

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ALLIYAH McCRARY, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner -Appellee,

v

ALFRED F. McKINLEY,

Respondent -Appellant.

UNPUBLISHED

January 12, 2001

No. 225626

Genesee Circuit Court

Family Division

LC No. 97-109176-NA

Before: Saad, P.J., and White, and Hoeksta, JJ.

PER CURIAM.

Respondent father appeals the family court's order terminating his parental rights to Alliyah, (dob 10-10-96), and seeks to have the order terminating his parental rights to Malika (dob 9-22-97) vacated because he is not Malika's biological father. We affirm the termination of rights as to Alliyah, and remand to the family court for entry of a proper order as to Malika.

I

Respondent married Latoya McCrary (Mrs. McKinley) on May 26, 1995. Alliyah was born on October 10, 1996. Respondent and Mrs. McKinley apparently separated in 1996.

A neglect/abuse petition concerning Alliyah was filed on September 15, 1997, alleging, in essence, that Mrs. McKinley had been observed putting a pillow over Alliyah's head in an apparent effort to suffocate her or cause her to need medical attention. The court's record of the September 15, 1997 preliminary hearing states that the respondent and Mrs. McKinley were separated, and that FIA was to do a home study of respondent father for possible placement, that placement with respondent would be at the clinical social worker's discretion, and that respondent could have unsupervised visits with Alliyah. Mrs. McKinley was allowed supervised visits. She pled no contest to the abuse charges regarding Alliyah.

Mrs. McKinley had another baby girl, Malika, on September 22, 1997. A supplemental petition alleging neglect concerning only Malika was filed on September 25, 1997, stating that

respondent was Malika's legal father and that her putative father was Maleck McDowell, who resided in Atlanta, Georgia. The caseworker, Kuiper, noted in the supplemental petition:

Dr. Nolen, of Hurley Medical Center, believes that Latoya McCrary-McKinley is suffering from Munchasen [sic Munchausen] by Proxy.¹ . . . Ms. Latoya McCrary-McKinley pled no contest to these allegations on 09/24/97.

* * *

Mr. McKinley is this child's legal father, but Ms. Mccrary-McKinley states he is not the biological father. Mr. McKinley states he doesn't know if he is the biological father or not. Mr. McKinley currently is being investigated by Special Operations, as his home was raided as a drug house.

Respondent did not enter a plea regarding Malika. Both Alliyah and Malika were adjudicated as temporary court wards and placed in separate foster care homes.

Respondent signed the initial service plan. It stated that the permanency planning goal was to return Alliyah to her mother and that placement with respondent was being explored. The service plan stated:

Mr. McKinley [DOB 11-14-66] had been on probation, since 1995, for carrying a concealed firearm. It is expected to end January, 1998. Mr. McKinley reports that probation period was decreased. Documentation of this has been requested, but has not been received.

* * *

RE: Alfred McKinley, Birth Father

* * *

Mr. McKinley . . . has a criminal record. He was convicted of possessing a firearm. It was reported that he was pulled over for a traffic violation and the weapon was found under his seat. Probation was set to end in January, 1998

¹ Webster's College Dictionary defines "Munchausen syndrome by proxy" as "a form of Munchausen syndrome in which a person induces or claims to observe a disease in another, usually a close relative, in order to attract the doctor's attention to herself or himself."

"Munchausen syndrome" is defined as "a factitious disorder in which otherwise healthy individuals seek to hospitalize themselves with feigned or self-induced pathology in order to receive medical treatment."

An addendum to the initial service plan stated that respondent wished to have Alliyah live with him in Flint and that respondent:

claims that he is engaged at this time and currently has five children. He states that he is financially stable to care for Alliyah and is going to school. He is consistent with his family visitations at ECC, which occur every Thursday. One main concern about his home is that the rail posts on the stairway need to be fixed. There is also concern, because he claims he has been previously shot six singular times, as a robbery victim. He says that his main concern with Alliyah is the weight she has gained because he feels Alliyah's foster parent is feeding her pork, which is against his Muslin [sic] religion.

A parent/agency agreement completed in January 1998, states that the permanency planning goal was to place both Alliyah and Malika with respondent and anticipated that that goal could be reached by the next court hearing in April 1998.

A supplemental order of disposition filed January 8, 1998, addressed both Alliyah and Malika, and stated that respondent "shall provide the caseworker with a criminal record check (favorable), shall complete a psychological evaluation, and complete parenting classes. Father is to continue visits with both children."

