STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JORDAN JUNIUS ASHTON BURR, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JEREMY BURR,

Respondent-Appellant,

and

MICHELLE MOHAN,

Respondent.

UNPUBLISHED
October 19, 2001

No. 230764
Oakland Circuit Court
Family Division
LC No. 98-610538-NA

In the Matter of JORDAN JUNIUS ASHTON BURR, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MICHELLE MOHAN,

Respondent-Appellant,

and

JEREMY BURR,

Respondent.

No. 231033
Oakland Circuit Court
Family Division
LC No. 98-610538-NA

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Respondents appeal as of right from an order terminating their parental rights to the minor child. The trial court terminated the parental rights of respondent Jeremy Burr ("respondent-father") pursuant to MCL 712A.19b(3)(c)(*i*), (g) and (h),[1] and terminated the parental rights of respondent Michelle Mohan ("respondent-mother") pursuant to MCL 712A.19b(3)(a)(*ii)*, (c)(*i*), (c)(*ii*), (g) and (h). We affirm.

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Respondent-father contends that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We review a trial court's findings of fact in a parental termination case under a clearly erroneous standard. MCR 5.974(I); see *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A finding is clearly erroneous when the reviewing court "is left with a definite and firm conviction that a mistake has been made." *Id.* The burden of proof is on the petitioner to prove a statutory ground for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once that burden is met, pursuant to MCL 712A.19b(5), "the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *Id.* at 354.

We agree with respondent-father's contention that the trial court erred by terminating his parental rights pursuant to § 19b(3)(c)(*i*). This subsection provides that parental rights may be terminated where:

> 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)(c)(*i*).]

Here, the record indicates that the sole "condition" concerning the father that led to the adjudication was his incarceration.[2] However, at the time of the hearing, respondent-father was

[1] Although respondent-father also asserts that the trial court erred in terminating his parental rights under § 19b(3)(c)(*ii*), the record does not indicate that the court terminated his parental rights under that subsection.

[2] The petition stated that both parents were incarcerated and that the maternal grandmother was no longer able to care for the minor child. The petition further stated that the termination of respondent-father's parental rights was requested because he would be incarcerated for more than two years. However, respondent-father was released from prison approximately 16 months after the petition was filed.

no longer incarcerated. Because the "condition" of defendant's incarceration no longer existed, we believe that the trial court clearly erred by terminating respondent-father's parental rights pursuant to MCL 712A.19b(c)(*i*). Similarly, we agree with respondent-father that the evidence did not support termination under § 19b(3)(h) because this ground looks to future incarceration, rather than past incarceration, and respondent-father was not facing future incarceration. 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).

Respondent-father also contends that the court erred in terminating his parental rights under § 19b(3)(g). This subsection provides that parental rights may be terminated where "[t]he 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." Here, the record clearly suggests that respondent-father has made significant progress since his release from prison, and that he worked to develop a relationship with his son. Nevertheless, we are also troubled by respondent-father's reluctance to participate in individual anger management counseling. While there was a factual dispute regarding his history of alleged domestic abuse, participating in anger management counseling would have demonstrated that his primary concern was the welfare of the minor child—even if the counseling was ultimately deemed to be unnecessary. The debate regarding the scope and method of counseling undermined respondent-father's progress, and unnecessarily delayed the potential reunification.

Moreover, by insisting that he would not benefit from individual anger management counseling, respondent-father did not give due deference to the opinions of authority figures, thereby calling into question respondent-father's progress towards correcting his documented anti-social behavior. In addition, at the time of the hearing, respondent-father had been absent from the minor child's life for 847 out of 1847 days, or approximately 46% of the minor child's life. In light of the minor child's age and the duration of respondent-father's absence during his formative years, we are not persuaded that there was a reasonable expectation that respondent-father could provide proper care and custody within a reasonable time considering the child's age. In other words, it is not clear that respondent-father would have been able to address his own issues in sufficient time to provide proper care for the minor child within a reasonable time. Indeed, the minor child needed a permanent, stable environment as soon as possible. Therefore, we conclude that the trial court did not clearly err by terminating respondent-father's parental rights pursuant to § 19b(3)(g).

Respondent-father contends that the trial court erred by admitting evidence that allowed the court to compare the child's foster home to respondent-father's home. Generally, we review a trial court's decision to admit evidence for an abuse of discretion. *In re Hill*, 221 Mich App 683, 696; 562 NW2d 254 (1997). The evidence in question, a report addressing a psychological evaluation of the child, included statements by the child expressing a preference to remain in his foster home. Respondent-father correctly argues that it is improper to compare a foster home to the legal parent's home to determine the existence of a statutory ground for termination. *In re Hamlet (After Remand)*, 225 Mich App 505, 520; 571 NW2d 750 (1997), overruled on other grounds in *In re Trejo, supra* at 353, n 10. However, the psychologist who evaluated the minor child opined that reuniting the child with respondent-father would be difficult and disruptive to

the child. The psychologist's report opined that it would be in the child's best interests to discontinue reunification efforts, and that the child had made significant gains during the past two years. We are confident that the trial court was aware of the limited purpose for which the evidence was admissible—whether termination of respondent's parental rights was clearly not in the child's best interests—and there is no indication that the trial court considered the report when applying the statutory grounds. Accordingly, we conclude that the court did not abuse its discretion in admitting this evidence.

Finally, respondent-father contends that the trial court erred in denying his motion for a directed verdict at the close of petitioner's case. Because this was a bench trial, respondent-father's motion is treated as a motion for involuntary dismissal, MCR 2.504(B)(2). "[I]nvoluntary dismissal of an action is appropriate where the trial court, when sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), quoting MCR 2.504(B)(2). Here, there was sufficient evidence that petitioner was entitled to the relief requested; indeed, we have already affirmed the trial court's termination of respondent-father's parental rights pursuant to MCL 712A.19b(3)(g).[3] Consequently, we conclude that the trial court did not err by terminating respondent-father's parental rights.

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Respondent-mother contends that the trial court erred in finding that the statutory grounds for terminating her parental rights were established, as well. As noted above, respondent-mother's parental rights were terminated pursuant to MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (c)(*ii*), (g) and (h).[4]

In contrast with respondent-father's argument regarding the applicability of § 19b(3)(c)(i), respondent-mother's parental rights were properly terminated because she was incarcerated at the time of the termination hearing. Again, it was respondents' incarcerations that led to petitioner's initial involvement in the minor child's care. Moreover, between respondent-mother's incarcerations, there was little evidence of any meaningful progress on the goals of her treatment plan. For these same reasons, we conclude that termination was also proper under § 19b(3)(g).

Respondent-mother also challenges the trial court's termination of her parental rights pursuant to § 19b(3)(a)(*ii*). MCL 712A.19b(3)(a)(*ii*) provides that parental rights may be

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[3] Contrary to respondent-father's argument, the trial court did not err in taking judicial notice of the file, since child protection proceedings are viewed as one continuous proceeding and evidence admitted at a prior hearing is to be considered at all subsequent hearings. *In the Matter of LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973).

[4] Respondent-mother did not address the trial court's ruling with respect to subsection (c)(*ii*).

terminated where a parent "has deserted the child for 91 or more days and has not sought custody of the child during that period." Here, the evidence showed that respondent-mother failed to even visit or contact the minor child between May 24, 1999, and August 27, 1999, the date of her incarceration. Because this ninety-five day period of desertion exceeded the ninety-one day requirement of MCL 712A.19b(3)(a)(*ii*), we do not believe that the trial court erred by terminating respondent-mother's parental rights under this subsection.

Respondent-mother also contends that her parental rights should not have been terminated under § 19b(3)(h), because she expected to be released from prison in less than two years. Indeed, MCL 712A.19b(3)(h) provides that parental rights may be terminated where: "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years . . . ." Here, the record reveals that respondent-mother's earliest release date was within two years of the termination proceeding. Accordingly, we agree with respondent-mother's contention that the trial court clearly erred by terminating her parental rights under this subsection. Nevertheless, because other statutory grounds for termination were established, this error does not warrant reversal. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Finally, in light of the above findings, we disagree with respondent-mother's contention that the evidence showed that termination of her parental rights was clearly not in the minor child's best interests. MCL 712A.19b(5); *In re Trejo, supra* at 354. Consequently, we conclude that the trial court correctly terminated her parental rights.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens