STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DESTINY NICOLE GIBSON, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

PATRICIA MCKIE,

Respondent-Appellant,

and

BRADLEY GIBSON,

Respondent.

UNPUBLISHED
November 30, 2004

No. 255446
Berrien Circuit Court
Family Division
LC No. 2003-000157-NA

In the Matter of JORDAN KILLINGSWORTH, SHAWN KILLINGSWORTH, and ELIZABETH KILLINGSWORTH, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

PATRICIA ANN MCKIE,

Respondent-Appellant.

No. 255843
Berrien Circuit Court
Family Division
LC No. 2001-000032-NA

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

PER CURIAM.

In Docket No. 255446, respondent Patricia McKie appeals as of right the May 4, 2004, order terminating her parental rights to her minor child, Destiny Nicole Gibson (born December 26, 2003). McKie's parental rights were terminated pursuant to MCL 712A.19b(3)(g) (failure to provide proper care), (i) (parental rights to another child have been terminated due to neglect or abuse), (j) (risk of harm if child returned), and (l) (parental rights to another child have been terminated under section 2(b) or similar law of another state).

In Docket No. 255843, McKie appeals as of right a May 10, 2004, order terminating her parental rights to Jordan Killingsworth (born May 10, 1995), Shawn Killingsworth (born September 20, 1996), and Elizabeth Killingsworth (born November 30, 1998) pursuant to MCL 712A.19b(3)(c)(i) (failure to rectify the conditions that led to adjudication), (g) (failure to provide proper care and custody), (i) (parental rights to the child's sibling were terminated due to serious and chronic neglect), (j) (reasonable likelihood that the child will be harmed if returned home), and (l) (parental rights to another child were terminated as a result of proceedings under MCL 712A.2). The trial court affirmed the referee's findings following the termination hearing, which concluded on April 16, 2004. We affirm.

I. Basic Facts And Procedural History

In March 2001, the Family Independence Agency (FIA) petitioned the trial court to take temporary jurisdiction of Jordan, Shawn, and Elizabeth based on an allegation that they were among eleven children who spent a weekend in the unfit home of Michael Gentry and his wife. The home was allegedly filthy, and the children slept on the floor. Further, Shawn reported that Gentry had sexually abused him during the visit. Also, it was alleged that the three children were dirty and inappropriately dressed, and that an earlier child protection investigation indicated that McKie had a tendency to make inappropriate decisions regarding babysitters.

On May 23, 2001, James Killingsworth tendered a no contest plea to the allegations in the petition. At the dispositional hearing, the hearing referee approved a treatment plan for both parents, and on May 30, 2001, the trial court entered an initial dispositional order removing the children from their home. By September 2001, both parents had made sufficient progress in parenting classes and counseling that the children were returned to the parents' home.

In November 2001, however, the FIA filed a supplemental petition for judicial review after McKie and James Killingsworth were evicted from their home and had no care plan for the children. The children were placed in foster care. Shortly thereafter, in December 2001, McKie gave birth to a fourth child, Deanna Killingsworth. Deanna was allowed to remain with McKie and James Killingsworth, who found a new home. On May 16, 2002, Judge Mayfield entered an order placing Shawn, Jordan, and Elizabeth in the home. The FIA recommended this placement at an earlier hearing in light of progress made by McKie and the father.

Shortly thereafter, in May 2002, the FIA filed a supplemental petition to have the children returned to foster care placement based on allegations that McKie and James Killingsworth were uncooperative, did not follow court orders, had difficulty getting Jordan to school on time, left the children with inappropriate caregivers, were unemployed, and were about to be evicted from their home. All four children were placed in foster care. However, the referee concluded that the evidence did not indicate that McKie and James Killingsworth were in the process of being evicted. Accordingly, the referee determined that the proper action was to place the children in their home, with continuing services.

In July 2002, the FIA filed a supplemental petition for the children to be removed from the home based on McKie and James Killingsworth having domestic relations problems, their home and the children being filthy, and Deanna being left with an inappropriate caregiver. The children were once again placed in foster care.

In September 2003, following an evidentiary hearing, James Killingsworth's parental rights were terminated. Although a statutory basis for terminating McKie's parental rights was also found pursuant to MCL 712A.19b(3)(j), the trial court concluded that terminating McKie's parental rights to Shawn, Jordan, and Elizabeth would not be in the children's best interests. However, the trial court terminated McKie's parental rights to Deanna[1] and denied visitation with Shawn, Jordan, and Elizabeth pursuant to the FIA's request.

In December 2003, McKie gave birth to a fifth child, Destiny Gibson, whose father was Bradley Gibson. A petition was filed December 29, 2003, seeking termination of McKie's parental rights to Destiny, alleging in part that McKie had three other children under the jurisdiction of the trial court and that a termination petition had already been filed regarding those children. On January 20, 2004, the Berrien County Prosecutor's Office filed a supplemental petition to terminate McKie's parental rights to Shawn, Jordan, and Elizabeth, noting that McKie's parental rights with regard to Deanna had already been terminated.

The trial court held separate evidentiary hearings on Jordan, Shawn, and Elizabeth Killingsworth and Destiny Gibson in March and April 2004. Evidence at these hearings revealed that McKie was unemployed, but was trying to find a job. Although McKie had only attended school through the seventh grade, she explained that she was not attending any educational program because she was emotionally unable to do so. McKie no longer had contact with James Killingsworth, whom she blamed for the children's prior exposure to improper caregivers. McKie was living with Destiny's father, Brad Gibson, in a house that she apparently believed her father, Delbert McKie, owned. McKie and Gibson spent a considerable amount of time and money to make the house habitable. However, Delbert McKie's land-contract interest in this house had actually been awarded to Delbert McKie's ex-wife during divorce proceedings. McKie acknowledged that if the ex-wife prevailed in her action to quiet title, McKie would be forced to relocate. Although a foster care worker had urged her to seek subsidized housing in case the house was awarded to her father's ex-wife, McKie refused to do so.

With regard to McKie's income sources, the foster care worker indicated that McKie's inability to maintain employment would likely prevent her from meeting eligibility requirements for state assistance. As of mid-April 2004, McKie was still unemployed, but Gibson had been working full time at Wal-Mart for three weeks, and she and Gibson had received financial assistance from relatives. An FIA worker testified that before Destiny's birth McKie had not participated in most of the services to which she had been referred.

Testimony indicated that McKie had been referred to three parenting classes, Families First services, outreach counseling, a parent aide, the Work Force Development Center Program, assistance through FIA for purchasing food, Medicaid, extended parenting time and regular contact by a supervising care specialist, and payment assistance for emergency utility shutoffs. McKie also had been provided a referral to Salvation Army for rent and a referral for mental

[1] McKie's appeal of the September 12, 2003, order terminating her parental rights to Deanna Anne McKie Killingsworth was dismissed by this Court for lack of jurisdiction because McKie failed to request an attorney within twenty-one days of the termination order. *In re Deanna Anne McKie Killingsworth*, unpublished order of the Court of Appeals, issued December 11, 2003 (Docket No. 252121).

health counseling, had been offered transportation services, and had been provided with a list of available subsidized apartments and a list of temporary employment services. McKie had further been provided with a referral to obtain her GED or high school diploma, outreach counseling, and subsidized housing. Nonetheless, her caseworker testified that McKie had repeatedly shown poor judgment regarding finances, such as quitting several jobs and spending large amounts of money on a home that she did not own instead of using that money to rent or buy a home of her own. McKie had also been given emergency funds to rent a home but had been evicted shortly thereafter.

Jordan and Shawn's case manager indicated that they were developmentally delayed, both emotionally and academically, and needed consistent parenting so they could take their focus off survival and safety issues and focus on school instead. Jordan and Shawn told their therapist that McKie had disciplined them by putting hot glue on their tongues, and Shawn said that McKie also used cayenne pepper and shut his mouth with duct tape. The FIA foster care worker recommended that McKie's parental rights to Jordan, Shawn, and Elizabeth be terminated.

Following these proofs, the referee rendered an oral opinion on April 16, 2004, in which he determined that McKie's parental rights to the Killingsworth children should be terminated, and the trial court affirmed the recommendation after being presented with a request for judicial review. It entered an order on May 10, 2004,[2] terminating McKie's parental rights. The trial court also found clear and convincing evidence to terminate McKie's parental rights to Destiny pursuant to MCL 712A.19b(3)(g), (i), (j), and (l). The trial court further found that termination was not contrary to Destiny's best interests. The trial court issued its order terminating McKie's parental rights to Destiny on May 4, 2004.

II. Termination Of Parental Rights

A. Standard Of Review

We review the trial court's findings of fact, and its determination regarding the child's best interests, for clear error.[3] 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.[4]

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[2] This Court's listing in Docket No. 255843 indicates that this order was entered May 10, 2004; however, the trial court states three times in the April 23, 2004, transcript that McKie's rights to Jordan, Shawn, and Elizabeth were terminated in April 2004. To the extent that the trial court relied on the termination of McKie's rights to Jordan, Shawn, and Elizabeth to support its termination of her rights to Destiny, any error that occurred was harmless, because the trial court could have predicated its findings on its valid termination of McKie's rights to Deanna in September 2003.

[3] 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).

[4] *Id.*

B. Legal Standards

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.[5] If the petitioner establishes a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights, unless it finds from evidence on the whole record that termination is clearly not in the child's best interests.[6] The trial court's decision regarding the child's best interests is reviewed for clear error.[7]

C. Destiny Gibson, Docket No. 255446

The trial court did not clearly err in determining that the statutory grounds were established by clear and convincing evidence.[8] McKie's parental rights to at least one of her other children had previously been terminated because of McKie's failure to provide a stable home for the children. Furthermore, although McKie had been provided numerous services for some time, she was either unable or unwilling to take the steps necessary to provide stability for the children. At the time of termination, McKie was unemployed, had no income, and was living in a home that she neither owned nor rented. She made virtually no effort to change her employment or housing status during her long history of involvement with the FIA. This evidence demonstrated that McKie was unable to provide proper care and custody, would not be able to do so within a reasonable time, and that there was a risk that the minor child would be harmed if placed in her custody.

Further, the trial court did not err in determining that termination was not contrary to the best interests of the child. The evidence established that McKie would not be able to overcome her problems and parent the child within a reasonable time. Therefore, termination of McKie's parental rights was not contrary to the best interests of the child.[9]

D. The Killingsworth Minors, Docket No. 255843

The referee relied on the following statutory grounds for termination:

> (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.

[5] *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993).

[6] MCL 712A.19b(5); *In re Trejo, supra* at 353.

[7] *Id*. at 356-357.

[8] MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

[9] MCL 712A.19b(5); *In re Trejo, supra* at 356-357.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child 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.

* * *

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

(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.

* * *

(l) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter or a similar law of another state. [MCL 712A.19b(3).]

1. MCL 712A.19b(3)(c)(i)

With regard to MCL 712A.19b(3)(c)(i), the initial dispositional hearing was on May 23, 2001, and the initial dispositional order was entered on May 30, 2001, thus satisfying the requirement that 182 or more days elapse since the issuance of the initial dispositional order.[10] McKie has not established that the referee clearly erred in finding that the condition still existed and that no reasonable likelihood existed that the condition would be rectified within a reasonable time, considering the ages of the children. At the time of the termination hearing,

[10] We note that the referee incorrectly applied MCL 712A.19b(3)(c)(i) to McKie because jurisdiction over the children was acquired based on the father's no-contest plea to allegations in the petition about the children being placed with inappropriate caregivers and the children being dirty and inappropriately dressed. Once the trial court had jurisdiction over the children, it had jurisdiction over McKie to make orders necessary for the children's physical, mental, or moral well-being. See MCL 712A.6. However, the termination of McKie's parental rights involves new or different circumstances, and therefore requires application of the legally admissible evidence standard for termination. See MCR 3.977(F); *In re CR*, *supra* at 205-206. Pursuant to MCR 3.977(F)(1)(b)(ii), it is not appropriate to terminate parental rights under MCL 712A.19b(3)(c)(i) for new or different circumstances. Nonetheless, because McKie has not argued that MCL 712A.19b(3)(c)(i) does not apply, this issue can be deemed abandoned, see *In re JS & SM*, 231 Mich App 92, 98; 585 NW2d 326 (1998); and because the termination decision was supported by other valid factors, any error was harmless. Only one statutory ground is required to terminate parental rights, see *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000); *In re SD*, 236 Mich App 240, 247; 599 NW2d 772 (1999), and the other statutory grounds for termination the referee identified are proper grounds for termination based on new or different circumstances. See MCR 3.977(F)(1)(b)(ii).