A psychological evaluation of respondent stated that respondent "is employed and also has his own used car and repair business," had graduated from high school and was only four credit hours from a bachelor's degree in Emergency Medicine. His verbal IQ score was in the average range, 96. He was noted to "have a logical approach to problems," and "possible perfectionistic tendencies." He stated to the evaluator that he loved his children and loved being a father, and he described himself as kind, caring and considerate. The evaluation recommended:

The psychological profile that was evidenced in this evaluation suggests that Mr. McKinley should be able to provide a very appropriate home for the children and that he should be able to be a very good role model and father to the children. However, serious concern should be given to what appeared to be his very unrealistic expectations of children. Therefore, he does need parenting classes and counseling so that he can overcome these rigid expectations and have more realistic attitudes in regard to what he expects in the way of behavior from children.

However, respondent began serving a four to eight year prison sentence in August 1998, after being convicted of possession of less than 25 grams of a controlled substance and habitual offender, third. A supplemental order of disposition filed August 28, 1998 continued the children in the temporary custody of the court and stated that the worker was "to follow up relative placement" and that "visits w/relative authorized."

An updated service plan completed in October 1998 stated in pertinent part:

Mr. McKinley is currently incarcerated at the Charles E. Egeler Correctional Facility. He was sentenced on 08/07/98 and received a combination of two sentences equaling 4 - 14 years of incarceration. The charges were possession of marijuana with the intent to deliver. Mr. McKinley has been charged with other drug-related crimes in the past. Since his incarceration, Mr. McKinley had not contacted this worker until 10/02/98.

* * *

On 09/11/98, Mr. McKinley's fiancée, Sharonda [sic] Clark, contacted this worker and wanted to know if she could take guardianship of Alliyah and Malika. . . . Ms. Clark indicated that . . . they planned to be married

* * *

Prior to his incarceration, Mr. McKinley visited on a regular basis

Mr. McKinley had not attended or completed individual counseling prior to his incarceration. He reported he did not see the point, as he anticipated being incarcerated for two years.

A supplemental petition concerning both children filed on December 3, 1998 sought to terminate the mother's parental rights. The petition also sought to terminate respondent's parental rights to both Alliyah and Malika pursuant to MCL 712A.19b(3)(c)(ii), (g), (h), and (j); MSA 27.3178(598.19b)(3).

Relative placements were explored and deemed unsuitable. An order filed January 21, 1999 stated that the court "will allow a home study to be performed re guardianship. Father can be available by phone for next hrg. Judge authorized great-aunt to file guardianship papers."

Respondent, who had filed for divorce in 1998, was granted a default judgment of divorce in April 1999. The divorce judgment stated that respondent would upon his release from prison be entitled to petition the court for parenting time or custody, or request to set aside any guardianship. The divorce judgment stated that both Alliyah and Malika were children of the parties.

At an April 21, 1999 termination hearing regarding both Alliyah and Malika, testimony and several affidavits were presented supporting that respondent was not Malika's biological father even though she was born during the marriage. After that hearing, Mrs. McKinley's parental rights to Alliyah and Malika were terminated. There are conflicting orders in the lower court record regarding respondent's parental rights, one indicating that respondent's rights to Malika were terminated at this hearing, and another stating that termination of respondent's parental rights would be decided at a later hearing. However, the court stated on the record near the conclusion of the April 21, 1999 hearing that:

All right. I'm prepared to make a ruling from the testimony being offered, from the testimony of Mr. McKinley on a previous occasion and the affidavits I've

gone over, from the testimony of Shirron Clark under oath today, I'm satisfied that there's sufficient reasons to terminate his rights. Remaining – the issue as to the oldest child obviously is still being considered, but I'm satisfied he does not appear to have any interest in trying to maintain contact with Malika, and it's obvious he has not cooperated in terms of any necessary services. So I'm satisfied that his rights as to Malika maybe [sic] terminated as far as this case.

And having done that, I think it's fair to say in the divorce, the court can conclude that he's not the biological father of Malika as well. That takes care of that issue.

A home study of respondent's new wife, Shirron Clark-McKinley, was performed in May 1999. The assessment states that she had an annual income of approximately \$5,000, had a three bedroom home, and that Ms. Clark wanted Alliyah and the child she had had with respondent, Adriana, to grow up together because they are family and she wants Alliyah to know her father. She stated that she would be Alliyah's primary caretaker, and that her mother and aunt would help. The assessment did not recommend placement with Clark, however:

It is not recommended that Aliyah [sic] be placed with Shirron Clark. Ms. Clark-McKinley seems to have good intentions; however, her relationship with Mr. McKinley is rather unstable, due to the fact that he will be incarcerated until November of 2002.

Aliyah [sic] was placed with ECC on 09/15/97, and Ms. Clark-McKinley has just recently come forward.

Shirron Clark has never met Aliyah [sic], thus, Ms Clark-McKinley was asked what she would do to make the child's transition from her current placement to her home. She said that she would love Aliyah [sic] and be there for her, as much as possible.

Despite the fact that Ms. Clark-McKinley will show love to Aliyah [sic], the child has bonded with her current foster mother for over a year now. Also, Mr. McKinley's prior involvement with drugs and the selling of drugs may put Aliyah [sic] at risk and in potential danger. Mr. McKinley is now incarcerated as a third time offender on charges of drug possession with the intent to sell. His pattern of unlawful conduct and his involvement with illegal drugs may put Aliyah [sic] in potential danger.

For all these reasons, placement of Aliyah [sic] McCrary with Ms. Clark McKinley is not recommended. Aliyah [sic] needs the stability of a permanent placement. A petition has been filed to terminate Mr. McKinley's parental rights. If Ms. Clark-McKinley is granted custody of the child, she will be returned to Mr. McKinley's care. . . .

An updated service plan dated June 1999 stated that respondent had asked that Ms. Clark be given guardianship over Alliyah, and that he wanted to retain his parental rights. The plan

stated that Clark had owned and lived in her home since August of 1998 and that it was clean and in good condition. The plan stated that the permanency planning goal for both children was adoption, and recommended that the girls be adopted by their current foster parents. It further stated that Alliyah had been in foster care placement since September 15, 1997 and had developed “a very strong attachment to her current foster mother.” At the continuation of the termination hearing held on November 2, 5, and 23, 1999, testimony was taken from Fred Smith of the FIA, Shirron Clark-McKinley, and respondent. That testimony is largely duplicative of the record as summarized above.

At the close of the hearing the trial court reviewed the allegations and the testimony, and noted that respondent’s psychological evaluation was positive to a great extent, that there had been efforts at placing Alliyah in a guardianship with other relatives that had not worked out, and that as to placing Alliyah with Ms. Clark:

She’s employed at one of the charter schools here in our community. Obviously the Court was concerned about Mr. McKinley’s background and how much she knew; however her testimony was she felt he was a nice person and that I don’t think she had much contact with the child. She never really babysat the child and I don’t think the child had ever been left alone with her.

The Court also took the testimony of Mr. McKinley by telephone pursuant to agreement and we obviously were concerned about some of his problems with the law. That was covered. He did indicate through his own testimony, though, that he wanted to become involved in the picture and stay involved. As I understood it . . . his out dates are I think August of 2002 and I believe he was gonna [sic] come up for some type of review in April of 2001. . . .

* * *

So to bottom line it, you’ve got an issue where you’ve got a three year old child, who from the testimony has had limited contact with father. And certainly this Court, if it was to terminate father’s rights, has no idea what would happen afterwards. As I recall the testimony, the child appeared to be doing well at such a young age in foster care. . . .

The Court went back and reviewed the psychological evaluation that was presented. And I don’t doubt that Mr. McKinley is probably of at least average to above average intelligence. He’s 31 years old and he seems to be articulate . . . the final recommendation indicated that – suggested that Mr. McKinley should be able to provide a very appropriate home for the children and that he should be able to be a very good role model and father to the children; however serious concerns should be given to what appeared to be his very unrealistic expectations of children. Therefore, the report says, he does need parenting classes and counseling so that he can overcome these rigid expectations. . . .

. . . he thinks that everything in a house should always be in a – its place and that a house should be spotless. He indicated that he thinks children should never obey (sic), talk back or cause trouble, they should always be quiet and listen.

Now again, that's just a comment that I picked up on there. The only reason I mentioned that is from the presentence report that I quickly glanced over and from Mr. McKinley's own testimony and the other testimony that's come out, I think – and I could stand corrected, but my recollection was that he actually fathered seven children, although I think one died, and I think it was from six different women. . . .

So the problem with this case is if – a couple of things. If Mr. McKinley were much younger and had made one mistake in life, I think anybody, at least I would like to think, would be sensitive enough to realize that people make mistakes and that they should be given certainly a second chance Now, the difficulty here is, from the testimony presented, is that he has fathered seven children . . . And I don't doubt that his present wife appears to be a caring, loving person. But as Mr. Guinn [assistant prosecutor] had argued, this case is about choices. And I think to some degree, as I look at what the Court has to do in making a final decision, when you're dealing with a child of three years of age, certainly some – some consideration has to be given to stability. Now, for the first three years of this child's life there's been minimal contact with the father. And I'm not suggesting . . . that he didn't establish some bonding, but I think in the fairest sense it – it couldn't be described as anything significant The present wife, again, looks like a caring and loving person, but at this particular moment she's not been actively involved in this particular child's life.

Now, his record speaks for itself. And I give Mr. McKinley credit because there were some things that were faxed down to the Court to show that he's trying to improve himself within the prison setting. But as Mr. Guinn had argued, he does not present to this Court a very distinguished record. There was reference made to convictions going back even to I believe it was 1998 [sic 1988] in Colorado; and he had a previous conviction, I think he made reference to, before Judge Yeotis in which he was placed on . . . lifetime probation and then he disappeared for a short period of time before he was extradited back from Chicago, Illinois. . . .

So you've got a 31 year old man who obviously has been involved, unfortunately, in the criminal justice system for about the last ten years. And while we certainly hope and encourage him to keep working hard, it's not a very distinguished record that he brings before this Court

. . . . When somebody is 31 years of age and has, as I recall, three previous felony convictions and two misdemeanors, certainly we always hope that people are gonna [sic] come back and see the light, but it's – it's not the type of thing that, if you were betting person [sic], that you'd put a lot of money on. And again, in terms of providing support for the minor children, one could argue that he's at

least been responsible enough to take part in where these children are gonna be placed. But certainly over the last few years of this child's life there's been very little if any support provided. There has been some support provided for the other children, but as I look at the basic picture here, it's been rather little. With a drug habit it's been difficult for him probably to pay the support that he should have during that period of time. So that becomes a major issue for this Court to consider.

And again, we've got a child that's three years of age. And if the Court's analysis is correct that he's probably not gonna be given serious consideration of getting out [of prison] until 2002, I believe, then he's looking at least another two years of incarceration; that a child that's now three and would possibly be getting school [sic] about the time that he might be released.

. . . And I'm satisfied from the evidence presented from the exhibits and from the testimony offered by the witnesses, including Mr. McKinley, that there's been clear and convincing evidence met that these allegations have been supported, and that is that the Prosecutor and the FIA had met their burden of proof.

Now, as it relates to the best interest of the minor child . . . the fact that there's been little bonding, little of any support at all, and terms of where he's proposing the child be placed, although again the Court did not find that his present wife presented any major problems, she's not had much involvement with this child. And since he's not gonna [sic] be released for at least two years, then I think . . . this case to some degree has to fall on stability. And that child appears to be functioning well now. . . .

But in all fairness to that child and the fact that he's fathered seven other children through six mothers, it does not give the big picture that this is a stable situation where he's maintained long relationships with female partners. . . . If he were to get out and this child could be placed with he and the present wife, it certainly does not look to be a stable situation.

And I'm satisfied, with the child being that young, number one; number two, very little bonding taking place; and number three, very little support and the fact that he's not gonna [sic] be in the picture probably for at least two years, I think it would be in the best interest of this minor child that his rights be terminated.

By order filed November 30, 1999, respondent's parental rights to Alliyah were terminated.

II

We review the trial court's determination that a statutory ground for termination has been proven for clear error. *In re Trejo*, 462 Mich 341, 356; 603 NW2d 787 (2000). The petitioner bears the burden of proving at least one ground for termination by clear and convincing evidence

under MCL 712A.19b(3); MSA 27.3178(598.19b)(3). *Id.* at 355. Subsection 19b(5) of the statute mandates termination once a petitioner establishes at least one statutory ground for termination, unless clear evidence exists, on the whole record, that termination is not in the child's best interests. *Id.* at 354.

There was clear and convincing evidence that respondent was imprisoned such that Alliyah would be deprived of a normal home for a period exceeding two years, that respondent had not provided for Alliyah's proper care and custody, and that there was no reasonable expectation that he would be able to do so within a reasonable time, considering Alliyah's age. MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3). The trial court's decision was not based on respondent's failure to fully comply with the parent-agency agreement alone, nor was it based solely on the fact of respondent's incarceration or criminal status. Rather, as is evident from the court's findings, quoted above, the court considered respondent's involvement with drugs, his history of not remaining with women with whom he had children, his extensive criminal record, his relative absence in Alliyah's life. As to the question of proper care and custody with respondent's new wife, the court determined that the placement was not suitable because three-year-old Alliyah had no relationship with the new wife, and there was no real promise of stability in that relationship, given respondent's track record. We find no error.

We also reject respondent's claim that the trial court erred by terminating his parental rights without specifying the statutory ground or authority for termination. As evidenced by the trial court's statements on the record, quoted above, it clearly determined that termination was warranted under at least subsection (h).

We affirm the termination of respondent's parental rights as to Alliyah. However, the order terminating respondent's parental rights to Malika must be vacated, as the record establishes that respondent is not her biological father, and an appropriate order entered on remand.

Affirmed as to Alliyah. Vacated and remanded for entry of an appropriate order as to Malika.

/s/ Henry William Saad

/s/ Helene N. White

/s/ Joel P. Hoekstra