STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ANTHONY LEE MCFERRIN, JR., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ANTHONY MCFERRIN, SR.,

Respondent-Appellant,

and

CHERYL MCFERRIN,

Respondent.

UNPUBLISHED
January 26, 2001

No. 223692
St. Clair Circuit Court
Family Division
LC No. 98-004494

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Respondent-father ("respondent") appeals as of right a family court order terminating his parental rights to the minor child, Anthony (DOB 1/8/97), pursuant to MCL 712A.19b(3)(c), (g), (h), and (j); MSA 27.3178(598.19b)(3)(c), (g), (h), and (j). We reverse and remand.

I

This Court reviews for clear error a trial court's decision that a statutory basis for termination of parental rights was proven by clear and convincing evidence. MCR 5.974(I); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). The clear error standard requires that a decision be more than "just maybe or probably wrong." *Id*. (citations omitted). 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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

A

We conclude that the family court erred in finding that termination under subsections 3(c), 3(g), 3(h), and 3(j) was established by clear and convincing evidence. At the time child protection proceedings in this case were initiated on July 6, 1998, respondent was incarcerated in prison.[1] The child was removed from the respondent-mother's care at her request because of her drug addiction relapse. At the time of the termination hearing fourteen months later, on September 8, 1999, respondent was still incarcerated, but was scheduled for a parole hearing that same month.

First, regarding respondent's incarceration as a basis of termination, we find that the evidence does not support termination under MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h):

> The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

Although respondent was incarcerated at the time the termination petition was filed, there was no clear and convincing evidence that two-year period provided for under subsection 3(h) would transpire. See *In re Perry*, 193 Mich App 648, 650; 484 NW2d 768 (1992); *In re Neal*, 163 Mich App 522, 527; 414 NW2d 916 (1987) (proper inquiry is whether incarceration will deprive a child of a normal home for two years in the future). Respondent's uncontroverted testimony at the termination hearing established that he was scheduled for a parole hearing in two weeks and that, based on his status and numerical ranking, it was highly probable that he would be paroled. Moreover, as discussed below, the evidence does not support a finding that there was no reasonable expectation that he would be able to provide proper care and custody of the child within a reasonable time.

B

We likewise conclude that there was no clear and convincing evidence to support termination under subsections 3(c), 3(g), and 3(j):

> (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:

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[1] Respondent was sentenced to two to five years in prison on December 18, 1996 for larceny by conversion. Because respondent was incarcerated before the minor child's birth, he has never resided with the child and has not been in a position to assume parenting responsibilities.

(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 child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has 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 child's age.

* * *

(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 child's age.

* * *

(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.

The record reflects that during the period the child was in temporary custody, the Family Independence Agency (FIA) did not undertake services with respondent because of his incarceration. Nevertheless, at the termination hearing, respondent presented evidence of his own efforts to avail himself of rehabilitative services while incarcerated, and his positive achievements. Respondent presented certificates for completing job training in custodial maintenance and in food service sanitation. He also presented certificates for group counseling, blood born pathogens orientation, and a pre-release program, as well as evidence of successful completion of emotions anonymous, alcoholics anonymous, and narcotics anonymous. His caseworker testified that respondent was cooperative and took positive steps to comply with service requirements.

Further, respondent's testimony established that he anticipated being paroled soon and would take the steps necessary to provide proper care and custody for the minor child. In this regard, respondent's caseworker testified that she had not worked with respondent on a parent-agency plan and that, if respondent were released from prison, she probably could determine within six months whether reunification with his child was appropriate. It was undisputed that respondent had been cooperative with the caseworker and involved himself in the proceedings concerning the minor child to the extent required. This evidence does not support a conclusion that there is no reasonable likelihood that the conditions leading to adjudication or other conditions cannot be rectified within a reasonable time, subsection 3(c), or that there is no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time, subsection 3(g).

Nor do we find clear and convincing evidence to support termination under subsection 3(j), i.e., there is a reasonable likelihood that the child will be harmed if returned to the home of the parent. Because respondent was incarcerated before the child was born and has never resided with the child, any evidence of potential harm is tenuous.

Only one statutory ground is required to terminate parental rights. *In re Huisman*, 230 Mich App 372, 384-385; 584 NW2d 349 (1998), overruled in part on other grounds, *In re Trejo*, *supra* at 352-353, n 10. However, we cannot conclude that any of the cited statutory bases for termination was proven by clear and convincing evidence. According to his caseworker's testimony, respondent signed and returned the parent-agency agreement that she mailed to him. It cannot be known whether respondent can or will comply with the agreement until he is afforded an opportunity to do so upon release from incarceration, which according to the evidence was imminent. The trial court clearly erred in terminating respondent's parental rights.

II

In light of our decision reversing the order of termination, we need not address respondent's second issue, i.e., whether the termination is a violation of the separation of powers because the judge who signed the order terminating respondent's parental rights was the chief prosecutor at the time these termination proceedings were initiated. Without commenting on the merits of this issue, we note that any future conflict in these proceedings can readily be avoided by decision before a different judge.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald