

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of R.S., JR., JES.S., D.S., A.S. and  
JER.S., Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RANDY SMITH,

Respondent-Appellant,

and

TERESA SMITH,

Respondent.

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In the Matter of J.D., Minor.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARK OXENDALE,

Respondent-Appellant,

and

TERESA SMITH,

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UNPUBLISHED  
November 16, 2001

No. 230661  
Ionia Circuit Court  
Family Division  
LC No. 99-000072-NA

No. 230710  
LC No. 99-000077-NA

Respondent.

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In the Matter of R.S., JR., JES.S., D.S., A.S.,  
JER.S., and J.D., Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

No. 231371  
LC Nos. 99-000072-NA;  
99-000077-NA

TERESA SMITH,

Respondent-Appellant,

and

RANDY SMITH and MARK OXENDALE,

Respondents.

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Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Following a contested hearing, the family court terminated the parental rights of respondents Randy Smith and Teresa Smith to their five children, R.S., J.R., Jes.S., D.S., A.S. and Jer.S., pursuant to MCL 712A.19b(3)(b)(i), (b)(ii),<sup>1</sup> (c)(i), (c)(ii), (g) and (j), and terminated the parental rights of Teresa Smith and Mark Oxendale to their child, J.D., pursuant to MCL 712A.19b(3)(g) and (j). Respondents Randy Smith and Mark Oxendale each appeal as of right, and respondent Teresa Smith appeals by delayed leave granted. The appeals have been consolidated for our consideration. We affirm.

Docket No. 230661

Respondent Randy Smith argues that the family court clearly erred in finding that termination of his parental rights was in the children's best interests. We disagree. Once the petitioner satisfies its burden of proving a statutory ground for termination by clear and

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<sup>1</sup> Only Teresa Smith's parental rights were terminated under § 19b(3)(b)(ii).

convincing evidence, "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." *In re Trejo Minors*, 462 Mich 341, 354; 612 NW2d 407 (2000). We review a trial court's finding regarding the child's best interests for clear error. *Id.* at 364. "A finding is clearly erroneous where the reviewing court is left with a firm and definite conviction that a mistake has been made." *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993).

The family court found that termination of Randy Smith's parental rights was in the children's best interests due to a long history of physical abuse and the little progress that respondent had made in counseling, as well as the amount of time it would take before the court could be satisfied that the children would be safe in his custody. The family court did recognize that some progress was made after petitioner intervened, but it mostly occurred later in the proceedings. Further, respondent failed to participate in a follow-up psychological evaluation to assess the progress made. Viewed as a whole, we believe the evidence does not establish that termination of respondent Randy Smith's parental rights was not in the best interests of the minor children.

Docket No. 230710

Respondent Oxendale first argues that the family court erred in finding that the statutory grounds for termination were established by clear and convincing evidence, and in finding that termination of his parental rights was in his child's best interests. We disagree.

The family court terminated respondent Oxendale's parental rights under §§ 19b(3)(g) and (j). As the family court observed, the evidence showed that respondent Oxendale had not protected his child when she lived with the Smiths, even though he was aware that there was physical abuse in the home and that there was an unreasonable health risk due to the presence of lead paint. Respondent Oxendale also maintained a relationship with the Smiths throughout these proceedings, which justifiably caused the court to question whether he could protect the child from the Smiths in the future. Furthermore, while respondent Oxendale sought custody of his daughter, he unnecessarily and unreasonably delayed making the necessary changes to make his home safe for the child, thereby negatively reflecting on his motivation and willingness to care for the child. We conclude that the family court's findings with regard to the statutory grounds for termination are not clearly erroneous and sufficiently establish that the grounds were proven by clear and convincing evidence. *In re Trejo, supra* at 358.

Regarding the child's best interests, the evidence showed that respondent's bond with the child did improve during the course of the proceedings. Nonetheless, the evidence still raised doubts concerning respondent's commitment to the child over the long term, and whether he was prepared to care for a small child on his own. Further, the evidence indicated that the child had behavioral problems and that respondent would require extensive assistance to ensure that he could handle the day-to-day responsibilities involved. Considering these facts, along with the child's young age and the lack of stability in her life up to this point, we believe the evidence does not establish that termination of respondent Oxendale's parental rights was not in the best interests of the minor child.

Respondent Oxendale also argues that his right to due process was violated because the family court did not advise him of his right to counsel until the time of the permanency planning hearing. We disagree. The record shows that the trial court followed the dictates of the court rules. MCR 5.915(B)(1) states:

(a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that

(i) the respondent has the right to a court-appointed attorney if the respondent is financially unable to retain counsel, and,

(ii) if the respondent is not represented by an attorney, that the respondent may request and receive a court-appointed attorney at any later hearing.

MCR 5.903(C)(8) defines a respondent in child protective proceedings to mean "the parent who is alleged to have committed an offense against a child or as defined in MCR 5.974(B)." Allegations were not raised against respondent Oxendale until the amended petition was filed in September 2000. MCR 5.974 applies when termination of parental rights is sought. Pursuant to this court rule, respondent includes "the father of the child as defined by MCR 5.903(A)(4)." MCR 5.974(B)(2). Because respondent Oxendale was the legal father of J.D., MCR 5.903(4)(d)(i), the court was required to inform him of his right to counsel once petitioner sought termination of his parental rights. Respondent was informed of this right, and counsel was appointed to represent him.

Respondent Oxendale nonetheless argues that the court's decision not to appoint counsel earlier in the proceedings violated his right to due process. Contrary to what respondent suggests, the Fourteenth Amendment does not require that counsel be appointed for a respondent in every neglect or parental rights termination proceeding. *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18, 31-32; 101 S Ct 2153; 68 L Ed 2d 640 (1981); *In the Matter of Perry*, 148 Mich App 601, 615-616; 385 NW2d 287 (1986). Further, "[t]he process that is due under the Fourteenth Amendment is not susceptible to precise definition and, therefore, must be determined on a case-by-case basis . . . ." *In the Matter of Perry, supra* at 615.

Here, respondent was not charged with committing any offense against the child, and until petitioner began to proceed towards termination of respondent's parental rights, respondent was not at risk of losing his parental rights to the child. Additionally, respondent was allowed to participate in the proceedings, and has not shown that, had an attorney been appointed earlier, there is a reasonable likelihood that the result of the case would have been different. Accordingly, the family court did not err in terminating respondent Oxendale's parental rights to his child.

#### Docket No. 231371

Respondent Teresa Smith argues that the family court erred in terminating her parental rights to her six children. We disagree. The evidence adduced below established a long history of physical abuse of the children, which respondent either condoned or sometimes participated

in. While respondent showed some progress in addressing the underlying problems that brought her family to the attention of petitioner, such progress was insufficient to assure the children's safety and to meet their emotional needs. We also note, these changes did not occur until the end of the proceedings, when termination of her parental rights was imminent. It is also significant that respondent refused to participate in a follow-up psychological examination to assess whether any progress was made during the short period of time she was in counseling. The children could not wait any longer to see whether respondent would be able to progress to the point where it would be safe for the children to return to her custody.

Based on this record, we conclude that the family court did not clearly err in finding that the statutory grounds for termination had been established. Further, the record does not show that termination of respondent Teresa Smith's parental rights was not in the best interests of the minor children.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter