

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DEVIN N. GARRETT, JENA L.
GARRETT, and KATELIN M. GARRETT,
Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL GARRETT,

Respondent-Appellant,

and

TONYA GARRETT,

Respondent.

UNPUBLISHED
September 22, 2009

No. 290687
Berrien Circuit Court
Family Division
LC No. 2007-000143-NA

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Respondent Michael Garrett appeals as of right from a trial court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(a)(ii) and (j). We affirm.

Respondent argues that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence, and in finding that termination of his parental rights was in the children's best interests. We disagree.

A statutory ground for termination must be proven by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). We review the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours*, *supra* at 633. Once a statutory ground for termination is established, the trial court shall order termination of parental rights if it finds that termination is in the child's best interests.

MCL 712A.19b(5). The trial court's best interests decision is also reviewed for clear error. *In re Trejo, supra* at 356-357.

We agree that the trial court clearly erred in finding that § 19b(3)(j) was proven by clear and convincing evidence. The burden was on petitioner to prove this statutory ground for termination. MCR 3.977(A)(3); *In re Trejo, supra* at 350. Section 19b(3)(j) considers whether there is a reasonable likelihood that a child will be harmed if returned to the parent's home. In finding that this statutory ground was proven, the trial court principally relied on respondent's failure to "clear up" a Florida criminal investigation of a 2005 incident in which respondent was accused of sexually molesting his daughter's friend. It was petitioner's position that respondent's ability to safely parent his children could not be assessed until that matter was resolved. While the pending Florida investigation may have provided petitioner with a reasonable basis for being hesitant in its ability to conclude that respondent *would not* present a risk of harm to his children, without more, it did not provide a basis for concluding the opposite, i.e., that there was a reasonable likelihood that the children *would be* harmed if returned to respondent's home. Notably, petitioner did not conduct its own investigation of the unresolved criminal matter, and thus had no independent basis for evaluating the truth of the accusation in order to make its own assessment of the likelihood that the children would be harmed if returned to respondent. By relying simply on respondent's failure to "clear up" that matter, the burden of proof was effectively and improperly shifted to respondent to prove that the children would not be at risk of harm if returned to his home. Thus, we conclude that termination was improper under § 19b(3)(j).

However, this error does not require reversal because a trial court is only required to find a single statutory ground for termination, *In re Sours, supra* at 632, and the trial court did not clearly err in finding that § 19b(3)(a)(ii) was proven by clear and convincing evidence. Although respondent knew that his children had been removed from their mother's custody and placed in foster care, he failed to seek their custody or contact petitioner from late 2007 until May or June 2008. Respondent's concerns about the unresolved criminal matter did not excuse his failure to seek custody of the children for this lengthy period.

Finally, considering that respondent had been separated from his children for at least two years and his belated and inadequate attempts to respond to or communicate with DHS or engage in services, and the children's need for permanence and stability, the trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. MCL 712A.19b(5); *In re Trejo, supra* at 356-357.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra