STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ROBERT CARL GARDNER, JR., JEWELRE MONAE GARDNER, ESTHERICA ALANA GARDNER and CARLOS GARDNER a/k/a BABY BOY GARDNER, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KENYATTA MONIEK POWELL,

Respondent-Appellant.

UNPUBLISHED
January 26, 2001

No. 225289
Wayne Circuit Court
Family Division
LC No. 97-362173

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ROBERT GARDNER,

Respondent-Appellant.

No. 225290
Wayne Circuit Court
Family Division
LC No. 97-362173

Before: Saad, P.J., and Griffin and Burns*, JJ.

PER CURIAM.

In these consolidated cases, respondents Kenyatta Powell and Robert Gardner appeal as of right the family court's order of November 11, 1999, terminating their parental rights to four minor children pursuant to MCL 712A.19b(3)(a)(ii); MSA 27.3178 (598.19b)(3)(a)(ii); MCL

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

712A.19b(3)(c)(i); MSA 27.3178 (598.19b)(3)(c)(i), MCL 712A.19b(3)(g); MSA 27.3178 (598.19b)(3)(g), and MCL 712A.19b(3)(j); MSA 27.3178 (598.19b)(3)(j). We affirm.

In a termination hearing, the petitioner bears the burden of proving by clear and convincing evidence at least one statutory basis for termination. MCR 5.974(F)(3); *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once a statutory basis for termination is shown, the trial court shall terminate parental rights unless it finds that the termination of those rights is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *Trejo, supra*, 462 Mich 354.

This Court reviews a trial court's termination decision for clear error. MCR 5.974(I); *Trejo, supra*, 462 Mich 356-357. A decision is clearly erroneous if "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989), quoting *In re Riffe*, 147 Mich App 658, 671; 382 NW2d 842 (1985).

Powell claims there was insufficient evidence to justify the termination of her parental rights. We disagree.

The court found that FIA proved by clear and convincing evidence that Powell's parental rights should be terminated pursuant to the following provisions:

MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i):

> (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 child's age.

MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(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.

MCL 712A.19b(3)(j); MSA 27.3178(598.19b)(3)(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 condition that led to these proceedings was Powell's crack cocaine use and her consequent abandonment of the children. On December 21, 1997, the children were taken into

protective custody after Powell left them for two days with a non-relative, Lynette Washington. Washington did not know Powell's whereabouts and Powell admitted that she was using crack cocaine. Powell also stated that she and Gardner were evicted from their home for failure to pay rent and that someone stole all their furniture. Based on Powell's admissions at the trial hearing before Referee Peter Schummer, the court took temporary jurisdiction over the children on February 25, 1998.

Following the hearing, Powell agreed to comply with an agency agreement to (1) undergo weekly drug screens, (2) obtain a drug and alcohol assessment, (3) undergo substance abuse treatment, (4) take parenting classes, (5) visit and behave appropriately with the children, (6) obtain and maintain suitable housing, (7) obtain and maintain a legal source of income, and (8) cooperate with the FIA caseworker.

Powell failed to fulfill the terms of the agency agreement during the pendency of this case. After the children were removed in December 1997, Powell did not appear for a drug assessment until April 1999. Further, Powell did not enter a drug treatment program until several months after her first referral and, although she completed one program, she soon relapsed and never completed further treatment. Powell completed a parenting class as of April 1999. However, she did not obtain suitable housing until FIA assisted her in finding a home on May 5, 1999, and she failed to maintain a suitable home after she moved out of that house less than two months later.

Powell asserted that she obtained a legal source of income, but she provided no verification of employment to FIA. Powell produced only one pay stub during trial to show she was employed at the time of the permanent termination hearing. Although Powell visited her children while they were removed from her custody, the FIA caseworker received reports from the childrens' foster parents that Powell made unrealistic promises to the children regarding how soon they would be returned to her. According to the caretakers, Powell's promises caused behavioral and disciplinary problems in the children because they constantly anticipated their immediate return to their mother.

Accordingly, the evidence showed that Powell did not uphold her part of the agency agreement, despite consistent help from FIA. Contrary to Powell's argument on appeal, FIA made several referrals for drug assessments and treatment programs to help her overcome her substance abuse problem. On March 24, 1998, FIA referred Powell for a drug assessment and Powell failed to appear. Instead, Powell voluntarily entered a four-week program on August 3, 1998, which she completed on September 4, 1998. Although the agency agreement required her to attend follow-up treatment, Powell attended only one Narcotics Anonymous/Alcoholic Anonymous meeting on September 26, 1998. Powell disputed this at trial and claimed that she attended NA/AA meetings two or three times per month. However, FIA records did not contain documentation to support this claim. Furthermore, the FIA caseworker testified that, of forty required drug screens in 1998, Powell submitted to eleven, three of which revealed cocaine in her system. Plaintiff claims that the required number of screens was much lower, but did not dispute at trial that she failed three of the eleven tests on record.

