STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CORNELIA FOSTER, ROBERT PEARSON, and GABRIELLE PEARSON, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CANDACE FOSTER,

Respondent-Appellant.

UNPUBLISHED
March 16, 2001

No. 227381
Oakland Circuit Court
Family Division
LC No. 98-612179-NA

Before: K. F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Respondent-appellant Candace Foster appeals as of right from an order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(g), (h) and (j); MSA 27.3178(598.19b)(3)(g), (h) and (j). We affirm.

When respondent became incarcerated in 1998, she arranged for her mother, Virginia Witherspoon, to care for the three minor children. Although Witherspoon obtained a guardianship over the children, she subsequently became incarcerated. In 1998, the FIA filed a petition for temporary custody of the children, alleging that Witherspoon was not an appropriate caregiver. The trial court granted the FIA's petition for temporary custody, placed the children in foster care, and terminated Witherspoon's guardianship. Because respondent remained incarcerated and because there were no other relatives to care for the children, the FIA filed a petition requesting termination of respondent's parental rights.

The FIA submitted the original petition for termination of respondent's parental rights on November 18, 1999, and submitted a supplemental petition on December 20, 1999. At the pretrial hearing, respondent stood mute to the petition's allegations. The trial court then conducted a hearing on February 15, 2000, at which the FIA presented testimony and documentary evidence. At the conclusion of that hearing, the trial court held that the FIA had presented clear and convincing evidence supporting a statutory ground for termination. After conducting a separate best interest hearing, the trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g), (h) and (j); MSA 27.3178(598.19b)(3)(g), (h) and (j).

In a termination hearing, the petitioner bears the burden of demonstrating a statutory basis for termination, by clear and convincing evidence. MCR 5.974(F)(3). The petitioner need only establish one statutory ground for termination. *In re Trejo Minors*, 462 Mich 341, 360; 612 NW2d 407 (2000). Once that statutory basis for termination is shown, the trial court shall terminate parental rights unless it finds that doing so is clearly not in the child's best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); MCR 5.974(F)(3); *In re Trejo Minors*, *supra* at 344. This Court reviews for clear error the trial court's decision that a ground for termination has been proven by clear and convincing evidence. *Id*. at 356-357; MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Appellant argues that the Michigan Court Rules permitted the trial court to consider only legally admissible evidence when deciding to terminate her parental rights. We agree. Once a trial court exercises jurisdiction over a child, it conducts a dispositional hearing "to determine measures to be taken by the court with respect to the child." MCR 5.973. As a general rule, the trial court may consider all relevant evidence at the dispositional hearing, even if it is not legally admissible. MCR 5.973(A)(4)(a). However, if the trial court elects to terminate a respondent's parental rights at the initial dispositional hearing, it may do so only upon the basis of "clear and convincing legally admissible evidence." MCR 5.974(D)(3). We conclude that the trial court terminated respondent's parental rights at the initial dispositional hearing, and was therefore permitted to consider only legally admissible evidence.

Appellant next argues that the trial court based its termination decision on evidence that was not legally admissible, and that petitioner failed to introduce clear and convincing, legally admissible evidence that a statutory basis for termination existed. The thrust of respondent's argument is that the trial court erroneously took judicial notice of the court file. We note that respondent's attorney did not object below to petitioner's request for the trial court to take judicial notice of the court file. Therefore, the admissibility of the court file is not properly preserved for appeal. *In re King*, 186 Mich App 458, 465; 465 NW2d 1 (1990). Nevertheless, we conclude that any error which may have been committed by the trial court when it took judicial notice of the court file was harmless because the legally admissible evidence that was presented did support termination of respondent's parental rights.

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(g), (h) and (j); MSA 27.3178(598.19b)(3)(g), (h) and (j). Section 19b(3)(h) allows a trial court to terminate a respondent's parental rights if:

> 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.

Respondent argues that the requirements of § 19b(3)(h) were not satisfied because she will most likely be released on parole in September, 2001, and because that early release date is less than two years from the filing of the termination petition. We disagree with respondent's reasoning. The statute does not require a parent to be imprisoned for a period of two years following the filing of a termination petition. Rather, the statute requires that the respondent be

imprisoned for "such a period" of time that the children "will be deprived of a normal home for a period exceeding 2 years." MCL 712A.19b(3)(h); MSA 27.3178(598.19b)(3)(h). Petitioner's trial exhibits demonstrate that respondent became incarcerated no later than September, 1998. Although Witherspoon acted as the children's guardian for a short period of time, the trial court terminated that guardianship on December 29, 1998. The children have resided in foster care since that time, and the evidence supports a finding that they have already been deprived of a normal home for a period exceeding two years. Further, even if respondent gains release from prison in September, 2001, which is not guaranteed, the children will have been deprived of a normal home for a period of almost three years. Therefore, the evidence supports a finding that the requirements of § 19b(3)(h) have been satisfied.

The trial court also relied on § 19b(3)(g) to terminate respondent's parental rights. That subsection allows the trial court to terminate a respondent's parental rights if:

> 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.

Vicki Monroe, the FIA case worker, testified at the dispositional hearing that respondent made only one plan for the care and custody of her children while she was incarcerated: she wanted her mother, Virginia Witherspoon, to care for the children. The trial court's decision to terminate Witherspoon's guardianship and place the children in foster care in December, 1998, demonstrated that respondent's plan was not appropriate. Further, Monroe testified that she spoke to respondent while in prison and that respondent could offer no plan for the children other than Witherspoon's care. This legally admissible evidence supports a finding that the requirements of § 19b(3)(g) have been satisfied. On this record, we cannot conclude that the trial court clearly erred in holding that the petitioner had proven at least one statutory basis for termination of respondent's parental rights.

Given our conclusion that the requirements of §§ 19b(3)(g) and (h) were established by clear and convincing evidence, we need not address the third statutory ground on which the trial court relied to terminate respondent's parental rights. *In re Trejo Minors*, *supra* at 360.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter