

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of Aguirre, Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CYNTHIA LYNN AGUIRRE,

Respondent-Appellant.

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UNPUBLISHED

November 16, 2004

No. 252630

Oakland Circuit Court

Family Division

LC No. 01-655651-NA

Before: Zahra, P.J., White and Talbot, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to the minor children, James Joseph Eddward Aguirre (d/o/b 11/3/92), Dylan Anthony Diego Aguirre (d/o/b 11/8/94), and Michael John Patrick Aguirre (d/o/b 9/21/96), under MCL 712A.19b(3)(b)(ii) (failure of parent to prevent injury or abuse), (g) (failure to provide proper care and custody), and (j) (children will be harmed if returned to parent). We affirm.

I. Erroneous Findings

Respondent argues that the court erred in terminating her parental rights because four of its findings of fact are not supported by evidence. We disagree.

A. Standard of Review

This Court reviews findings of fact in a case terminating parental rights for clear error. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In applying the principle that findings of fact may not be set aside unless clearly erroneous, this Court must give regard to “the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(C).

B. Analysis

Respondent first challenges the court’s finding that she was receiving assistance because of her pregnancy. Respondent cites the court’s April 28, 2003, opinion and order terminating respondent’s parental rights, which states that respondent “is currently receiving cash assistance,

food stamps and medical care from the state, to assist with her pregnancy.” Respondent testified at trial about the source of her income, stating that she believed the assistance was not because of her pregnancy. Here, the court’s statement can be interpreted to mean that respondent was receiving assistance because of her pregnancy, but it can also be interpreted to mean that the state would provide medical care to assist with her pregnancy. The record supports the latter interpretation, and thus, we are not left with a definite conviction that a mistake has been made. Further, it is unclear that this alleged erroneous finding is material to the court’s conclusion that respondent “lack[ed] the means to meet the children’s basic needs for food, shelter and clothing.” At the time of the hearing, respondent was unemployed and without reliable housing. Thus, the court’s conclusion that respondent “lack[ed] the means to meet the children’s basic needs for food, shelter and clothing,” even if based on a slight misunderstanding of the source of respondent’s income, is not clearly erroneous.

Respondent second challenges the court’s finding that respondent failed to benefit from parenting classes because she did not demonstrate the learned skills during visits. Respondent argues this finding was erroneous because it was based on testimony about visits that occurred before respondent had completed the classes, and that the testimony showed later visits were different. However, the foster care worker testified that in visits following respondent’s completion of parenting classes that respondent still had trouble controlling her children. And although others also had difficulty controlling the minor children, respondent’s psychological evaluation indicated that she possessed little insight into her children’s behavior. Therefore, the court’s finding that respondent did not sufficiently benefit from parenting classes is not clearly erroneous.

Respondent third challenges the court’s finding that she left the children alone with Daryl Bright after respondent had reason to believe that Bright had sexually assaulted one of the children. Specifically, the court stated in its opinion that, “[a]fter the abuse occurred and was reported to [respondent], she allowed Mr. Bright to return to her home and left him alone with the minor children.” The record supports the trial court’s finding. Respondent failed to prevent Bright from gaining access to the abused child and possibly the other children.

Respondent fourth challenges the court’s finding that Dylan told respondent he was afraid of Rogers and that respondent violated the no contact order. The court found that, while the case was pending, Dylan reported to respondent that Rogers had physically abused him. The record does not make clear that Dylan reported this to respondent. However, the court ordered no contact between Rogers and the children pending the investigation. The court found that respondent violated this order by allowing Rogers to drive her to a visit with the children, during which the children saw him through a window. Given the order, respondent should not have allowed Rogers to come along to the visit. Indeed, the sight of Rogers upset Dylan, who called Rogers a “a bad, bad man.” Therefore, we cannot conclude that the court’s finding was clearly erroneous.

## II. Termination

### A. Standard of Review

To terminate parental rights, the court must find that at least one of the statutory grounds for termination listed in MCL 712A.19b(3) has been met by clear and convincing evidence. *In*

*re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993). Once a statutory ground has been established by clear and convincing evidence, the court shall order termination of parental rights unless the court finds from evidence on the whole record that termination is clearly not in the child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The court's decision is reviewed for clear error. *In re Trejo, supra* at 356-357. A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a firm and definite conviction a mistake was made. *In re Miller, supra*. To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520; reh den 460 Mich 1205; 598 NW2d 351 (1999). In applying the clearly erroneous standard, regard must be given to the special opportunity of the trial court to assess the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller, supra*.

## B. Statutory Grounds

Respondent argues that the court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree.

Respondent's parental rights were terminated under MCL 712A.19b(3)(b)(ii), (g), and (j), which provide:

(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 or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

\* \* \*

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer 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 or she is returned to the home of the parent.

Concerning subdivision (b)(ii), the court apparently found respondent failed to protect her children from the sexual abuse by Bright and physical abuse by Rogers. We agree with the court that respondent should have been aware of the danger Bright posed, even if James had changed his initial story about sexual abuse. Respondent certainly witnessed highly inappropriate behavior by Bright that was part of the reason she told Bright to leave. She let Bright back in for dubious reasons and, even if she did not know Bright was with James, by her own admission she knew that Bright had access to James for the undisputed sexual abuse to occur. Thus, she failed to prevent the abuse.

We also agree with the court that the minor children would likely be at risk of future abuse if returned. There were allegations that Rogers had physically abused Dylan, and even if those allegations were not substantiated, the court ordered respondent not to allow Rogers to have contact with the children because of abuse allegations. Nonetheless, respondent allowed Rogers to drive her to a visit where he had contact with the children, albeit not immediate. This shows that respondent continues to show the same poor judgment made under circumstances that resemble her allowing Bright back in the children's home. The court properly determined that sufficient clear and convincing evidence supports this statutory ground for termination. MCL 712A.19b(3)(b)(ii).

Concerning subdivision (g), we agree with the court respondent did not have suitable housing or income throughout the case. Thus, she could not provide proper care and custody. In addition, there is no reasonable likelihood respondent will be able to provide proper care and custody in a reasonable time. Two years after the children were removed, she still did not have housing. She expected to get an apartment with Rogers, but it only had one bedroom. She had not worked before the divorce and only had sporadic employment throughout the case, including once being fired for theft. She expected at trial to get training and a good job placement, but this had not happened six months later at the best interests hearing, though apparently because of the pregnancy. We cannot conclude that the court's determination that clear and convincing evidence supports this statutory ground for termination is clearly erroneous.

The court concluded subsection (j) was established by the same evidence establishing subdivision (b)(ii). As stated *supra*, the court did not clearly err in finding there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home. Accordingly, based on respondent's conduct in allowing Bright back into the home under dubious circumstances, we cannot disagree with the court that sufficient evidence supports a finding under subsection (j).<sup>1</sup>

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<sup>1</sup> Respondent raises as a separate claim the FIA's failure to make reasonable efforts to reunite the family. However, respondent has not provided legal authority to establish that the FIA's failure to make reasonable efforts alone establishes a basis for relief. MCL 712.18f(4). Rather, the absence of reasonable efforts on the part of the FIA has only been relevant to assessing whether the statutory grounds for termination were established. See, e.g., *In re Newman*, 189 Mich App 61, 65-68; 472 NW2d 38 (1991). Thus, we address respondent's allegations concerning the FIA's lack of efforts in the context of statutory grounds for termination.

(continued...)

### C. Best Interests of the Children

Respondent argues that the court erred in holding that termination of parental rights was not clearly contrary to the child's best interests. We disagree. MCL 712A.19b(5) provides that the court "shall" terminate parental rights if one statutory ground for termination is found, "unless" termination is clearly not in the best interests of the child. *In re Trejo, supra* at 350. This provision attempts to strike a balance between policies favoring preservation of the family unit and the need for security and permanency for the child. *Id.* at 354.

Here, after finding statutory grounds for termination existed, the court held a separate proceeding to determine whether termination was clearly not in the best interests of the children. Following the hearing, the court issued a November, 3, 2003 opinion finding that termination of respondent's parental rights was in the minor children's best interests. The court found that respondent was unequipped to meet the psychological needs of the children, and could not provide the stability the children need in a reasonable time. We cannot disagree with court's assessment.

The court found there was no dispute that the minor children love respondent and are bonded with her. However, the court noted that the children have underlying psychological problems that need to be addressed on a continual basis. Indeed, all three children take psychiatric medication for behavioral and emotional problems. At the time of the hearing, respondent still had not found housing or income. The court also noted respondent experienced difficulty with extended care of the children. Given the circumstances, the court did not clearly err in concluding that respondent would not be able to within a reasonable time provide for the stability of her children, who are younger and have substantial psychological issues.

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(...continued)

Before addressing respondent's claims, we note that from August 27, 2001 to November 3, 2003, the court found on at least seven separate occasions that reasonable efforts were made to prevent or eliminate the need for removing the children from the children's home. Respondent did not challenge these findings.

Respondent claims that the foster care worker (1) failed to provide her a domestic violence counseling referral (2) failed to timely correct respondent statements to her children; and (3) failed to provide a letter necessary for respondent to enter the PATH program. While respondent would likely have benefited from the referral, the failure of the FIA to provide it did not harm respondent given her failure to comply with other provisions of the parent-agency agreement. So also has respondent not shown how the foster worker's failure to correct her statements hindered her reunification efforts. Last, the record reflects that respondent's lack of income and her expressed intent to stay with Rogers, who could not live with her under the PATH program, were obstacles beyond the caseworker's control. Accordingly, even if the caseworker had written the letter, which the record indicates she could not do because of respondent's non-compliance with the PAA, the PATH program would not have been available to respondent.

Further, the court also relied cited respondent's poor judgment in support its decision that termination was in the best interests of the minor children. The court reiterated evidence that respondent first showed poor judgment by allowing Bright back into the home of her minor children under dubious circumstances. The court found her poor judgment continued as shown by her violation of a court order. The court had ordered respondent not to allow contact between her children and Rogers because one of the children had complained that Rogers abused him. Respondent allowed this contact by having Rogers drive her to visit her children. Also, at the best interest hearing, respondent indicated that she would continue her relationship with Rogers, despite the allegations against him. Thus, the trial court did not clearly err in finding that respondent had shown she will continue to have poor judgment and place her needs before her children's.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot

I concur in result only.

/s/ Helene N. White