After again testing positive for cocaine and alcohol, FIA referred Powell to Black Family Development for drug treatment on March 19, 1999, and referred Powell for a drug assessment

on April 22, 1999. Powell failed to appear for treatment, but appeared for the assessment and was referred to an outpatient drug treatment program at Vantage Point, which she began on May 14, 1999. Powell did not attend sessions as scheduled and was terminated from the program on June 18, 1999. During 1999, the FIA caseworker estimated that Powell was required to submit to thirty or forty drug screens, but complied with only sixteen, two of which were positive for cocaine. Again, Powell disputed the number of required screens and also disputed one of the positive results.

During the spring of 1999, Powell completed a parenting program after failing to attend classes during the fall of 1998, and, throughout this adjudication, she regularly visited with her children. However, Powell lived at seven different addresses, all but one of which were unsuitable for her children. Powell did not start working until May 5, 1999, then lost or quit her job on May 30, 1999. Moreover, Powell did not provide any documentation to FIA to substantiate her employment.

FIA helped Powell obtain suitable housing for her children and, based on her partial compliance with the agency agreement, the court returned the children to Powell's custody on July 1, 1999. On July 13, 1999, a Family First worker visited Powell's home and found three of the children sitting on the porch, locked out of the house. Powell left the fourth child, Robert, at a playmate's house and he was returned to the childrens' grandmother on July 14, 1999. The children were again taken into custody and Powell's whereabouts remained unknown to the FIA caseworker until July 21, 1999. At trial, Powell claimed she left the children with a neighbor while visiting a girlfriend. However, Powell's boyfriend and grandmother told the caseworker that Powell was at a "drug house" during her absence.

As noted above, Powell tested positive for cocaine on July 6, 1999, while she had custody of the children.[1] Thereafter, Powell told her FIA caseworker that she enrolled in an Eastwood drug treatment program on July 25, 1999, and she testified at trial that she was continuing her treatment. However, FIA did not receive any documentation or verification of her enrollment or progress in that program.

FIA presented clear and convincing evidence that the condition that initiated these proceedings continued to exist, with no reasonable likelihood that the conditions would be rectified within a reasonable time. Despite some initial success and consistent referrals for further treatment, between December 1997 to July 1999, Powell did not stop using cocaine. Any treatment Powell claims she underwent after that time has not been verified with FIA per the agency agreement. Powell used cocaine after the return of her children and again abandoned them under strikingly similar circumstances as the incident that initiated these proceedings.

Although the petitioner need only prove one basis for termination by clear and convincing evidence, the court also properly terminated Powell's parental rights pursuant to 19b(3)(g) and

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[1] According to the FIA caseworker, the children were not immediately removed from Powell's care after the positive screen because FIA did not receive the results of the drug test until one or two weeks after Powell took it.

19b(3)(j). *In re Trejo Minors, supra*, 462 Mich 344, 355. Contrary to the agency agreement, Powell did not maintain adequate housing for the children and provided no verification of income from legal employment. Although Powell completed parenting classes, it is apparent that the program had little effect since she again abandoned her children after having regained custody for only two weeks. Although Powell visited her children during most of these proceedings, her continued drug use, inability to provide a suitable home and repeated abandonment place the minor children at significant risk of harm and evidence her inability to provide for their care and custody.

In summary, the termination of Powell's parental rights on the aforementioned statutory grounds was supported by clear and convincing evidence and we find no clear error in the court's decision. Termination is mandatory following the trial court's finding one or more statutory bases for termination, unless the court finds that termination is not in the best interests of the children. Given Powell's continued drug use and abandonment, the evidence clearly showed that termination was in the best interests of the children.

Like Powell, respondent Gardner admitted to using cocaine at the trial hearing on February 25, 1998, and he thereafter entered an agreement with FIA to submit to weekly drug screens, undergo drug treatment, attend parenting classes, obtain suitable housing and maintain a legal income.

Gardner failed to comply with the agency agreement. He did not submit to a drug and alcohol assessment or to regular, weekly drug screens. Gardner did not participate in a drug treatment program and several of the drug screens Gardner did submit revealed cocaine in his system. The record reflects that Gardner also had an alcohol abuse problem and, according to the referee, he arrived to testify at the permanent termination hearing "absolutely reeking of alcohol." He clearly failed to fulfill the agreement with regard to substance abuse treatment.

Although Gardner was employed by Mackie Automotive Systems for approximately a year and a half, he did not obtain or maintain suitable housing for the family during the pendency of this case. Gardner claimed he earned a steady income, but provided no documentation of his employment and showed no interest in finding a home for the children. Moreover, Gardner did not attend parenting classes as the agreement required and, according to the FIA caseworker, Gardner did not maintain contact with the agency and stopped visiting the children altogether after December 1998. Accordingly, Gardner failed to comply with any aspect of the agency agreement.

The basis of Gardner's appeal is that the court's suspension of his parenting time for no violated MCL 712A.13a(11); MSA 27.3178(598.13a)(11) and contributed to the termination of his parental rights. MCL 712A.13a(11); MSA 27.3178(598.13a)(11) provides:

> If a juvenile is removed from his or her home, the court shall permit the juvenile's parent to have frequent parenting time with the juvenile. However, if parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time. The court may suspend parenting time while the psychological evaluation or counseling is conducted.

The children were placed in Gardner's custody at the trial hearing on February 25, 1998. At a review hearing on May 22, 1998, the referee learned that Gardner tested positive for cocaine and did not attend parenting classes. The referee warned Gardner that the court would remove the children from his custody if he continued to test positive for cocaine. On September 9, 1998, the referee learned that the children were removed from Gardner's custody after another drug screen showed cocaine in his system. Despite several referrals, Gardner did not enter drug treatment and failed to regularly submit to drug screens. The referee stated that the court would suspend Gardner's visitation with the children if he did not enter a substance abuse program.

Gardner claims that the court suspended his visitation with the children on December 3, 1998, based on his continued noncompliance. This claim is not supported by the record. Although Gardner failed to enter a treatment program or submit regular urine samples, the referee merely ordered that any visitations take place at the agency under FIA supervision. According to the FIA caseworker, Gardner never visited the children at the agency despite his right to do so.

The trial court did suspend Gardner's visitation rights on June 1, 1999, because he did not comply with any part of the agency agreement, but was visiting the children without required supervision while they were staying at a relative's house. Gardner claims the court's suspension of his visitation violated the statute because the court did not order psychological evaluations or counseling for the children.

As FIA correctly notes in its appeal brief, Gardner did not appeal or seek review of the court's suspension under the statutory provisions MCR 5.9991(B)(3), MCR 5.991(C), or MCR 7.101(B). Accordingly, Gardner's claim is unpreserved.

While the statute requires the court to order a psychological examination once it suspends parenting time, the court had ample reason to conclude that Gardner's unauthorized contact with the children might be harmful to them. The court ordered the suspension because Gardner continued to use cocaine, never obtained treatment, and violated a court order requiring that visitation take place at FIA with agency supervision. Moreover, the court took this action after months of urging Gardner to get help for his drug addiction and based on his continued use.

Furthermore, the court's termination decision was not affected by its suspension of Gardner's parenting time. Based on Gardner's complete failure to fulfill any aspect of the agency agreement and his continued substance abuse, clear and convincing evidence supported the termination of his parental rights. Gardner agreed to seek treatment for his addiction at the inception of this case and he did not complete any treatment program between December 1997 and October 1999. The problems that initiated these proceedings continued to exist even during the permanent termination hearing when Gardner testified while smelling strongly of alcohol. Moreover, based on his refusal to participate in a treatment program, there was clear and convincing evidence that Gardner's drug problems would not improve within a reasonable period of time. MCL 712A.19b(3)(c)(i); MSA 27.3178 (598.19b)(3)(c)(i).

During the case, Gardner made no effort to plan for the childrens' care and refused to stay in contact with the FIA caseworker. Gardner's drug habit, unsuitable living arrangements and failure to participate in treatment or parenting classes clearly demonstrate an inability and an

unwillingness to provide care or custody for the children. MCL 712A.19b(3)(g); MSA 27.3178 (598.19b)(3)(g). These facts also constitute clear and convincing evidence that there is a reasonable likelihood that the children would be harmed if placed in Gardner's care because of his continued drug use and unsuitable housing. MCL 712A.19b(3)(j); MSA 27.3178 (598.19b)(3)(j).

According to the FIA caseworker, Gardner stopped visiting the children altogether in December 1998. He did not attend parenting time at FIA for six months prior to the final suspension of those visits.[2] Moreover, Gardner did not contact the FIA caseworker to inquire about the health or welfare of the children and no proof showed that he provided them any support. Accordingly, there was clear and convincing evidence that he abandoned the children for more than ninety-one days. MCL 712A.19b(3)(a)(ii); MSA 27.3178 (598.19b)(3)(a)(ii).

Therefore, were we to find that the court erred by failing to order psychological testing of the children after the suspension of his parenting time, any error was harmless and had no affect on the court's termination decision. The termination of Gardner's parental rights was supported by clear and convincing evidence pursuant to the four statutory grounds discussed above. Moreover, no evidence showed that termination would not be in the best interests of the children and, therefore, termination was proper.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns

[2] We also find Gardner's claim that the suspension of visitation "resulted in the breakdown of the bond between parent and child" wholly disingenuous because, contrary to the FIA records, Gardner claimed at trial that he visited the children "many times," despite the order prohibiting it.