

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SHANNA RISLEY, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHERYL DONAHUE,

Respondent-Appellant,

and

DEAN RISLEY,

Respondent.

In the Matter of SR, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DEAN RISLEY,

Respondent-Appellant,

and

CHERYL DONAHUE,

Respondent.

UNPUBLISHED
December 19, 2000

No. 223766
Midland Circuit Court
Family Division
LC No. 98-000130-NA

No. 224300
Midland Circuit Court
Family Division
LC No. 98-000130-NA

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

In these consolidated appeals, respondents Cheryl Donahue (Donahue) and Dean Risley (Risley) appeal as of right from a family court order terminating their parental rights to the minor child SR¹ pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j); MSA 27.3178(598.19b)(3)(c)(i), (c)(ii), (g), and (j).² In Docket No. 223766, we reverse the family court's order terminating Donahue's parental rights. In Docket No. 224300, we affirm the family court's order terminating Risley's parental rights.

I. Facts and Procedural Background

This case first came to the attention of petitioner Family Independence Agency (FIA) in late 1997 after Donahue's live-in boyfriend, Donald Burns, Sr., assaulted his teenage son, who also lived in the home. When the FIA learned that Burns continued to live in the home and continued to consume alcohol in an uncontrolled manner, Donahue's daughter Shanna was removed from her mother's custody and placed in foster care. A petition was filed, alleging that (1) Donahue and her two daughters resided with Burns and his two teenage sons from June 1996 to September 1997, (2) Donahue's youngest daughter Shanna witnessed Burns assault one of his sons on September 16, 1997, for which he was criminally charged and ordered out of the home, (3) Burns grabbed Donahue's older daughter Kelly and ripped her shirt in the summer of 1997 and threatened to kill both of Donahue's daughters, (4) Donahue continued to reside with Burns with full knowledge of these allegations, (5) Burns consumed alcohol on a daily basis including the day he assaulted his son, and (6) Donahue's daughter Kelly wanted only supervised visitation with her father, respondent Risley, who she claimed abused Donahue during their marriage. Following a preliminary hearing on the petition, the family court authorized the petition and made Shanna a temporary court ward.

At a dispositional hearing on March 11, 1998, Donahue admitted allegations (1) and (2) in the petition, but pleaded no contest to the remaining allegations. Risley pleaded no contest to the allegation that his daughter Kelly was afraid to visit with him and admitted to domestic violence with Donahue while they were married.

At the first review hearing on June 19, 1998, there was testimony from the foster care worker that both Donahue and Shanna were involved in services, including family counseling, and that they had both benefited from the services. Donahue had substantially complied with the terms of her treatment plan, and was moving into a new house within a month. The foster care worker testified that if Donahue moved slowly in her relationship with Burns and he did not

¹ The original petition also included Shanna's older sister, Kelly Risley; however, Kelly turned eighteen on January 21, 1999, and was dismissed as a ward of the court.

² Respondent Donahue's parental rights were terminated under all four subsections. Respondent Risley's parental rights were terminated only under subsections 19b(3)(g) and (j).

move back into her home at this time, Shanna could return home to her mother by the end of July 1998. The foster care worker further opined that Risley was in general compliance with his treatment plan, but still needed to attend anger management classes. At the conclusion of the hearing, the family court permitted Shanna to return to Donahue's home subject to Burns not being in the home.

At the September 24, 1998, review hearing, the foster care worker testified that Shanna had limited contact with Risley because of his work schedule. The foster care worker had mailed Risley a letter inquiring about a good time to reach him, but Risley had not responded. Risley did not attend this hearing and did not provide any documentation that he attended AA meetings or the anger management program. The foster care worker testified that Donahue had complied with her treatment plan and continued to attend therapy as well as Alanon meetings on a weekly basis. According to the foster care worker, Donahue had made progress toward alleviating the conditions that led the court to assume jurisdiction. Burns was participating in the Tri-Cap program and intended to live with Donahue and her children upon his completion of the program. The foster care worker did not find those plans to be a problem as long as Burns continued with the appropriate services. According to a counselor at Shelter House, Donahue was progressing very well, but Risley was still demonstrating anger, usually directed at Donahue. At the conclusion of the hearing, the family court rescinded its prior order that Burns stay out of Donahue's home and away from Shanna, noting that it observed Burns in the courtroom and thought he was doing well as long as he continued to stay sober. The family court suspended Risley's visitation until he contacted petitioner to monitor his compliance with his treatment plan.

