STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DONYELL MECHELLE KATRINA LYTTLE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

BARBARA MITCHELL,

Respondent-Appellant.

UNPUBLISHED
October 6, 2000

No. 222488
Wayne Circuit Court
Family Division
LC No. 81-227250

In the Matter of DONYELL MECHELLE KATRINA LYTTLE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DARNELL LYTTLE,

Respondent-Appellant.

No. 222489
Wayne Circuit Court
Family Division
LC No. 81-227250

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Respondents Barbara Mitchell and Darnell Lyttle appeal by right from the family court's order terminating their parental rights to a minor child. The court terminated respondents' rights on the basis of MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g) ("[t]he 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") and MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(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"). We affirm with respect to Mitchell but reverse with respect to Lyttle.

This Court reviews for clear error a trial court's finding that a statutory basis for termination has been met. MCR 5.974(I); *In re Trejo Minors*, ___ Mich ___; 612 NW2d 407 (2000) (Docket No. 112528, decided 7/5/2000), slip op, p 28. Once a statutory basis has been proven by clear and convincing evidence, the court must terminate parental rights unless the court finds that termination is not in the best interests of the child. *In re Trejo Minors*, supra at 27. A court's finding on the best interests prong is also reviewed by this Court for clear error. *Id*. at 28.

With respect to Mitchell, the trial court did not clearly err in determining that a statutory ground for termination was established by clear and convincing evidence and that termination was in the best interests of the child. The evidence showed that Mitchell had trouble managing her life, even *without children present*, while not in an inpatient treatment program. Indeed, she voluntarily entered an inpatient program because she could not handle both outpatient counseling and a job. Further, Mitchell was discharged from two successive treatment programs: once for drug use and once for leaving the premises while on "restricted" status. Additionally, she attended a court hearing while intoxicated, and two different counselors thought her prognosis was "guarded" and that she had a likelihood of relapse. In light of this evidence, the family court did not clearly err in determining that Mitchell had failed to demonstrate proper parenting ability or a recovery from substance abuse problems and that termination on the basis of MCL 712A.19b(3)(g) and (j); MSA 27.3178(598.19b)(3)(g) and (j) was therefore warranted.

With respect to Lyttle, however, we agree with the child's appellate attorney and conclude that the trial court clearly erred in terminating his parental rights because he was denied an attorney during the first half of the termination trial. As stated in *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986), "the right to appointed counsel at . . . [termination] proceedings is . . . a fundamental constitutional right guaranteed by the equal protection clauses of the United States and Michigan Constitutions." See also MCR 5.915(B)(1)(b) (mandating that the court appoint an attorney for indigent respondents in child protective proceedings), and *In re EP*, 234 Mich App 582, 597; 595 NW2d 167 (1999), rejected on other grounds by *Trejo, supra*.

Petitioner argues that the absence of counsel in this case was allowable because (1) Lyttle did not attend some early hearings, and (2) Lyttle did not file an affidavit of parentage until the trial was half over and thus was not entitled to an attorney until after that date. These arguments are unpersuasive. Indeed, although Lyttle missed the preliminary hearing and the hearings on visitation, he nonetheless appeared for all of the actual termination trial. His missing initial hearings did not justify the deprivation of the right to counsel at subsequent hearings, where he requested counsel. See *In re Hall*, 188 Mich

App 217, 222; 469 NW2d 56 (1991) (indicating that even if a party waives his right to counsel by failing to appear at various court hearings, he may nonetheless reassert the right at a later time).

Moreover, while it is true that the rules governing child protective proceedings cover only those fathers who have formally acknowledged paternity (unless the father was married to the child's mother at the time of birth), a reliance on this technicality to get around the deprivation of counsel in this case is improper in light of the facts that (1) Lyttle acknowledged on the record, toward the beginning of the protective proceedings, that he fathered the child, and (2) all parties were proceeding under the assumption that Lyttle was indeed the father of the child. Accordingly, the family court erred by failing to reappoint counsel to Lyttle at the commencement of the termination trial.

Hall, supra at 222, suggests that the deprivation of counsel at child protective proceedings can be subject to harmless-error analysis. Here, however, the error cannot be deemed harmless, because (1) Lyttle was deprived of counsel during the actual termination trial (as opposed to the review hearing in *Hall*), (2) new evidence of Mitchell's parental unfitness and Lyttle's abusive nature was elicited at the trial while Lyttle was without counsel, and (3) Lyttle's rights were terminated, in part, because he left the minor child with an unfit parent and because of his "volatile and abusive" relationship with Mitchell. Cf. *Hall, supra* at 222-223. Accordingly, the family court's order with respect to Lyttle is reversed, because he was deprived of his fundamental right to counsel at half of the termination trial and because the deprivation was not harmless.

Affirmed with respect to Mitchell and reversed with respect to Lyttle. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry W. Saad
/s/ Patrick M. Meter