STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DWP, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

WILLIAM W. HUFF,

Respondent-Appellant.

UNPUBLISHED
January 18, 2002

No. 234518
Grand Traverse Circuit Court
Family Division
LC No. 01-000017-NA

Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

PER CURIAM.

Respondent appeals as of right from an April 10, 2001 order terminating his parental rights pursuant to MCL 712A.19b(3)(b)(i), (3)(g), (3)(j) and (3)(k)(iii). We affirm.

I. Basic Facts and Procedural History

While attending "boot camp" in lieu of prison upon a conviction for embezzlement and false report of a felony, respondent advised his superiors that he attempted to kill his five month old infant by smothering the child until he quit breathing. Respondent also advised that he had recurring thoughts about harming his son and for this reason he feared that upon his return home, he would act upon these urges. As a result of this revelation, the Michigan State Police conducted an investigation. Respondent admitted to police officers during the investigation that he attempted to kill his son "just the one time." Respondent then refused to speak with the police officers any further indicating that he wanted legal representation. However, respondent thereafter stated, "I don't know how you found out, I just told about it so I could get help for my problem." Thereafter, respondent was charged with criminal child abuse, first degree. Ultimately, he pled guilty to assault with intent to commit great bodily harm and was sentenced to three to ten years' imprisonment.

While the criminal investigation was ongoing, the FIA filed a petition requesting the court to take temporary jurisdiction over the minor child and to terminate respondent's parental rights. In support, the petition cited respondent's statements to boot camp officials. In addition, the petition cited information obtained as a result of the police officers' interview with Anique Puckett, the child's mother. Ms. Puckett stated that respondent admitted that when the child was

six months old, he "smacked" the child because he was crying uncontrollably. She also stated that respondent was an aggressive person and that he struck her on a number of occasions. Further, she advised the police that respondent would chase her around the room, restrain her and attempt to suffocate her by placing his hand over her mouth while simultaneously pinching her nose. While in this position, he told her that he did not want to be with her or with the baby.

On April 9, 2001, the termination case proceeded to trial.[1] Testimony adduced at trial established that respondent is an aggressive individual and has difficulty managing his anger. Testimony demonstrated that respondent struck the infant when he was only six months old because he cried uncontrollably and respondent's efforts to otherwise console him failed. Respondent admitted that he has an anger management problem and also admitted that he attempted to smother his son with his hand until the child stopped breathing. As a result of respondent's conduct, the child did stop breathing, his skin turned gray from lack of oxygen, and the infant was transported by ambulance to the hospital for emergent care.

Child protective services worker Rhonda Richards testified that in her opinion, there does not exist a reasonable likelihood that a meaningful attachment between respondent and child will develop following respondent's release from prison. Although Ms. Richards admitted that a two to three year absence from a child's life does not necessarily sound the "death knell" for the development of parent/child relationship, she nevertheless testified that there is a substantive difference between a two or three year absence for military service for instance, and a two or three year absence for incarceration resulting from an attempt to suffocate one's child. Accordingly, Ms. Richards opined that termination of respondent's parental rights would serve the child's best interests.

To the contrary, Ms. Puckett testified that from November of 1999 until May of 2000, when respondent departed for boot camp, the relationship between respondent and the minor child was "wonderful." Ms. Puckett advised that respondent would play with the child, get up in the middle of the night with the child, change and bathe him. Although respondent admitted to her that he "smacked" the child once, Ms. Puckett testified that in her estimation, the minor child has a right to know and see his father "regardless of who his father is or what he has done." She further testified that at present, respondent does not pose any physical risk of injury to the child and that considering respondent's incarceration, he will not have any contact with the child for four or five years. Ms. Puckett testified that she does not believe that respondent ever attempted to intentionally harm the minor child, despite respondent's guilty plea. Finally, she testified that respondent's conduct in pinning her down, placing his hand over her mouth and pinching her nose was nothing more than a method to secure her attention and make her listen to respondent.

After evaluating the testimony, the family court terminated respondents parental rights pursuant to MCL 712A.19b(3)(b)(i), (3)(g), (3)(j) and (3)(k)(iii). The family court found that respondent has an anger management problem and that contrary to his family's and Ms. Puckett's belief, he intentionally attempted to smother his child. Although respondent

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[1] On February 2, 2001, respondent initially indicated that he wished to relinquish his parental rights but changed his mind and elected to proceed to trial. On March 19, 2001, an adjuacatory hearing was held wherein respondent admitted to the allegations contained in the petition.

maintained that his conduct was an isolated incident, the family court nevertheless found this portion of his testimony incredible insofar as it conflicted with the information contained in the court file and evidence received during trial or in prior hearings. Ultimately, the family court concluded "the facts really are not disputed to the extent that [respondent] did attempt to seriously injure, if not kill, [the minor child] for whatever reason."[2]

In making its factual findings, the family court further noted respondent's criminal conviction of assault with intent to commit great bodily harm requires respondent to serve between thirty-eight and one hundred twenty months in prison. The court noted that as of the date of trial, respondent had not participated in the child's life for approximately one year. The family court reasoned that in light of respondent's sentence, it was foreseeable that a significant number of years would pass before respondent could contribute in any meaningful way to the child's life and requiring the child to wait until respondent could function as a suitable parent would clearly not serve his best interests. Coupled with respondent's failure to produce evidence demonstrating that termination of his parental rights would clearly not serve the child's best interests, the family court entered an order terminating respondent's parental rights to his minor child.

II. Standard of Review

This Court reviews a family court's factual findings in an order terminating parental rights for clear error.[3] A finding is clearly erroneous if, upon review of the record, this Court is left with a definite and firm conviction that a mistake has been made[4]. In accord with this standard, the appellate court must give due deference to the family court's determinations regarding the credibility of the witnesses brought on to testify before it[5]. Once the family court discerns clear and convincing evidence supporting one of the statutory grounds for termination of parental rights exists, then the family court must terminate parental rights unless it finds, based on the entire record before it, that termination is clearly not in the best interests of the child[6].

III. Grounds for Termination

The family court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i), (3)(g), (3)(j) and (3)(k)(iii) which provide in pertinent part:

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[2] In explanation, respondent testified that he attempted to suffocate his son because he feared fatherhood and the amount of responsibility that it commands. Additionally, respondent testified further that he told boot camp officials that he attempted to suffocate his son and that he had recurring thoughts of hurting the child to receive help for his problem and to be relieved from any further participation in the camp.

[3] MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Powers*, 244 Mich App 111, 117; 624 NW2d 472 (2000).

[4] *In re Powers*, *supra* at 117-118.

[5] MCR 2.613(C); *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

[6] MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000).

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(b) The child . . . has suffered physical injury . . . under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury . . . and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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 . . . is returned to the home of the parent.

(k) The parent abused the child . . . and the abuse included 1 or more of the following:

* * *

(iii) Battering, torture, or other severe physical abuse.

Upon review of the entire record, we find that termination of respondent's parental rights was proper under subsection 19b(3)(b)(i). Respondent admitted on a number of occasions that he attempted to suffocate his child by placing his hand over the child's mouth and nose so that the child could not breath. As a direct consequence of respondent's conduct, the infant stopped breathing. And, by respondent's *own* observation, the infant's skin, turned blue/gray or "cytonic." Additionally, respondent acknowledged that as a result of his actions, the infant's breathing became very shallow, thus necessitating an emergency medical unit to transport the infant to the hospital for immediate treatment. Further, testimony adduced at trial indicated that respondent admitted to striking the infant on at least one occasion when the child cried inconsolably. Indeed, there is clear and convincing evidence on the record that respondent caused physical injury to his child.

However, respondent argues that there is no evidence to demonstrate that respondent's conduct was anything other than an isolated incident by an "immature" and "under trained" father and given respondent's three to ten year prison sentence, there is no evidence to indicate that if the child is placed back into respondent's care that there is a reasonable likelihood that the child will suffer injury in the foreseeable future. We do not agree.

First, we note that evidence placed onto the record reveals that respondent stated to boot camp officials that he had *recurring* thoughts about harming his son. Further, we note that the incident necessitating the infant's trip to the emergency room occurred while respondent spent the night at his mother's home. As opposed to waking her and asking for assistance or parental guidance in soothing the child, instead, respondent elected to try and silence the infant by suffocating him. While respondent may be a young and inexperienced father, respondent's parental response to his crying child in conjunction with testimony indicating that respondent admitted to recurring thoughts of harming the infant, well supports the family court's finding that there is a reasonable likelihood that the child would suffer injury in the foreseeable future if placed into respondent's home. In light of the serious nature of his conduct, we find that the family court did not clearly err by finding that termination pursuant to subsection 19b(3)(b)(i) was proper and thus affirm.[7]

Additionally, we find termination was proper under subsection 19b(3)(g). Respondent argues that he intends to receive all counseling services available to make him a better parent while incarcerated. He further contends that there is nothing to suggest that he would be unable to provide proper care for his son after he receives this counseling and is released from prison. Indeed, respondent argues that the sheer time that he will spend away from his son while serving out his sentence is not necessarily dispositive on his future ability to reunite with his child. To that end, respondent argues that those who serve in the military are absent from their children's lives for extended periods of time and that when parent and child are reunited, they re-establish the parent-child relationship.

As an initial matter, we note that there is a fundamental difference between compelled absence because of military service and compelled absence because of imprisonment for attempting to suffocate one's child. Although respondent's intent upon receiving counseling for his anger management problem while incarcerated may be laudable, we nevertheless consider, as did the family court, his child will be approximately four or five years old when respondent may be reintroduced into his life and even available to participate in his child's life on *any* level.

Considering respondent's incarceration and the time that it will take for him to reach an acceptable level of parenting skill, if at all, we agree with the family court that it would not serve his child's best interests to wait until his father can become an acceptable parent. Not only must the family court concern itself with the time that it would take for one to improve fundamental parenting skills, but also how long the *child* can wait for the improvement.[8] Accordingly, we find that the trial court did not clearly err by terminating respondent's parental rights in accord with subsection 19b(3)(g).

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[7] At this juncture, we note that the family court terminated respondent's parental rights in accord with subsection 19b(3)(j) which provides for termination where there is a "reasonable likelihood" that based on the parent's conduct or capacity that the child will be harmed if returned to the parent's home. For the reasons stated in our discussion regarding termination in accord with subsection 19b(3)(b)(i), we find that termination was similarly appropriate pursuant to subsection 19b(3)(j) and that the family court did not clearly err in this regard.

[8] *Matter of Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991).

Similarly, termination was proper under subsection 19b(3)(k)(iii). Although respondent points out the lack of physical marks, bruises or other injuries indicative of force on the infant, we find respondent's argument unpersuasive considering that respondent confessed and plead guilty to assaulting his child with intent to commit great bodily harm. Further, we note that it would not be difficult to overpower a five-month-old infant without leaving bruises, lacerations or any other evidence indicative of physical force. On review of the entire record, we find that the family court did not clearly err by finding that termination was proper in accord with subsection 19b(3)(g).

Finally, we agree with the family court that respondent failed to carry his burden and otherwise establish by the requisite clear and convincing evidence that termination of respondent's parental rights would not otherwise serve the child's best interests[9]. Termination is therefore mandatory[10].

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

[9] MCL 712A.19b(5); *In re TM*, 245 Mich App 181, 192; 628 NW2d 570 (2001).

[10] *In re TM*, *supra* at 192.