STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of SARAH ALLEN, SAMANTHA ALLEN, KASSIE ALLEN, CARL ROUSE, KYLE ROUSE, and COLIN ROUSE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CARL ROUSE II,

Respondent-Appellant,

and

KAREN ALLEN,

Respondent.

UNPUBLISHED
August 10, 2004

No. 252134
Oakland Circuit Court
Family Division
LC No. 2001-653037-NA

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KAREN ALLEN,

Respondent-Appellant,

and

CARL ROUSE II

No. 252395
Oakland Circuit Court
Family Division
LC No. 2001-653037-NA

Respondent.

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

In these consolidated appeals, respondents Carl Rouse II and Karen Allen appeal as of right from an order terminating their parental rights to the minor children under MCL 712A.19b(3)(b)(i) (Rouse only), (b)(ii) (Allen only), (g), (j) and (k)(ii). We affirm.

I

Respondents argue that there was insufficient evidence to support the termination order. 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 (1991). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J); *In re Trejo*, 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." *In re Trejo*, *supra* at 341 quoting *In re Sours*, 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. *In re Miller*, *supra* at 337. This Court gives due regard to the trial court's unique ability to assess the witnesses' credibility. *Id.*

Petitioner concedes, and we agree, that the evidence was insufficient to support termination under § 19b(3)(k)(ii), abuse involving penetration. We also agree that there was insufficient evidence to terminate respondent Rouse's parental rights under § 19b(3)(b)(i), or respondent Allen's parental rights under § 19b(3)(b)(ii). To establish termination under these subsections, petitioner was required to show not only that a parent abused the child, § 19b(3)(b)(i), or failed to protect the child from abuse, § 19b(3)(b)(ii), but also that the abuse was likely to recur if the children were returned to the parents. The oldest child's statements about "the tickle game," and "finger-tipping" were insufficient to establish the anticipatory abuse prong of § 19b(3)(b)(i) and (ii) because they reveal too little about the frequency or pattern of the alleged abuse. Respondent Rouse's refusal to attend a second sexual abuse assessment after receiving a favorable report from the first assessment also is insufficient to establish the anticipatory abuse prong.

Nonetheless, a trial court is only required to find a ground for termination under one statutory provision. *In re Sours*, *supra* at 633. Here, the evidence sufficiently established that termination was appropriate under §§ 19b(3)(g) and (j). Respondents Allen and Rouse continued to test positive for drug use, and the evidence showed that respondent Allen used drugs during her pregnancy with Colin. Despite completing domestic violence counseling with a favorable report from their therapist, respondents Allen and Rouse were involved in a violent incident that led to respondent Rouse's conviction and incarceration. Respondents Allen and Rouse also never submitted proof of a stable income. And, respondents Allen and Rouse never established stable housing, and their only attempt to improve this situation was a dubious effort to purchase a

house that was beyond their means. Both respondents failed to understand and appreciate their children's serious emotional and behavioral problems, and they persisted in blaming "the system" instead of recognizing how their own chaotic lifestyle contributed to the children's problems. This evidence established both a failure to provide proper care and custody without a reasonable likelihood of becoming able to do so within a reasonable time, and a likelihood that the children would be harmed if returned to the care of respondents Allen and Rouse. Accordingly, the trial court properly terminated the parental rights of respondents Allen and Rouse under §§ 19b(3)(g) and (j).

II

Respondent Rouse argues that §§ 19b(3)(g) and (j) are unconstitutionally vague. Because respondent Rouse failed to preserve this issue by raising it below, we review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999); *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 602, 606; 603 NW2d 824 (1999); *In re Gentry*, 142 Mich App 701; 369 NW2d 889 (1985).

A statute may be challenged for vagueness on the grounds that it does not provide fair notice of the conduct proscribed or that it confers on the trier of fact unfettered and unlimited discretion to determine whether an offense has been committed. *People v Tombs*, 260 Mich App 201, 218; 679 NW2d 77 (2003). Challenges on vagueness grounds must be examined in light of the facts of the case at hand, and "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.*, quoting *People v Lynch*, 410 Mich 343, 352; 301 NW2d 796 (1981), *United States v Raines*, 362 US 17, 20; 80 S Ct 519; 4 L Ed 2d 524 (1960), and *Blodgett v Holden*, 275 US 142, 148; 48 S Ct 105; 72 L Ed 206 (1927).

In *In re Gentry, supra*, this Court rejected a vagueness challenge to former MCL 712A.19a(c),[1] the predecessor to current MCL 712A.19b(3)(g). Although the predecessor statute included some substantively different provisions, it included "proper care and custody" and "[no] reasonable expectation" language similar to that contained in present § 19b(3)(g), which respondent Rouse challenges as unconstitutionally vague. The respondents in *In re Gentry, supra*, claimed that these terms were unconstitutionally vague because they did not provide fair notice of the prohibited behavior, and they conferred too much discretion on the trier of fact. *Id.* at 707. This Court rejected the former claim because the respondents lacked standing to challenge the statute where there was "no question that respondents' conduct clearly fits within the statute." *Id.* at 708-709. The Court also rejected the second claim because the term "proper," as used in "proper care and custody," "is not so vague that people of common intelligence must guess at its meaning, nor does it leave the judge free to decide the issue of jurisdiction [or

[1] The predecessor statute authorized termination where "A parent or guardian of the child is unable to provide proper care and custody for a period in excess of 2 years because of a mental deficiency or mental illness, without a reasonable expectation that the parent will be able to assume care and custody of the child within a reasonable length of time considering the age of the child."

termination] without legally fixed standards." *Id.* at 711. The Court likewise rejected the respondents' argument that the term "reasonable expectation" was impermissibly vague. *Id.* at 712-713.

The analysis of the vagueness issue in *In re Gentry*, *supra*, applies to the instant case, notwithstanding the substantive differences between the former statute and the current versions of §§ 19b(3)(g) and (j). Like the respondents in *In re Gentry*, respondent Rouse lacks standing to challenge the "proper care and custody" language because his own conduct unquestionably falls within the statute where petitioner presented clear and convincing evidence that respondent Rouse failed to resolve the domestic violence issues between himself and respondent Allen, failed to establish stable and adequate housing and means of support, and failed to demonstrate an understanding of the children's special needs or an ability to meet them. Respondent Rouse also lacks standing to challenge the "reasonable expectation" language because he had more than 1-1/2 years between the entry of the initial dispositional order and the termination order (as well as an additional eight months between the time of the children's removal and entry of the initial dispositional order) to establish a stable lifestyle and home. Moreover, we reject respondent Rouse's "unfettered discretion for trier of fact" claim for the same reasons given by this Court in *In re Gentry*.

We likewise reject respondent Rouse's vagueness claim concerning § 19b(3)(j). Respondent Rouse contends that every child faces a "reasonable likelihood" of harm, such as accidents and illnesses for which the parents are blameless, but this argument is contrary to the plain language of the statute. Section 19b(3)(j) authorizes termination where "[t]here 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." (Emphasis added.) The statute clearly authorizes termination only where the trier of fact finds a reasonable likelihood of harm that is attributable to the parent's unfitness. Furthermore, the term "reasonable likelihood" could be construed to mean more than a theoretical or conjectural possibility, just as the term "will be harmed" could be construed to mean more than ordinary or mild mishaps that cause no material harm. Because the language can be narrowly construed to avoid impermissibly vague interpretation, it is not constitutionally defective. *In re Gentry*, *supra* at 709.

In any event, respondent Rouse lacks standing to raise a vagueness challenge to § 19b(3)(j) because his conduct unquestionably places the children at an intolerable risk of future harm if returned to his care. All the children, except the youngest, developed severe behavioral problems and emotional disturbance while raised in the chaotic, violent environment of respondents' home. Respondent Rouse never resolved these problems, or showed that he understood the connection between his behavior and the children's problem. Consequently, his children would clearly be at a risk of future harm if returned to his home.

III

Respondent Allen contends that the trial court erroneously considered evidence that was not legally admissible. Respondent Allen correctly asserts that a trial court's termination decision must be based on legally admissible evidence when parental rights are terminated at the initial disposition, or when a respondent's parental rights to a child already under the court's jurisdiction are terminated based on new or different circumstances from those that led to the

original adjudication. MCR 3.977(E)(3)(b) and (F)(1)(b); see also *In re Gilliam*, 241 Mich App 133, 136-138; 613 NW2d 748 (2000).

Respondent Allen's parental rights to the five older children were terminated partly on the basis of substance abuse and domestic violence, which were proven at the original adjudication, but also on the basis of housing and income instability, which constitute new or different circumstances, and her parental rights to Colin were terminated at the initial disposition. Accordingly, legally admissible evidence was required to prove housing and income instability, and allegations pertaining to Colin. But respondent Allen failed to object to any evidence on hearsay grounds at the termination hearing, and she fails to specify any erroneous evidence that formed the basis of the court's termination decision. Consequently, this issue is neither properly preserved, nor properly presented on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); see also *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000) (a party "may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim").

Furthermore, the trial court's findings of housing and income instability were not based on hearsay evidence, but largely on respondents' own testimony at hearings or their own statements to St. Pierre, which were not hearsay. See MRE 801(d)(2). These matters pertained to Colin as well as the older children, so his adjudication and disposition were in compliance with MCR 3.977(E)(3)(b). As respondent Allen concedes, her counsel stipulated to the admission of Colin's medical records and the report on her hair follicle drug testing. This evidence was sufficient to support the termination order as to all the children. If the trial court considered any hearsay, it was in addition to the body of properly admitted evidence. The mere existence of hearsay at a termination hearing does not warrant reversal where there was sufficient clear and convincing, legally admissible evidence to prove new and different circumstances. *In re CR*, 250 Mich App 185, 206-207; 646 NW2d 506 (2002). Accordingly, we find no plain error.

Respondent Allen also argues that the trial court failed to comply with MCR 3.977(H), which requires the court to state on the record its findings of fact and conclusions of law pertaining to an order to terminate parental rights. The trial court's written opinion satisfies the requirement of "[b]rief, definite, and pertinent findings and conclusions" on contested matters. MCR 3.977(H)(1). Although respondent Allen claims that the opinion fails to advise her of the statutory grounds for termination as required by MCR 3.977(H)(3), it is clear that the trial court relied on §§ 19b(3)(b)(ii), (g), (j) and (k)(ii), because (3)(b)(i) clearly applied only to respondent Rouse. The trial court's opinion was sufficient to notify respondent Allen of the reasons underlying the court's decision, and did not prevent her from making a meaningful appeal.

IV

Respondent Allen further argues that termination was improper because her children were abused and neglected in foster care. Although problems arose with the children's placements, the trial court made appropriate responses, and these problems do not negate the evidence warranting termination of respondents' parental rights. Furthermore, although respondent Allen argues that termination was contrary to the children's best interests, she fails to cite any record evidence in support of this claim. MCL 712A.19b(5); *In re Trejo, supra* at 353.

We find no basis in the record to conclude that the trial court erred by declining to find that termination of respondent Allen's parental rights was clearly not in the children's best interests.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad