lack of competent evidence presented by the FIA. The FIA filed a petition to terminate respondent's parental rights knowing, as stated by Bontrager, the case "revolved around [respondent's] mental status." Yet the FIA presented no evidence from a qualified mental health professional that respondent failed to significantly improve her mental

[4] The dissent's characterization of respondent as a "confused, sad and desperate creature" is particularly biased considering that two former caseworkers, two psychologists, respondent's doctor, and an FIA driver all testified that termination of parental rights is not appropriate.

condition. Thus, our dissenting colleague is placed in the precarious position of substituting respondent's statements for competent psychological evidence that clearly should have been presented to support the petition. The result renders the court and the dissent stand-in psychologists, drawing conclusions in regard to respondent's mental condition based only upon her statements. Moreover, that respondent denies she is a poor parent cannot seriously be considered evidence that her mental condition has not significantly improved. Also, there is no evidence establishing that a lack of insight is a litmus test for the failure to improve a mental condition.

Finally, we disagree with the dissent's assertion that the majority has failed to acknowledge the possibility that the children's exposure to their mother could lead to harm. Clearly there was evidence of past neglect. However, the possibility that the children's exposure to their mother could lead to any harm has not been shown to currently exist. Indeed, from the date of the adjudication, there is no evidence of a single act by respondent that could be construed as causing any type of harm to her daughters. The dissent mentions only one event which followed the adjudication that at all concerns respondent's behavior in front of her daughters, to which the dissent unfairly claims that respondent "stood by and watched her own daughter being groped by an older acquaintance." Respondent's response to this incident does not warrant termination of her parental rights. Respondent made her contempt known to the man, and he immediately stopped fondling her daughter. Respondent soon after informed her lawyer and the police of the event, but the local prosecutor declined to file criminal charges. The dissent's failure to adhere to the statute and attempt to justify the court's decision on the basis of past neglect verifies our definite and firm conviction that a mistake has been made in this case.

We reverse the court's order terminating respondent's parental rights in the minor children, and remand for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Brian K. Zahra