

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BRYNN MARIAMA BANKS and
GREGORY PETOSKEY-BANKS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LAFRAYE BANKS,

Respondent-Appellant.

UNPUBLISHED
September 30, 2004

No. 252617
St. Clair Circuit Court
Family Division
LC No. 03-000225

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

MEMORANDUM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(i). We reverse.

Respondent's baby was either thrown by respondent or fell from a second story window. Without deciding whether the fall was accidental or intentional, the referee declined to terminate parental rights. The referee concluded that the fall was the result of respondent's mental illness and that respondent's progress in treatment made it unlikely the child or the child's older brother would face future risk of harm from respondent. The trial court reversed, finding that the child's injury was not related to respondent's mental illness, but was instead an intentional act that by its very nature indicated respondent was likely to harm both her children in the future, necessitating termination on the cited statutory ground.

Our review of the record, however, indicates that the trial court's conclusions were not based on clear and convincing evidence that the injury was unrelated to respondent's mental illness. Rather, they were based on a perceived *absence* of evidence relating to this issue. We agree with the referee's conclusion that the fall was the result of respondent's mental illness. Moreover, the trial court's further conclusions that respondent intentionally threw her child out the window for a reason other than mental illness and, thus, would likely harm the child again in the future are not supported by *clear and convincing* evidence in the record, as required under the statute. Without clear and convincing evidence that respondent was likely to harm the children in the future, the statutory ground for termination was not supported and the trial court

erred in terminating respondent's parental rights. MCR 3.977(G); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Having concluded that the trial court erred in ordering termination of respondent's parental rights, we find it unnecessary to reach respondent's claim of ineffective assistance of counsel.

Reversed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Jane E. Markey