

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of CHRISTY ANN MOSSBURG,  
Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHRISTOPHER JASON MOSSBURG,

Respondent-Appellant,

and

MISTY LYNN WILLIAMS,

Respondent.

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UNPUBLISHED

October 26, 2004

No. 255184

Saginaw Circuit Court

Family Division

LC No. 02-028139-NA

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Respondent Christopher Jason Mossburg appeals as of right from the order terminating his parental rights to his minor child, Christy Ann Mossburg (d/o/b December 2, 2002) pursuant to MCL 712A.19b(3)(a) (the child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period), (c)(i) (182 days or more have elapsed and the conditions that led to adjudication continue to exist), and (g) (failure to provide proper care or custody without regard to intent). We decide this appeal without oral argument pursuant to MCR 7.214(E).

**I. Basic Facts And Procedural History**

The FIA filed a petition on December 19, 2002, just over two weeks after Christy was born, alleging that Mossburg was unable to provide a care plan for her. The trial court ordered that Christy be placed in the care and custody of her mother, Misty Williams. At the beginning of the February 4, 2003 adjudication hearing, the trial court observed that Mossburg had neither hired nor requested an attorney, and noted that the county would appoint an attorney if Mossburg could not afford to hire one. The trial court asked if Mossburg was representing himself, and he replied that he was. The trial court told Mossburg that he could request an attorney in future proceedings if he changed his mind.

Williams admitted to the allegations in the petition as amended. Mossburg admitted to the allegation in the petition that he was unable to provide a care plan for Christy. Christy was made a temporary ward of the court and placed with Williams provided she remain in treatment approved by the FIA.

At the May 2, 2003 review hearing, the trial court noted that Mossburg had not had counsel in the previous hearing, and asked if he would again be representing himself. Mossburg replied that as of that day, he was going to “be in the process of hiring an attorney.” The trial court asked whether Mossburg planned to proceed with the hearing and would consult an attorney afterward, and Mossburg responded, “yes.” The trial court ordered that the care of Christy remain with Williams and that Mossburg have regular and frequent visitation and parenting time as approved by the FIA.

Mossburg did not appear at the August 11, 2003 review hearing, although the trial court noted that he had signed for a copy of the order from the last hearing that included the date. Williams’ attorney volunteered that after the last hearing, Mossburg was upset and had stated he was done with this and he wanted to release his rights. She further indicated that she advised him to take some time and think it over, but that it was her understanding there was no further contact between him and the FIA. The trial court stated that Mossburg had more than adequate opportunity to appear.

Williams testified that the last time she had contact with Mossburg was two weeks after the last court date and that he did not give her a phone number or address where he could be reached. The trial court ordered that Christy remain with Williams, stating that Mossburg had “pretty much dropped out of the picture.” He was not participating in reunification, had not asked for parenting time with the child, and was doing nothing to help provide resources for the child. The trial court ordered that Mossburg’s parenting time be suspended while psychological evaluation or counseling was conducted and until further order of the court.

The FIA filed a petition on October 6, 2003, alleging that Williams had given Christy so much water she had to be taken to the hospital, that Williams gave her mother money for crack cocaine at the expense of Christy’s health, and that Mossburg had not contributed to Christy’s physical, emotional or financial support and his address was unknown. The trial court placed Christy in temporary care to be supervised by the FIA.

At the emergency removal hearing, Williams’ attorney pointed out that Mossburg was not listed as a father with any address and that she did not know whether he had been given notice. The trial court confirmed with Williams that Mossburg’s address was unknown. The trial court placed Christy with the FIA and set the review and adjudication on the allegations to coincide with the next review hearing on November 20, 2003.

The parties appeared for a hearing on November 20, 2003, and stipulated that permanency planning/review hearings should be waived because the FIA intended to file for immediate termination of parental rights and the evidence would be presented during the termination proceeding. Efforts to locate Mossburg were unsuccessful. The FIA was ordered to make further efforts to notify Mossburg of the termination proceedings.

A petition to terminate parental rights was filed on December 4, 2003. With regard to Mossburg, the petition alleged that (1) since May 2003, Mossburg's progress had been poor, (2) in the areas of the service plan where he had been compliant, he had not progressed sufficiently to allow reunification, (3) he had not any contact with Williams, and (4) he failed to comply with any of the services in the treatment plan. The petition further alleged that Williams and Mossburg were unable to provide for Christy's needs and neither parent had offered an appropriate care plan for her.

A termination hearing was held on March 4, 2004, with regard to Mossburg's parental rights. Williams voluntarily released her parental rights to Christy. The trial court stated that an effort was made to serve Mossburg by sending papers to Nebraska, but that Mossburg had apparently moved from there to Iowa. The trial court also stated that Mossburg was aware of the proceeding and was expected to be at a certain telephone number, but that he was not available at that number. The prosecutor confirmed that Michelle White, the foster care worker, said that she spoke with Mossburg on February 25, 2004 and that he told her he had received the summons and notice of hearing for the March 4 date. Mossburg gave White a new address in Iowa and told her that he wanted to participate by telephone, and he gave her a telephone number. The prosecutor indicated that they tried to reach Mossburg at the number he provided, reached a voice mail, and left a message that included the court's telephone number.

White testified that she attempted to assist Mossburg in reunifying with Christy and entered into parent/agency agreements with Mossburg on February 4, 2003 and May 2, 2003, but that Mossburg then moved out of the state without leaving a forwarding address and quit all his services. White was able to locate Mossburg through social security in October 2003 and sent him a letter. Mossburg called White on October 23, 2003 and they spoke a few days later about the fact that Christy had been brought back into foster care and placed out of Williams' home. White testified that she told Mossburg that the trial court had set a hearing for November and Mossburg said that he wanted to participate by telephone, but when the hearing date arrived, he could not be reached. Mossburg told White that he planned to move back to Michigan, but he had not done so.

White testified that Mossburg participated in services before leaving in May but failed to make sufficient progress with any of the services to the point that it would have allowed for reunification with Christy. White further testified that Mossburg had not had any contact with Christy since May 2003, had not requested any contact with Christy, and had not provided any financial support. After the May 2003 hearing, Mossburg indicated to her that he wanted to release his rights and did not want to be a parent to Christy. She also testified that Mossburg was unable to provide for the needs of Christy and had not offered an appropriate care plan for her.

White testified that she spoke to Mossburg on February 25, 2004, and he provided her with a phone number in reference to participating in the hearing. White was present when the prosecutor attempted to contact Mossburg, and a voice mail answered and repeated back the number that they had called. White believed that termination of Mossburg's parental rights was in Christy's best interests because she was very young and Mossburg was unlikely to be available to parent her presently or in the foreseeable future. She stated that she was satisfied that Mossburg had abandoned Christy and since the time that he said that he wanted to release his rights, he had done nothing to convince her otherwise.

The trial court found that since May 2003, Mossburg's progress has been poor and that in those areas of service in which he had complied, he had not progressed sufficiently to allow reunification. Specifically, Mossburg had no contact with Christy, provided Christy with no financial support, and failed to comply with any of the services in the treatment plan. The trial court also found that Mossburg was unable to provide for Christy's needs and neither parent had offered an appropriate care plan for her.

As the trial court was reading these findings from the bench, Mossburg called the courthouse, and his call was transferred to the courtroom. The trial court told Mossburg that Williams had released her rights to Christy because she believed it was best for the child to become available for adoption. The trial court asked Mossburg whether he wanted to be involved to contest the termination of his parental rights, give permission for the termination, or just find out what happened. Mossburg replied that he was going to sign off his rights, and agreed that Christy should be in foster care. The trial court asked Mossburg to clarify whether he agreed with Williams that the rights of both parents should be terminated and Christy made available for adoption and Mossburg replied, "yes." The trial court asked Mossburg whether it was true that he had not seen Christy and had not attempted to make provision for Christy since at least last May and there were grounds that would support termination of his rights, and Mossburg replied, "yes."

The trial court found that, on the basis of Williams' statements, other testimony, and Mossburg's acknowledgement of termination, it was in the best interests of Christy that parental rights be terminated. The trial court found that there was clear and convincing evidence to support the termination of Mossburg's parental rights under MCL 712A.19b(3)(a). Christy was abandoned by Mossburg far in excess of the time required. The trial court found that MCL 712A.19b(3)(c) was met as well, because Mossburg was unable to provide a care plan for Christy when the trial court took jurisdiction over her and, by his own admission and conduct, was still unable to do so. The trial court did not see a reasonable likelihood that this would change in the foreseeable future.

The trial court also found that MCL 712A.19b(3)(g) was met because Mossburg failed to provide proper care and custody for Christy, provided no home or alternative plan and, considering that this situation had existed for ten months, the trial court was satisfied that the situation would not alter within a reasonable time, considering Christy's age. The trial court also found that, pursuant to MCL 712A.19b(5), Christy's best interests were served by terminating all parental rights and making Christy a ward of the Michigan Children's Institute.

## II. Constitutional Challenge To The "Clear Error" Standard

### A. Standard Of Review

Whether the "clear error" standard is improper in a termination proceeding is a question of law, and is therefore reviewed de novo.<sup>1</sup>

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<sup>1</sup> *Burba v Burba*, 461 Mich 637, 647; 610 NW2d 873 (2000).

## B. Determining The Standard Of Review

Mossburg argues that this Court should use a “stricter or higher” standard of review of the trial court’s order because termination of parental rights deals with a fundamental liberty interest. Mossburg is correct that parental rights are considered fundamental liberty interests and are to be protected by due process.<sup>2</sup> However, that fact does not affect the standard of review we apply to the trial court’s factual findings. The trial court’s factual findings, regardless of the context in which they are made, are always reviewed for clear error, even when the underlying matter involves a fundamental constitutional right.<sup>3</sup> Had Mossburg challenged the constitutionality of the *statute* that sets forth the procedures for terminating parental rights, we would likely have determined the statute’s constitutionality by employing strict scrutiny review because of the fundamental right involved.<sup>4</sup> In so doing, however, we would have reviewed the trial court’s determination regarding the statute’s constitutionality *de novo*, not with “strict scrutiny,” because it is a question of law.<sup>5</sup> This example illustrates that Mossburg’s argument is based on a misunderstanding of the difference between reviewing the legal and factual aspects of a trial court’s decision, on the one hand, and determining the constitutionality of, for example, a statute, on the other.

As Mossburg concedes, the law in our state is clear on this point. MCL 600.861(c) provides for an appeal of right to the Court of Appeals when the trial court has entered an order terminating an individual’s parental rights, and MCL 600.866(1) provides that the appeal shall not be considered *de novo*. The clearly erroneous standard of review is set forth in the Michigan Court rules,<sup>6</sup> and in case law.<sup>7</sup>

In any event, Mossburg does not explain why a higher standard would require this Court to reverse the decision of the lower court. The evidence is undisputed. Mossburg left the state, did not appear for review hearings, did not appear for the termination hearing, did not support Christy, did not stay in contact with the FIA, and agreed to the termination of his rights. There is no basis for Mossburg’s argument for a higher standard, and the trial court did not clearly err in finding that MCL 712A.19b(3)(a)(ii), (c)(i) and (g) were met by clear and convincing evidence.

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<sup>2</sup> See *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *In re Brock*, 442 Mich 101, 499 NW2d 752 (1993).

<sup>3</sup> See MCR 2.613 (“Findings of fact by the trial court may not be set aside unless clearly erroneous”). See also MCR 3.977(J) (“The clearly erroneous standard shall be used in reviewing the court’s findings [of fact] on appeal from an order terminating parental rights”).

<sup>4</sup> See, e.g., *In re AH*, 245 Mich App 77, 83; 627 NW2d 33 (2001).

<sup>5</sup> See *id.* at 79.

<sup>6</sup> MCR 3.977(J).

<sup>7</sup> *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

### III. Right To Counsel

#### A. Standard Of Review

We review constitutional questions de novo.<sup>8</sup>

#### B. Scope Of The Trial Court's Duty To Appoint Counsel

Mossburg also argues that the trial court violated his constitutional rights because it did not *sua sponte* appoint an attorney to represent him. However, Mossburg was required to take affirmative action to obtain assistance of counsel. The trial court had no obligation to appoint an attorney to represent a parent in a termination proceeding absent a request.<sup>9</sup> Here, Mossburg was advised of his right to an attorney on numerous occasions, both in writing and orally by the trial court. Mossburg never requested an attorney. Rather, he initially advised the trial court that he was going to represent himself, and later told the court that he was in the process of hiring an attorney. Thus, Mossburg took no affirmative action to request a court-appointed attorney, and the trial court's failure to do so *sua sponte* does not require reversal.

Mossburg also argues that the Americans with Disabilities Act<sup>10</sup> required the court to *sua sponte* appoint an attorney for him or to stop the proceedings when he indicated that he planned to hire an attorney. While it appears that Mossburg has dyslexia and received special education services, he indicated to the caseworker that this condition did not cause significant problems for him. Furthermore, it is clear from the record that Mossburg was aware of his right to hire or have an attorney appointed and chose not to do so. Mossburg cannot now complain that his rights were violated because the trial court did not appoint an attorney for him.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra

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<sup>8</sup> *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

<sup>9</sup> *In re Hall*, 188 Mich App 217, 222; 469 NW2d 56 (1991).

<sup>10</sup> 42 USC 12143.