On December 24, 1998, Burns was arrested for OUIL and a possible hit-and-run accident. Donahue was a passenger in the car Burns was driving. The guardian ad litem requested the family court to review Shanna's placement in her mother's home. On March 22, 1999, the guardian ad litem filed a motion for a change of custody to the maternal grandmother, with whom Shanna had been residing since January. The parties agreed that Burns would not live in or visit Donahue's home; however, he apparently did not leave Donahue's home because he could not find alternative housing he could afford and could not stay with friends who were drinking. Donahue lived with Burns on a part-time basis and with her mother part time, while Shanna resided with her maternal grandmother. The foster care worker was concerned that Donahue was not spending enough time with Shanna since Donahue did not live in the same home and was concerned about the emotional affect the arrangement had on Shanna. The foster care reported that Risley had not provided any documentation that he complied with the services. At the conclusion of the hearing, the family court ordered Shanna placed in foster care, but gave Donahue one last opportunity to offer a plan for her child.

At the next review hearing on June 22, 1999, the foster care worker testified that Donahue continued to attend counseling but was unable to get beyond her anger with the issues that caused Shanna to be in foster care. The foster care worker was also concerned that Donahue was still living with Burns, who was not supposed to have any contact with Shanna. The foster care worker had no verification that Risley attended AA meetings, but was informed by his attorney that he was attending an anger management program. According to the foster care worker, Shanna's behavior and self-esteem seemed to improve while in foster care, and after

unsupervised visits with her parents, particularly Donahue, Shanna seemed to revert to poor behavior again. The foster care worker did not believe that sufficient progress had been made toward returning Shanna to her parents and she recommended that a termination petition be filed so SR could obtain permanency in her life. At the conclusion of the hearing, the family court ordered that a termination petition be filed, but noted that there was still time to prove to the court that termination was not in the child's best interests.

At the termination hearing, the family counselor testified that Donahue was living independently without Burns, held a position in adult care through Lutheran Social Services, improved her relationship with her children, reduced her defensiveness, was better able to verbalize her emotions, and became more aware of how domestic violence affected her decision making and parenting abilities. However, the counselor testified that Donahue was still not ready for reunification because she harbored anger at the foster care worker who recommended filing the termination petition, misplaced the blame for her circumstances on others instead of taking responsibility for her own decisions, and failed to recognize that Burns' behavior was a problem. The counselor opined that Donahue was still not able to place Shanna's needs before her own. The counselor testified that Shanna believed her mother chose Burns over her, and noticed the difference in behavior between Burns and her foster father, explaining that she liked how her foster home was quiet and disliked how there was always yelling, fighting and anger in her mother's home, particularly when Burns was drunk. The counselor opined that Shanna did not have much of a bond or relationship with Risley and cited a number of instances where Risley acted inappropriately in Shanna's presence (using foul language, falling asleep during visitation, not listening to Shanna). On the other hand, Shanna had a strong bond with her mother, loved her mother, and wanted to be reunited with her mother. The counselor concluded that because Donahue clearly intended to remain in a relationship with Burns, Donahue could not offer the type of home environment that Shanna needed. Thus, she recommended termination of Donahue's parental rights.

The foster care worker testified that there were no noted concerns during the visitations between Donahue and Shanna, but there was little interaction during the visits with Risley. Risley continued in his anger management program, but did not participate in the ordered parenting classes or AA meetings. Further, Risley had not requested that Shanna be returned to his care until June 1999, after the termination petition was filed. The foster care worker testified that Donahue could not demonstrate that she was able to put Shanna's needs before her own, particularly in her continued relationship with Burns, and was unable to get beyond her anger to act in her child's best interests. The foster care worker recommended termination of both parents' parental rights because, in her opinion, neither parent would be able to achieve what was needed for Shanna within the foreseeable future.

In an opinion and order, dated November 15, 1999, the family court terminated both Donahue's and Risley's parental rights for the following reasons:

The Court's greatest concern is that Cheryl Donahue will fail to protect Shanna from an emotionally abusive environment. In the adjudicative hearing, Cheryl admitted that Shanna witnessed Mr. Burns physically assaulting his children in September of 1997. He was convicted of child abuse. In this

termination hearing, she testified if anyone abused her kids, they would be out. Cheryl admitted that in the summer of 1997, Mr. Burns grabbed Kelly [her other daughter] and ripped her shirt while in the camp grounds. Mr. Burns threatened to kill Kelly and Shanna and Cheryl still continued to live with him. *In re Parshall*, 159 MA 683 (1987).

