STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KAYTIE SOURS, SEAN SOURS, AMANDA SOURS, STEPHEN SOURS, CHANCE SOURS and SAMMUAL SOURS, Minors.

FAMILY INDEPENDENCE AGENCY

Petitioner-Appellee,

v

JAMES EDWARD SOURS and ZELLMA LOUISE DECAIRE,

Respondent-Appellant.

UNPUBLISHED
August 25, 1998

No. 208203
Hillsdale Juvenile Court
LC No. 96-031419 NA

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Respondent appeals as of right a trial court order terminating her parental rights to her six minor children pursuant to MCL 712A.19b(3)(b)(i) and (ii), (3)(c)(i) and (ii); MSA 27.3178 (598.19b)(3)(b)(i) and (ii), (3)(c)(i) and (ii). We reverse and remand.

A trial court's termination order must be supported by clear and convincing evidence that at least one of the statutory grounds for termination exists. MCR 5.974(F)(3). We review the trial court's findings in support of a termination order for clear error. MCR 5.974(I). Clear error exists when, although evidence exists to support a finding, we are left with the definite and firm conviction that a mistake has been made. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

This tragic series of events began with a mother responding appropriately to physical abuse from her husband. The only evidence remotely supporting involvement of the Family Independence Agency (FIA) in this case was the evidence regarding the incident leading up to this proceeding, that, while attempting to strike his wife, the father accidentally hit Sean causing his black eye. The accidental and solitary nature of this event was uncontradicted. The mother filed criminal charges. Thereafter, she

was submerged into a whirlpool of events that culminated in the loss of her six children. The children were initially removed because she allowed her husband to return to the marital home, failed to appear and testify against him in court and moved the family to a different city.

The testimony offered at trial established that the father had struck the mother on several prior occasions. The evidence however does not support the conclusion that the mother failed to protect the children. Further, no evidence whatsoever supports a conclusion that the children were in jeopardy when the mother ultimately allowed the father to come back into the home, nor was there any evidence that the mother fled because she knew the FIA was planning to take her children. The mother did go to court and to the FIA office as requested by the worker, but arrived only to find that the hearing had been canceled. It was at that point in time that the children, the mother and father moved to Coldwater where the children were enrolled in school. When the mother returned to Hillsdale County in November, 1996 and enrolled her children in school, the FIA took her children from her and she was incarcerated for 20 days. The incarceration and the loss of her children is a heavy penalty to pay for failure to appear in court.

Although the trial judge did not specifically cite the various probate code sections that are applicable in the matter before us, we do so in order to address the evidence that was brought before the court. Sections 19b(3)(b)(i) and (ii) authorize termination where a parent's act or failure to take possible preventative measures caused physical injury or abuse and the court finds a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parents' home. The record contains no evidence whatsoever that the mother or father ever physically injured or abused any of the children. Witness testimony established that the father and mother had been complete and loving parents, and never demonstrated any sign of physical abuse or otherwise placed their children in any form of jeopardy, except for the accidental injury previously mentioned. Because the prosecutor did not present any evidence to the contrary, the court lacked clear and convincing evidence that is was likely that the children would ever suffer any injury or abuse in the foreseeable future at either parent's hands. Sections 19b(3)(b)(i) and (ii).

Section 19b(3)(c)(i) authorizes termination when the conditions that led to an adjudication in a prior child protective proceeding continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child. With respect to the mother, the condition which led to the adjudication was her alleged failure to protect the children from their father and her involvement with him after the original incident. However, the evidence showed that at the time of the termination hearing, the mother was no longer involved with the father and that both parents had moved on to other relationships. In fact, the father had remarried and was incarcerated at the time. The prosecutor offered evidence that the mother is now engaged to a man who assaulted her at one time. However, unrebutted testimony regarding this incident clarified that her fiancé had pulled her hair when she intervened in an argument between he and his stepfather, and that she had given a false statement to the police because she was angry at her fiancé. This was an isolated incident deriving from the original event--a fight between her fiancé and his stepfather. The prosecutor produced no evidence that her boyfriend has a tendency to abuse anyone, including children.

With regard to Section 19b(3)(c)(ii), this provision authorizes termination when

> [o]ther conditions exist that cause the child to come within the jurisdiction of the court, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice, a hearing, and been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

With respect to the mother, she was ordered to seek employment, to participate in programs and to find housing, and to provide proof that she had done so. She accomplished each and every one of these tasks, including proving that she had applied for numerous jobs on a regular basis. In his findings, the trial judge alluded to the fact that the mother failed to make a commitment for employment. He failed to consider the only evidence in that regard, which established that she tried to get a job seven or eight times every week and finally acquired one immediately prior to this hearing. Although her parenting course attendance may have been inconsistent or tardy, she attended all substantive sessions and completed the course, and on many occasions participated quite actively. The only session she missed was the goodbye session at the conclusion of the program. She also attended on a weekly basis since September, 1996 the required domestic harmony course for battered wives, completing the course prior to the hearing. For a short period of time, after her newborn was taken from her, she became extremely depressed and turned to alcohol for relief. Her other five children had also already been removed. However, after this short period of time, and absent the necessity of any FIA, court or counselor recommendation, the mother solved the problem on her own. There is no suggestion in the record that she ever had a previous or subsequent alcohol problem, and there were no problem conditions about which she received recommendations that she failed to rectify by the time of the hearing.

With respect to the father, he continued to be incarcerated at the time of the hearing and there was some evidence that he continued to be incarcerated beyond even that time. His present status is unknown.

With regard to the newborn child, Sammual, we would note that the trial court refers to the baby as being severely malnourished and a failure to thrive child. However, the record reveals that the physician never testified at this hearing, and therefore there was no opportunity to cross-examine his conclusions, which were presented by the way of unobjected to hearsay testimony. This child, along with the mother's other babies, was premature and very small. The mother testified that all her babies were like that for a variety of reasons, including the genetic factor that she and her husband are both very small. In addition, the children did in fact increase their weight as they got older. No live testimony suggested that any of the children were at risk healthwise.

Further, it became apparent in reviewing the record that there was a personality conflict between the mother and the FIA workers involved in this case. There is no question that the mother probably had what one might consider an "attitude" problem in her initial dealings with both of the FIA workers. However, her hostility is understandable in light of her treatment in this situation. Here, she follows the recommended course of action for a battered woman and presses charges and as a result therefrom, a series of events which can only be characterized as a mother's nightmare led to the loss of

her six children. FIA worker Yoder's testimony amply demonstrates that there was no objectivity left by August, 1996 when he recommended termination. From that time on, he never really considered the reunification of the parents with the children.[1] He did absolutely no investigation of the mother's present situation, including her relationship with her fiancé. Her fiancé has attended counseling classes and unrebutted testimony indicated that he was a loving and supportive mate for the mother.

Even the court in rendering its opinion recognized that this personality conflict existed between Mr. Yoder and the mother. The judge, in his findings, recognized this hostility:

> The mother in dealing with the department, and the Court will make several notes. She felt nothing she did was right. Up until September, nothing she did was right. She was told to go to these things. What can we do to help you. What can be done. What can Mr. Yoder do. Yes, he's a demanding task master. We're not dealing with school here. We're not dealing with car payments. We're not dealing with a creditor. We're not dealing with a probation officer. We're dealing with somebody who had five, now six children under his care and he's gotta try and get a ship back on course. A ship that has gone on this trip for ten years. That's what he has to do. And, if he didn't enforce those orders, I would've come after him. These order, and they were made well our standard orders. These were critical to Ms. Decaire to get her life back in order. They weren't there for my health. They weren't there because George was bored. They weren't there to make your life miserable. They were there because we have six children that I do not want, and I explained to Ms. Decaire in the first hearing and the second hearing. I do not want them in foster care. I want them out. Cooperate. There was some talk in some of the testimony that she needed counseling. There's no question about it. It was all available. There's no question that the children need to be a parent—or need to have a parent. There's no doubt in this Court's mind. But, they've got to have a decent parent. A parent that is stable. A parent that makes a commitment. She has had numerous support services over this period of time, up until she left. Did they require her to make effort. Did they require her to provide some transportation. They require her to do this that and the other thing, yes. It was not a complete hand out, but, there was support there for her. She had to make the initial step. There'd been comments made, well how can you get a job if you don't have a car. How can you get a car if you don't have a job. In this Court's eyes, both those problems are minuscule, are very minor compared to raising six children. Six children are much more difficult than trying to maintain a forty hour a week job. Or maintain a car. Tryin' to feed, clothe, educate, counsel, support, take care of on a twenty-four hour a day basis, is far more difficult than maintaining a forty hour a week job. Than attempting to find housing. Than attempting to find a car. Than attempting to go to

[1] His attitude contravenes the clear and unmistakable intent of the legislature to affirm the ancient policy of law and society of keeping children with their natural parents and, if a child is temporarily removed from such custody, to return it to its family whenever feasible. *In re Mathers*, 371 Mich 516, 534; 124 NW2d 878 (1963).

> counseling, once a week. Go to s—batters group, once a week. Go to visitation, once a week. It's a twenty-four hour a day commitment.

In its conclusions, the court found, "Therefore there's been a long term neglect and abuse, of the minor children, and has continued for ten years. And, that there's been no showing of the possibility it (sic) stopping."[2] The trial judge made some findings relative to the children's insecurity and their constant need to be reassured. There is no question that the abrupt removal of the children by the FIA after a year of their attending school on a regular basis and without any showing of their being at risk or in jeopardy most certainly could have led to such insecurity.

The trial court did clearly err in finding that the statutory grounds for termination in this case were established by clear and convincing evidence. The record does not support such a finding. "The fundamental liberty interest of natural parents in the care, custody, and management of their child[ren] does not evaporate simply because they have not been model parents or have lost temporary custody of their child[ren] to the state." *Santosky v Kramer*, 455 US 745, 102 S Ct 1388, 71 L Ed 2d 599 (1982).

We reverse and remand for the entry of an order of disposition placing the children in the custody of their natural mother. This shall be accomplished with due diligence and every effort shall be made to minimize the emotional impact of the children's transfer employing all necessary resources of the court.

/s/ William B. Murphy
/s/ Hilda R. Gage

[2] We note that the ten years is an inappropriate calculation in light of the fact that the oldest minor child was barely nine at the time of the hearing.