McKie was unemployed and had no housing for which she had received any legal right to occupy. McKie's insistence on staying in the house and spending financial resources to improve it, notwithstanding her lack of a legal right to remain there, is evidence of her continuing poor decisionmaking and unstable lifestyle.

Contrary to McKie's argument on appeal, the "reasonable time" element of MCL 712A.19b(3)(c)(i) does not require that a petitioner prove, or the trial court to find, a specific time period that would be required for the children to be reunited. The case cited by McKie merely involved expert testimony that the respondent needed two or three years of therapy to reach an acceptable level of parenting skills, for purposes of concluding that MCL 712A.19b(3)(c)(i) was proven.[11] The "reasonable time" standard itself was construed only as indicating a legislative intent that children not be left in foster care indefinitely.[12]

The other case on which McKie relies likewise does not establish that MCL 712A.19b(3)(c)(i) requires proof of a specific time period for reunification. Rather, this Court found that MCL 712A.19b(3)(c)(i) was not proven there because the respondents were not given a full and fair opportunity to rectify the conditions that led to the adjudication.[13] A homemaker was assigned to assist the respondents in remedying their home conditions, but stopped going to the home because it was too dirty.[14] This differs from the instant case in which the referee found that McKie was given an "incredible amount of time and services over the past three years." On appeal, McKie has established no clear error with respect to this finding.

In sum, McKie's attempt to interpret the "reasonable time" element of MCL 712A.19b(3)(c)(i) as requiring proof of a specific time period for reunification should be rejected. While it is appropriate for the trial court to consider a number of factors, including a respondent's past success, or lack thereof, with regard to her treatment plan in evaluating reasonableness standards in termination statutes,[15] MCL 712A.19b(3)(c)(i) only required proof that there was "no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." When statutory language is plain and unambiguous, it must be applied as written because it is assumed that the Legislature intended the plainly expressed meaning.[16]

We also reject McKie's other arguments regarding MCL 712A.19b(3)(c)(i). McKie incorrectly argues that parental rights cannot be terminated unless a court applies the standard in *Fritts v Krugh* that "[t]here must be real evidence of long-time neglect, or serious threats to the future welfare of the child, to overthrow permanently the natural and legal right of parents to the

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[11] *In re Dahms*, 187 Mich App 644, 646-647; 468 NW2d 315 (1991).

[12] *Id*.

[13] *In re Newman*, 189 Mich App 61; 472 NW2d 38 (1991).

[14] *Id*. at 66.

[15] See generally *In re JK*, *supra* at 214, and *In re Sours*, 459 Mich 624; 593 NW2d 520 (1999).

[16] *Maxwell v Citizens Ins Co of Am*, 245 Mich App 477, 482; 628 NW2d 95 (2001); *In re Halbert*, 217 Mich App 607, 612; 552 NW2d 528 (1996).

custody and nurture of their own children."[17] The question before our Supreme Court in *Fritts* was how to construe specific "neglect" language in a termination statute, with due regard to the rule of statutory interpretation that a statute should be construed whenever possible to save it from unconstitutionality. This Court found that due process would not support an order of termination based on purely temporary neglect, such as children having inadequate shelter due to a fire destroying their home.[18] Because MCL 712A.19b(3)(c)(i) does not contain the "neglect" language construed in *Fritts*, it is not controlling in this case.

Also, McKie's reliance on the "best interests" standard for termination is misplaced. The cases on which McKie relies are not controlling because they predate the Legislature's 1994 adoption of the "best interests" standard in MCL 712A.19b(5), and our Supreme Court's decision construing that standard in *In re Trejo*.[19] Further, MCL 712A.19b(5) is only applicable if a statutory ground for termination is proven. McKie's argument on appeal confuses the statutory ground for termination under MCL 712A.19b(3) with the "best interests" standard under MCL 712A.19b(5). In this case, the evidence did not establish that termination was clearly not in the children's best interests.

At the time of the referee's decision, the children had spent about three years as temporary court wards. The youngest child, Elizabeth (born November 30, 1998), was five years old when the referee rendered his decision on April 16, 2004. The oldest child, Jordan (born May 10, 1995), was almost nine years old. Shawn (born September 20, 1996) was about one year younger than Jordan, and the evidence indicated that Shawn was an emotionally disturbed child with a need for structure and permanence. In light of the uncertainty of McKie ever achieving a stable lifestyle and the length of time that the children were temporary court wards, the referee did not clearly err in his assessment of the children's best interests. Hence, termination of McKie's parental rights was justified on the basis of MCL 712A.19b(3)(c)(i) and (5).

2. MCL 712A.19b(3)(g)

The referee relied on the same reasoning applied to MCL 712A.19b(3)(c)(i) to find that MCL 712A.19b(3)(g) was also proved, specifically noting that McKie admitted being unemployed and, "due to her emotional needs at this time she is not able to continue with what she would need for continuing her education and what she would need for trying to seek and obtain further employment." On appeal, McKie refers to her previous argument with regard to MCL 712A.19b(3)(c)(i), and then challenges the referee's finding that MCL 712A.19b(3)(g) was proven, arguing that the referee mistakenly disagreed with her interpretation of the evidence concerning her employment and housing situation. We conclude that McKie has not shown clear error. Based on the same unstable employment and housing situation that underlies the analysis for MCL 712A.19b(3)(c)(i), the referee did not clearly err in finding that MCL 712A.19b(3)(g) was established by clear and convincing evidence.

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[17] *Fritts v Krugh*, 354 Mich 97, 116; 92 NW2d 604 (1958) (citations omitted), overruled on other grounds in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993).

[18] *Id*. at 114.

[19] *In re Trejo*, *supra* at 350-354.

3. MCL 712A.19b(3)(j)

The referee also relied on his findings with regard to MCL 712A.19b(3)(c)(i) to conclude that MCL 712A.19b(3)(j) ("[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") was proven. On appeal, McKie argues that termination was premature under MCL 712A.19b(5). McKie then relies on cases predating *In re Trejo* as setting forth the appropriate standard of proof. McKie asserts that she should have been given more time to reunite with the children.

However, as with MCL 712A.19b(3)(c)(i), McKie confuses the statutory ground for termination under MCL 712A.19b(3)(j) with the best interests determination under MCL 712A.19b(5). McKie has not shown clear error in the referee's finding that her unstable lifestyle presented a reasonable likelihood that the children would be harmed if returned to her home. Also, McKie has not established any basis for disturbing the referee's assessment of the children's best interests under MCL 712A.19b(5).

4. MCL 712A.19b(3)(i) and (l)

Finally, the referee relied on the trial court's September 12, 2003, order terminating McKie's parental rights to Deanna as the basis for finding that subsections (i) ([p]arental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful) and (l) ("[t]he parent's rights to another child were terminated as a result of proceedings under section 2(b) of this chapter . . . "), were both proven.

The referee did not make specific findings with regard to whether the termination of McKie's parental rights to Deanna was based on serious or chronic neglect, or whether prior rehabilitative efforts failed, as set forth in MCL 712A.19b(3)(i). Because McKie does not contest this omission or otherwise claim factual error with regard to either statutory ground, we need not address whether there is any basis for disturbing the referee's finding that MCL 712A.19b(3)(i) and (l) were proven.[20]

Rather, McKie presents a single argument that attacks the legislative intent underlying MCL 712A.19b(3)(i) and (l). McKie argues that the Legislature could not have intended to allow termination without an opportunity for a parent to show improvement. McKie proposes, similar to MCL 712A.19b(3)(c)(i), that the neglect standard in *Fritts*[21] applies to children who are the subject of the termination proceeding, and that a respondent should be given a reasonable time to rectify conditions.

Because it is plain that MCL 712A.19b(3)(i) and (l) do not contain McKie's proposed standards, McKie's argument can be rejected. When statutory language is clear, the statute must be applied as written.[22] "Courts cannot assume that the Legislature inadvertently omitted from

[20] *In re JS & SM*, *supra* at 98.

[21] *Fritts*, *supra* at 114.

[22] *Maxwell*, *supra* at 432.

one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."[23] Therefore, we reject McKie's challenge to MCL 712A.19b(3)(i) and (l). The trial court may consider evidence regarding a respondent's improvement when evaluating a child's best interests under MCL 712A.19b(5);[24] but, as discussed, McKie has not shown any basis for disturbing the hearing referee's assessment of the children's best interests.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

[23] *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

[24] See *In re Trejo, supra* at 356.