STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BARBARA NEWCOMB, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

GLORIA NEWCOMB,

Respondent-Appellant

and

JAMES EDWARDS,

Respondent.

UNPUBLISHED
May 2, 2000

No. 222115
Jackson Circuit Court
Family Division
LC No. 94-018336-NA

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Respondent-mother, Gloria Newcomb, appeals as of right from the circuit court's order terminating her parental rights to her minor daughter, Barbara Newcomb (DOB 3/28/91), pursuant to MCL 712A.19b(3)(c)(*i*) and (g); MSA 27.3178(598.19b)(3)(c)(*i*) and (g). We affirm.

On November 7, 1997, the Jackson County Intermediate School District filed a petition requesting that Gloria Newcomb (hereinafter respondent) be charged with educational neglect. This petition alleged that during the 1997-1998 school year, respondent's minor daughter, Barbara Newcomb, a six-year-old in first grade, had missed twenty-one days of school and had been tardy on eight days. Further, respondent had failed to respond to letters from the Intermediate School District seeking to address this problem. Respondent was charged with educational neglect, the court appointed an attorney for Barbara, and an adjudication hearing was scheduled for January 7, 1998.

At the January 7, 1998, hearing respondent entered a no contest plea. Barbara was made a temporary ward of the court under the supervision of petitioner, the Family Independence Agency (FIA). Barbara was to remain in the custody of respondent, however, who was ordered to cooperate with the caseworker and with any programs deemed in Barbara's best interest. The FIA was ordered to investigate alternate placement. At a February 4, 1998, review hearing, the court ordered that Barbara continue as a temporary ward of the court, but that placement be changed to out-of-home placement with a relative, Lagina Poole. Respondent was ordered to cooperate with the caseworker in any programs deemed in Barbara's best interest, including visitation arrangements.

Respondent did not immediately comply with the court's order for relative placement, failing to release Barbara into Poole's care. Thus, on February 10, 1998, the FIA filed a motion and order to show cause alleging this refusal to obey the court order. Barbara was placed with Poole on February 11, 1998, and at a February 25, 1998, hearing respondent was found in contempt and ordered to serve two days in jail, February 26-28, 1998. On March 3, 1998 a bench warrant was issued for respondent because of her failure to appear at the jail on February 26, 1998. The warrant was executed on May 18, 1998, and following a hearing on that date respondent was again found in contempt. Respondent was ordered to serve five days in jail, the original two days ordered in February and three additional days for her failure to comply with the original order.

Meanwhile, on May 6, 1998, a second review hearing was held regarding Barbara's placement. The court ordered that Barbara be continued as a temporary ward of the court, with out-of-home placement with Poole to continue under supervision of the FIA. The court ordered respondent to participate in substance abuse assessment and recommended treatment and testing, psychological evaluation and recommended treatment and supervised visitation as arranged. The court also ordered Poole to cooperate with Barbara's educational planning. On July 30, 1998, Barbara was removed from Poole's home and temporary placement in an FIA licensed foster home was effectuated. At the next review hearing, August 5, 1998, the court continued this out-of-home placement.[1] The court additionally ordered Barbara to participate in psychological evaluation and recommended services.

On September 25, 1998, a different relative placement was effectuated as Barbara was placed with her adult sister Lenise Newcomb (DOB 9/1/78). Efforts toward Lenise's adoption of Barbara were also initiated by the FIA. At a November 4, 1998, review hearing the court ordered that Barbara be continued as a temporary ward, with out-of-home placement with Lenise to continue under FIA supervision. Respondent was ordered to cooperate with recommended services including visitations, substance abuse assessment and recommended treatment and testing, psychological assessment and recommended counseling. The court ordered Barbara to participate in psychological assessment, and ordered that sibling visitations be arranged. These orders remained in effect following the next review hearing on February 3, 1999.

At a May 4, 1999, review hearing, the placement orders were kept in effect. However, the court this time found that continuation of reasonable efforts to improve the conditions that had necessitated temporary wardship were no longer consistent with a permanency plan. The court found that progress was no longer being made to alleviate or mitigate the conditions which had required the court's initial action, and that efforts toward completing permanent placement were appropriate. On

May 21, 1999, the FIA wrote a letter to the county prosecutor requesting the issuance of a petition for termination of parental rights to Barbara. In a May 24, 1999, letter, the FIA advised respondent that termination proceedings had been initiated because respondent had failed to comply with the court's orders to attend substance abuse treatment meetings and to undergo psychological assessment. At a June 8, 1999, hearing, the court scheduled a show cause hearing on the termination petition for August 2, 1999.

At this termination hearing, respondent-father James Edwards voluntarily released his parental rights to Barbara. The court then heard the testimony of both the FIA foster care worker assigned to Barbara's case, and a counselor who provided details of respondent's efforts in regard to the court ordered treatment.

Nancy Martini, a part-time counselor at the Washington Way Recovery Center testified that respondent first contacted the treatment center on March 10, 1999. Martini testified that respondent was subsequently scheduled to begin substance abuse treatment in an intensive outpatient program, but that respondent failed to attend sessions during March and April. After respondent was reevaluated in May she began a treatment program, but attended only sporadically and dropped out of the program in early June. Martini testified that on July 5, 1999, respondent again began a treatment program, again attending only sporadically, but that in the two weeks leading up to this termination hearing respondent had begun to attend regularly and appeared to be taking more responsibility. Martini testified that respondent's progress in the treatment program was slow, and that the program could be completed in three months.

Carol McDermott, respondent's FIA foster care worker, testified that despite numerous referrals to a variety of treatment centers, respondent failed to secure treatment until the termination hearing was upon her. McDermott testified that respondent missed or was late to numerous appointments at every treatment facility. She further testified that including satisfactory completion of the substance abuse program at Washington Way, it would be at least nine months before respondent could set her affairs in order such that she could be in a position to provide for Barbara. With regard to Barbara's placement with Lenise, McDermott testified that this was a stable environment, that there was no recommendation to change this placement, and that respondent's exercise of visitation was sporadic. McDermott testified that to ensure Barbara's long-term stability, she recommended terminating respondent's parental rights and making Barbara's placement with Lenise permanent.

The court then took judicial notice of the court file on stipulation of the parties and, finally, respondent testified on her own behalf. Respondent testified that her initial poor record of attendance at appointments for treatment and evaluations was the result of her conflicting work schedule and the failure of the FIA to adequately communicate with her regarding notice of appointment times. Respondent testified that she was now regularly attending Washington Way because her work schedule allowed it and because the threat of losing her rights to Barbara spurred her on. Respondent testified that she could finish the substance abuse program, that she would attend an FIA scheduled psychological evaluation if given notice, and that she was in a position to secure a suitable home. Respondent testified that she saw Barbara, at Lenise's home, every day, and that she did not think Barbara would be better off if she was not in her life anymore.

At the conclusion of this hearing, the court found that statutory grounds for termination had been proven by clear and convincing evidence and that it had not been shown that termination was not in Barbara's best interests. An order terminating respondent's parental rights to Barbara was entered on August 23, 1999. It is from this order that respondent now appeals.

A two-pronged test applies to a decision of the family division of circuit court to terminate parental rights. "First, the probate court must find that at least one of the statutory grounds for termination, MCL 712A.19b; MSA 27.3178(598.19b), has been met by clear and convincing evidence." *In re Sherman,* 231 Mich App 92, 97; 585 NW2d 326 (1998). This Court reviews the family court's decision under the clearly erroneous standard. MCR 5.974(I); *In re Sours Minors,* 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989). A finding of fact is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Miller, supra* at 337; *In re Conley,* 216 Mich App 41, 42; 549 NW2d 353 (1996). To be clearly erroneous, a decision must be more than maybe or probably wrong. *Sours, supra* at 633. Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *Miller, supra* at 337.

Once a statutory ground for termination of parental rights is established, the court must terminate parental rights unless it finds that termination of parental rights to the child is clearly not in the child's best interest. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Hall-Smith,* 222 Mich App 470, 472; 564 NW2d 156 (1997). Once the petitioner has established a ground for termination of parental rights, the burden of going forward with evidence to establish that termination is clearly not in the child's best interest rests with the respondent. *Sherman, supra* at 98; *Hall-Smith, supra* at 472-473. If the respondent fails to produce any evidence rebutting the presumption that termination of parental rights is appropriate, termination must be ordered, but if the respondent proffers evidence on the issue, the petitioner must satisfy the burden of proof. *In re Boursaw,* 239 Mich App 161, 179-180; ___ NW2d ___ (1999). Finally, this Court reviews the family court's now non-discretionary decision regarding termination in its entirety for clear error. *Sherman, supra* at 98; *Hall-Smith, supra* at 472.

We conclude that the court did not clearly err in finding that grounds for termination were established by clear and convincing evidence. The family court initially assumed jurisdiction in this matter based on a petition charging educational neglect. Ultimately, respondent's parental rights were in part terminated pursuant to MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g). Section (3)(g) provides that parental rights may be terminated 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.

This provision requires clear and convincing evidence of both a failure and an inability to provide proper care and custody. *In re Hulbert,* 186 Mich App 600, 605; 465 NW2d 36 (1990). The family court also found reason to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*); MSA 27.3178(598.19b)(3)(c)(*i*). Section (3)(c)(*i*) provides that parental rights may be terminated if, after

182 days have elapsed following an initial dispositional order, the conditions which 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 age of the child. The determination of what is a reasonable time properly includes both how long it will take for the parent to improve conditions and how long the child can wait for the improvement. *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991).

The FIA's first contact with respondent regarding Barbara was November 7, 1997. This initial contact concerned respondent's failure to ensure Barbara's attendance at school. Because of an identical problem with an older daughter, Lydia Powell (DOB 2/3/84), the FIA had previously had contact with respondent from December 1994 until April 1996. This earlier case was closed out only when Lydia's attendance improved beginning in February 1996, after the initiation of proceedings toward establishing foster care. Despite the FIA's similar intervention on behalf of Barbara, she continued to miss an inordinate number of days at school over the next few months and the court again determined that out-of-home placement was necessary. This time, however, rather than satisfactorily responding to the court's action, respondent initially refused to comply with the court's order and was held in contempt of court. Only after the court successfully effectuated foster care, ultimately the relative placement with Lenise, was improvement and consistency shown in Barbara's care. Respondent does not contest these facts. Accordingly, there is clear and convincing evidence that respondent failed to provide proper care for Barbara in regard to her education. *Hulbert, supra* at 605.

Respondent's inability to provide proper care and custody is likewise established by clear and convincing evidence. *Id.* The court identified respondent's substance abuse problem, and a related inconsistent employment history, as the factors primarily contributing to educational neglect. Accordingly, from the time the court initially took jurisdiction over Barbara, repeated orders required respondent's participation in treatment and assistance services. Despite the approximately twenty months of oversight and review hearings, respondent consistently refused to participate in the court ordered services. Only in the two weeks immediately preceding the termination hearing did respondent make any progress in a substance abuse program. Respondent herself testified that this suddenly regular participation at Washington Way was initiated by the realization that termination proceedings were near completion. In addition, respondent never obtained a psychological evaluation, never went for drug screening, and demonstrated an inability to find suitable housing or steady employment. This record of negligible improvement, coupled with respondent's history of similar problems with another daughter, evidences an inability to properly provide the care Barbara needs.

There is, moreover, no reasonable likelihood that these problems will be rectified within a reasonable time considering Barbara's age. At the time of the termination hearing, the court had maintained jurisdiction over Barbara for more than a year and a half since the initial disposition order. Eight years old at the time of the hearing, Barbara was scheduled to repeat the first grade because she had missed school so often during the preceding year. Testimony suggested that even if respondent successfully completed the substance abuse program, estimated by Martini as another three months of treatment, it would be at least nine months before respondent could hope to have satisfied the additional court ordered counseling and evaluation. Moreover, respondent still needed to establish steady work and suitable housing. McDermott testified that because these lifestyle issues were identified as the root

of the educational neglect, respondent's failure to accomplish the court-ordered goals in the previous year and a half, coupled with the showing that respondent's minimal progress came only under the threat of final court action, was indicative of unlikely success on such a time frame. We find that the cited grounds for termination, MCL 712A.19b(3)(c)(*i*) and (g); MSA 27.3178(598.19b)(3)(c)(*i*) and (g), were established by clear and convincing evidence.

We additionally find that the family court did not clearly err in concluding that termination of respondent's parental rights was in Barbara's best interests. *Sherman, supra* at 98; *Hall-Smith, supra* at 472. Respondent argues that because testimony shows that she was attending treatment meetings regularly at the time of the final hearing, the court's order terminating her parental rights was merely intended as punishment for her delayed participation in the court ordered programs. Respondent also argues that because Barbara is to be permanently placed with respondent's adult daughter Lenise, where, practically speaking, respondent's contact with Barbara will be unlimited, there is nothing to be gained by termination. We find no merit in these contentions.

McDermott's testimony established that Barbara has settled with her sister Lenise and that this suitable placement has resulted in stability that was desperately lacking when Barbara was with respondent. Respondent had the burden of going forward with evidence to establish that termination was clearly not in Barbara's best interest. *Sherman, supra* at 98; *Hall-Smith, supra* at 472-473. To that end, respondent merely testified that in the near future she could provide a suitable home and that despite her previous failures to comply with court orders, she would now do so. Respondent failing to produce any meaningful evidence rebutting the presumption that termination of parental rights was appropriate, termination was mandatory. See *Boursaw, supra* at 179-180. Although respondent's delayed participation in the court ordered treatment programs was assuredly a primary factor in the decision to terminate, it is clear that the court based its decision on the need to maintain Barbara's improved position and outlook, not a desire to punish respondent.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White

[1] Although the court's orders of May 6, 1998 and August 5, 1998 indicate that Barbara's placement was to *continue with respondent*, on review of the record it is clear that Barbara was consistently in out-of-home placement during the relevant time period. This apparent clerical error in the court's orders does not bear on our resolution of this appeal.