The counseling record indicates on at least thirteen occasions Cheryl was told to remove Mr. Burns from her home. The FIA told her many times. When the Court read her Shanna's log that she was afraid that her mother would leave her to be with Mr. Burns, Cheryl did not see that as abusive treatment of her child. This case has been open since January of 1998, and aside from the fact that Mr. Burns moved out a few months ago, there is no progress in Cheryl's commitment to keep him out of her life and no progress in her displaced anger at the FIA, her therapist and the Court. The visitation logs are replete with Cheryl threatening to report everything she saw wrong to her attorney. Many times Shanna had to ask her mother why she looked so sad. Shanna also reverted back to baby talk when she was with her mother.

In Cheryl's psychological evaluation, it states Cheryl is passively angry and depressed. Projective tests indicate that Cheryl "tends to believe that it she is not physically abused in a relationship that her needs as well as the needs of her minor children are met. In this respect, Cheryl can be expected to have difficulties protecting her self and her minor children." Cheryl appears to find it difficult to believe her children were at risk with Mr. Burns and or the home environment was inappropriate. The Court agrees with the evaluator. *In re Johnson*, 142 MA 764 (1985). This case has been going on since the fall of 1997 and while Cheryl participated in services and has made progress in her angry demeanor, she has not recognized the verbal abuse, the witnessing of child abuse and the feelings of abandonment that Shanna has suffered in her relationship with Mr. Burns. Cheryl allowed this abusive environment to continue by keeping Mr. Burns in her home and life. *In re Miller*, 182 MA 70 (1990).

Mr. Risley had his visitations suspended because he wouldn't do services. After the June hearing when termination was ordered, he did begin. Shanna's therapist does not feel there is any bond with her father. In the visitation logs, Shanna tried to ask her father why he hurt and had fights [with] her mother. Mr. Risley refused to talk to her about it. He does not see Shanna has any issues to deal with. Mr. Risley still hasn't done parenting classes or AA meetings. It is too little, too late. Shanna needs a permanent home now.

It is time the Court place Shanna's needs of stability, safety and nurturance [sic] first. It is in her best interest to terminate the rights of her mother and father.

II. Standard of Review

The petitioner has the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); MSA 27.3178(598.19b)(3); *In re Trejo Minors*, 462 Mich 341, 350; 612 NW2d (2000). Once the petitioner establishes at least one statutory ground for termination, the family court must terminate parental rights unless the court finds, on the whole record, that termination is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo, supra* at 355. The family court's decision that a statutory ground for termination has been proven by clear and convincing evidence and the family court's assessment of the best interests of the child are reviewed for clear error. *In re Trejo, supra* at 356. This Court will reverse a termination order only when, upon review of the whole record, it is left with a definite and firm conviction that a mistake has been made. *In re Boursaw*, 239 Mich App 161, 176; 607 NW2d 408 (1999), overruled on other grounds 462 Mich 341 (2000) (rejecting *Boursaw's* holding that a parent must produce some evidence of the best interests of the child to oppose termination).

III. Docket No. 223766

Donahue argues that the family court erred in terminating her parental rights because the petitioner failed to establish a statutory ground for termination by clear and convincing evidence. We agree.

Donahue's parental rights to the minor child were terminated under MCL 712A.19b(3)(c)(i) and (ii), (g) and (j); MSA 27.3198(598.19b)(3)(c)(i) and (ii), (g) and (j), which provide as follows:

(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 age of the child.

(ii) Other 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 condition, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the age of the child.

(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 age of the child.

(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.

We conclude that the trial court erred in terminating Donahue's parental rights under subsection 19b(3)(c)(i). The original allegations in the petition were that Donahue lived with Burns who assaulted one of his sons, grabbed Donahue's daughter and tore her shirt, threatened to kill both of Donahue's daughters, and Donahue continued to live with Burns despite these allegations and while Burns continued to consume alcohol on a daily basis. The family court found that "17 months have elapsed since the adjudication and the conditions of Mr. Burns' influence in the home and in Cheryl's life 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 age of Shanna." However, in making this determination, the family court failed to mention that, in September 1998, the court itself rescinded its order that Burns not have contact with Shanna, finding that Burns was at that time doing well. The family court also failed to consider testimony from the termination hearing establishing that Burns had moved out of Donahue's home sometime between June and October 1999 and, according to Donahue and her mother, sister, and daughter Kelly, Burns and Donahue no longer had a romantic relationship. Additionally, both Donahue and Kelly testified at the termination hearing that Burns did not spend the night in Donahue's home during the summer of 1999. On this record, we do not find that there was clear and convincing evidence that the conditions that led to adjudication, particularly Burns' presence and influence in Donahue's home, continued to exist at the time of the termination hearing. Accordingly, termination of Donahue's parental rights under subsection 19b(3)(c)(i) was improper.

We also conclude that the family court's finding that "other conditions" existed that justified termination of Donahue's parental rights under subsection 19b(3)(c)(ii) was clearly erroneous. The family court found that the "other conditions" warranting termination were Donahue's continued relationship with Burns and her leaving Shanna at her maternal grandmother's house in order to be with Burns, despite ample communications and opportunities to rectify those conditions.

At a review hearing in March 1999, it was reported that Shanna had been staying at her grandmother's house for approximately two months while Donahue lived part-time with Burns and part-time with her mother and Shanna. Donahue confirmed that she saw Shanna every day and spent three to four nights a week with her, while the remainder of the time was spent in her house with Burns. Donahue testified that she reported the living conditions to her therapist and explained that she and Burns could not afford to live separately at that time, and Burns could not stay with friends who were drinking. After this hearing, Shanna was ordered back into foster care, but the family court indicated that Donahue would be given every opportunity to come up with a plan for Shanna.

At the next review hearing on May 24, 1999, an agreement was reached whereby Donahue would have four, unsupervised weekend visitations with Shanna to prove that she could have positive visitations. According to Donahue, her notice about the first weekend visit was

very short and caused her scheduling problems at work. Donahue also maintained that the foster care worker gave her permission for Shanna to stay overnight at her grandmother's house on days that Donahue had to work. After the first of the four weekends, which occurred over Memorial Day 1999, and during which Shanna spent the entire four-day weekend at her grandmother's house, the agreement was rescinded and the family court ordered that a petition to terminate parental rights be filed.

At the termination hearing, it was undisputed that Burns no longer lived in Donahue's home, he had moved approximately eighteen miles away, and their relationship had changed. Further, the evidence showed that Donahue was regularly visiting with Shanna as scheduled. Thus, while "other conditions" may have existed at the review hearing when the family court ordered the filing of a termination petition, the evidence at the termination hearing, almost four months later, showed that these conditions either had been rectified or were being rectified by Donahue. On this record, we are not persuaded that petitioner established by clear and convincing evidence that there were "other conditions" that would not be rectified within a reasonable time considering the age of the child. Accordingly, termination of Donahue's parental rights under subsection 19b(c)(ii) was improper.

We next conclude that the trial court erred in terminating Donahue's parental rights under subsection 19b(3)(g). The family court found that Donahue, without regard to intent, failed to provide proper care and custody for the child, and there was no reasonable expectation that she would be able to do so within a reasonable time. The family court did not articulate any specific factual findings in support of its determination on this factor; rather, it generally stated that it was concerned that, in view of Burns' presence and behavior in her home, Donahue would fail to protect Shanna "from an emotionally abusive environment." The family court cited *In re Parshall*, 159 Mich App 683; 406 NW2d 913 (1987), in support of its ruling in which this Court affirmed the termination of a father's parental rights even though only the mother had abused the child. The *Parshall* Court stated, "[p]arental rights may be terminated on the basis of neglect where, although one parent does not personally abuse the child, that parent permits an environment to continue where children will likely be abused." *Id.* at 690. However, we find *In re Parshall* distinguishable from the instant case because there is no evidence here that Shanna or her older sister were physically harmed by Burns or were placed in an abusive or harmful environment. Indeed, the family court allowed Burns back into the home at one point during the proceedings. Further, at the time the termination petition was filed, Burns was no longer living with Donahue. Thus, there was no evidence that Donahue had permitted an environment to continue where Shanna would likely be harmed, or that she would not be able to provide proper care and custody to Shanna within a reasonable time. Accordingly, the petitioner failed to prove this statutory ground by clear and convincing evidence, and the trial court erred in terminating Donahue's parental rights under subsection 19b(3)(g). See *In re Boursaw*, *supra* at 176-177.

Finally, we conclude that termination of Donahue's parental rights under subsection 19b(3)(j) was improper. The family court found that there was a reasonable likelihood based on Donahue's conduct or capacity that Shanna would be "emotionally harmed" if returned to her home. The family court referred to Donahue's psychological evaluation which labeled her as passively angry and depressed and opined that she would likely have difficulties protecting her children. The family court further noted that, while Donahue had participated in services and

made progress in her anger, she had not recognized the verbal abuse, witnessing of child abuse, and feelings of abandonment that Shanna suffered during her mother's relationship with Burns.

However, as discussed above, there was much evidence presented at the termination hearing that Donahue was rectifying the conditions that the family court determined were emotionally abusive. Furthermore, there was substantial testimony that Shanna loved her mother and was very bonded to her, that she was bonded to her sisters and maternal grandmother, and that she was sad and depressed in the weeks after the filing of the termination petition when she was not allowed to see her mother. Additionally, Shanna became angry when she was told that she might be separated from her mother and had a difficult time sleeping at night. Given this evidence, "the trial court's conclusion that there is a 'reasonable likelihood' that Shanna would be harmed if reunited with respondent strikes us as being "essentially conjecture." *In re Sours*, 459 Mich. 624, 636; 593 NW2d 520 (1999).

In sum, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. Like the respondent in *In re Boursaw*, *supra* at 176, Donahue "may not yet be a model parent," however, "we believe the record shows that, at the time of the termination hearing, she had made significant strides toward remedying the problems that had brought this matter to petitioner's attention." We are strongly reminded that "[t]he fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents" *In re Boursaw*, *supra* at 176, quoting *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). In this case, we believe that petitioner has not established with the requisite degree of certainty that termination of the familial bond was warranted. Likewise, we do not believe that sufficient evidence was offered that Donahue would not be able to give Shanna proper care and custody within a reasonable time. Therefore, we find that termination of Donahue's parental rights was improper.³

IV. Docket No. 224300

In Docket No. 224300, respondent Risley argues that the family court clearly erred in terminating his parental rights. We disagree.

The family court terminated Risley's parental rights under MCL 712A.19b(3)(g) and (j). After reviewing the record, we conclude that the family court did not err in finding that Risley, without regard to his intent, failed to provide proper care and custody of Shanna and there was no reasonable expectation that he would be able to do so within a reasonable time. Risley and Donahue separated and then divorced several years before this action began, largely because of Risley's drinking problem and violence directed at Donahue. After the divorce, Risley was a

³ Because we find that the family court clearly erred in finding that statutory grounds for termination of Donahue's parental rights were established by clear and convincing evidence, MCR 5.974(I); *In re Hamlet*, 225 Mich App 505, 522; 571 NW2d 750(1997), overruled in part on other grounds, 462 Mich 341 (2000), we need not address Donahue's additional argument that the family court clearly erred in holding that termination of her parental rights was not adverse to the child's best interests. *In re Boursaw*, 239 Mich App at 176.

noncustodial parent, although he had regular visitation with Shanna before the original petition was filed. Risley was present when the petition was authorized in early 1998, and, throughout the following months, was encouraged by petitioner to participate in services, particularly an anger management program and AA meetings. However, his visitation was temporarily suspended in September 1998, when it was determined that he had made himself unavailable for services. In March 1999, petitioner reported that Risley had not provided any verification that he had complied with services. At the June 1999 review hearing, Risley was enrolled in an anger management program, but there was no evidence that he had participated in AA.

Petitioner acknowledged making no great efforts at reunification between Shanna and her father because petitioner's focus was on reunification with the child's mother; however, petitioner noted that Risley displayed little interest in visiting and interacting with Shanna. In fact, Risley did not even express a desire to obtain custody of the child until after the June 1999 review hearing, when the court ordered petitioner to file a petition for termination of parental rights. At the termination hearing, Risley acknowledged that he did not have a great track record with services, but testified that he had completed parenting classes, attended alcohol counseling, and attended AA. He testified that his job kept him away from home several nights a week, although he was looking for other employment. His plan for Shanna's care, if he were to receive custody of her, was to have his girlfriend, who had moved into his home with her children earlier that year and whom he did not plan to marry, be Shanna's primary care provider. Given Risley's demonstrated inability to provide proper care and custody for Shanna, without regard to his intent, we are unable to conclude that the family court clearly erred in finding that subsection 19b(3)(g) was established by clear and convincing evidence.

The family court also terminated Risley's parental rights under subsection 19b(3)(j), finding that there was a reasonable likelihood, based on Risley's conduct or capacity, that SR would be emotionally harmed if placed in his home. Although there was testimony from the therapist and the foster care worker that Shanna did not feel particularly bonded with her father, we do not believe that this equates with emotional harm, particularly for a child who had been living in foster care. However, any error in ruling that this statutory basis for termination was established by clear and convincing evidence was harmless given the quantity of evidence supporting termination of Risley's parental rights under subsection 19b(3)(g).

In Docket No. 223766, we reverse the family court's order terminating respondent Donahue's parental rights and remand for further proceedings consistent with this opinion. In Docket No. 224300, we affirm the family court's order terminating respondent Risley's parental rights to the child. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck