STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JAMES ERNEST BRENT, ANTOINEQUE DHERESA PERNELL, MALIK ROEMELLO TREVON JOHNSON, and ANDRELL ANTWON MUNN, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

TIJUANA JOHNSON,

Respondent-Appellant,

and

JAMES ERNEST BRENT, SR., ANTOINE PERNELL, and ALANDUS MARICE WOOTEN,

Respondents.

UNPUBLISHED
March 23, 2004

No. 250567
Monroe Circuit Court
Family Division
LC No. 99-014402-NA

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Respondent-appellant Tijuana Johnson (respondent) appeals as of right from an order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(ii), (g), and (j). We affirm.

I

Respondent first argues that the circuit court did not have jurisdiction to entertain this child protective proceeding because the referee failed to find that only the children's placement outside her custody would protect them from a substantial risk of harm, as required by MCR 5.965(C)(3).[1] Whether a court possesses subject-matter jurisdiction to act with respect to a

[1] As of May 1, 2003, former MCR 5.965 was recodified as MCR 3.965. Because the preliminary (continued…)

particular dispute constitutes a legal question that this Court considers de novo. *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 8; 656 NW2d 881 (2002); *Smith v Smith*, 218 Mich App 727, 729; 555 NW2d 271 (1996).

This Court has recognized that "jurisdiction over termination proceedings is derived solely from statutes and the constitution." *In re SR*, 229 Mich App 310, 313; 581 NW2d 291 (1998). "The courts, by rule or otherwise, may not enlarge or diminish this jurisdiction." *In re Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993). The circuit court's jurisdiction with respect to child protective proceedings is prescribed within MCL 712A.2, which provides, in relevant part, as follows:

> The court has the following authority and jurisdiction:
>
> * * *
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent . . . , when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents . . . , or who is without proper custody or guardianship. . . .

At the time of the May 6, 2002, preliminary hearing in this case, MCR 5.965(B)(9) provided as follows concerning the circuit court's preliminary hearing obligation with respect to the statutory jurisdictional requirements:

> Unless the preliminary hearing is adjourned, the court shall decide whether to authorize the filing of the petition. The court may authorize the filing of the petition upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b) . . . .

In this case, the May 6, 2002, amended supplemental petition alleged in its first and seventh paragraphs that the children were within the circuit court's jurisdiction on the basis of MCL 712A.2(b)(1), which petitioner quoted. Petitioner subsequently alleged with specificity that respondent had used a belt to bruise Malik's forearms, that James reported that respondent had bruised his hand and buttocks with a belt, that respondent excessively shook the children, and that on several occasions respondent left Malik and Andrell unsupervised, following which they wandered to school in search of care.

At the May 6, 2002, preliminary hearing concerning the petition, the referee initially explained the purpose of the hearing to determine whether probable cause existed to support one

---

(…continued)

hearing took place before the court rule amendment and recodification, we refer to the former rule.

or more of the petition's allegations. The referee heard the testimony of a protective services worker, who recounted her observations of bruises on Malik and James, their reports that the bruising derived from respondent's use of a belt to strike them, the advice of four children that respondent shook them, and that Malik and Andrell on three occasions had wandered unsupervised to school after their normal school hours in search of care. Respondent, who acted as her own counsel, cross-examined Roberts and also called the children's maternal grandmother as a witness on her behalf. As required by MCR 5.965(B)(9), the referee then found probable cause to support the petition's allegations of neglect and abuse. The referee signed the May 6 petition confirming its authorization, and shortly thereafter entered an order authorizing the petition on the basis of his finding that probable cause existed to support the allegations.

The referee's finding that probable cause existed to support the allegations of abuse and neglect of the children by respondent sufficed to bring the children within the circuit court's subject-matter jurisdiction:

> [T]he . . . court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous. *The valid exercise of the probate court's statutory jurisdiction is established by the contents of the petition after the probate judge or referee has found probable cause to believe that the allegations contained within the petitions are true.* [*In re Hatcher, supra* at 437 (emphasis added).]

Even assuming that the referee subsequently set forth with inadequate specificity according to MCR 5.965(C) his findings regarding the propriety of the children's placements outside respondent's custody, this procedural error would not divest the circuit court of jurisdiction over the children. *In re Hatcher, supra* at 437.

Respondent's appeal from the circuit court's order terminating her parental rights to the children collaterally challenges the court's order within the prior adjudication proceeding that exercised jurisdiction over the children. *In re Hatcher, supra* at 436. Respondent at no time challenged in the circuit court the referee's initial finding of probable cause pursuant to which the court exercised its subject-matter jurisdiction over the children, despite the fact that several court rule and statutory provisions permit such review or rehearing. *Id*. at 436, 438 n 12. To the contrary, the adjudication phase of the proceedings concluded when respondent *admitted* allegations that she abused and neglected the children, which admissions established that the children fell within the continued exercise of the circuit court's subject-matter jurisdiction. *Id.* at 438. Because the Supreme Court's decision in *In re Hatcher, supra* at 444, "sever[ed] a party's ability to challenge a . . . court decision years later in a collateral attack where a direct appeal was available," we conclude that respondent may not in this appeal collaterally attack the circuit court's exercise of jurisdiction. *In re Powers*, 208 Mich App 582, 587-588; 528 NW2d 799 (1995).

II

Respondent next argues that petitioner failed to present clear and convincing evidence of any statutory ground to warrant termination of her parental rights. This Court reviews for clear error a circuit court's decision that a statutory ground for termination of parental rights has been

proven by clear and convincing evidence. MCR 3.977(J)[2]; *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The circuit court's findings of fact qualify as clearly erroneous when this Court's review of the record reveals some evidence to support the findings, but leaves this Court with the definite and firm conviction that the court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

We find that the voluminous record in this case contains clear and convincing evidence that respondent failed to provide the children proper care and custody, and that no reasonable expectation exists that respondent could provide the children proper care and custody within a reasonable time. MCL 712A.19b(3)(g); *In re Hulbert*, 186 Mich App 600, 601, 605; 465 NW2d 36 (1990).

A. Failure to Provide Proper Care and Custody

The testimony of the principal and a teacher at the children's school, as well as by respondent herself, reflected that, since 1999, the children consistently arrived late to school several times each week, or did not arrive at all, despite that respondent received notifications of the children's continued absences and tardiness. The testimony of the principal and teacher also indicated that Rayvina,[3] James, and Antoineque consistently displayed problematic behaviors that resulted in repeated suspensions from school, and that although respondent often met with the principal and teacher to discuss her implementation of plans to modify the children's behaviors, respondent apparently did not follow through in applying the plans because the children's misbehaviors inevitably recurred and intensified near the time of their removal from respondent's custody

. Respondent admitted the allegations that on three days in April 2002, she left Malik and Andrell unsupervised and that the children walked themselves to school without supervision; the principal and teacher testified that the children had to cross a busy intersection near the school and that no one came looking for them after they appeared at school. Respondent further admitted that she has unresolved issues with anger management and uses unreasonable physical discipline of the children, including an incident on April 18, 2002, in which she shook Malik, causing bruising to his arms. Respondent failed to arrange immunizations for Rayvina, who was suspended from school after repeated notifications of the immunization deficiency. This evidence clearly and convincingly demonstrates respondent's *failure* to provide the children proper care and custody. *In re Hulbert, supra* at 605.

[2] Because the amended court rules governing termination proceedings became effective on May 1, 2003, the month before the instant termination hearing occurred, we refer to the current rule.

[3] Rayvina Laverne Faye Munn, an older sibling of the children involved in this appeal, was originally a party to this action. However, on June 12, 2003, the second scheduled date of the termination hearing, the family court granted Rayvina's counsel's motion to dismiss the termination petition with respect to her because petitioner did not serve Rayvina with the petition at least fourteen days before the termination proceedings commenced.

B. Inability to Provide Proper Care and Custody

The evidence of respondent's failure to address her acknowledged anger management problem or satisfy other court-ordered treatment plan requirements clearly and convincingly established respondent's *inability* to provide the children proper care and custody. Respondent had a chronic anger management problem that began before the children's removal from her custody in April 2002. During the children's school years before their removal, the principal recalled observing on several occasions that respondent became angry with the school staff and also screamed angrily at the children. The teacher testified that respondent sometimes swore at her in anger, and that on the day of the children's removal, respondent approached her in the school parking lot and threatened, "I'm going to get you, you white bitch."

Respondent continued to exhibit an anger management problem throughout the course of the 2002-2003 child protective proceedings. In June 2002, respondent began anger management counseling with Michael Welch, to whom she expressed anger and frustration, but by respondent's third and final session with Welch, she became angry with him, swore at him, and accused him of doing nothing to assist her. Petitioner's caseworker, Randi Sheldon, testified that in July 2002, respondent swore at and threatened her and a protective services worker in the children's presence. Foster care worker Shirley Tarvis similarly described that respondent always appeared angry at petitioner and the system, repeatedly violated the court order that she refrain from threatening caseworkers during her visits with the children, and sometimes swore in the children's presence. On September 18, 2002, respondent became very upset when Tarvis told her that her parents could not attend a visit, addressed Tarvis with vulgar language and yelled and screamed at Tarvis while refusing to cooperate in concluding the visit. In November 2002, after Rayvina's placement facility refused to permit respondent's attempted visit, respondent became angry, insisted she would see Rayvina, tried to walk past security, threatened to hurt a security guard, and only departed sometime after the police arrived. After an April 2003 court hearing, respondent approached Sheldon in an intimidating manner, yelled in her face, and called her an "ugly, f------ bitch" who "needed to get a real haircut." While at the hospital for treatment of an overdose of Paxil, respondent argued with hospital staff, who felt it necessary to call the police. During respondent's last visit with the children on April 22, 2003, respondent pointed her finger in Tarvis' face and threatened to spit on Tarvis if she kept messing with respondent.

During the slightly longer than one-year period between the children's removal from respondent's custody and the termination hearing, respondent did not regularly attend counseling to address her anger management problem. Respondent did not substantiate that she had any employment, never supplied Sheldon with documentation indicating that she suffered a disability, and failed to complete a required money management course. Although respondent regularly attended her scheduled visits with the children, the testimony of Sheldon, Tarvis, and respondent indicated the children often behaved out of control, and that respondent almost never redirected the children's bad behaviors. Respondent often expressed to the children her anger with petitioner's employees, advised the children not to speak with petitioner's "bad" employees, and also informed the children about the termination proceedings.

Respondent attended a psychiatric evaluation in February 2003, at which she was diagnosed as having a "major depressive disorder with psychotic features." The psychiatrist, Nancy Hankey, also characterized respondent as a passively suicidal individual, who would not

impulsively plan to kill herself, but had a wish to die or to "go to sleep and never wake up." Hankey prescribed respondent Wellbutrin, which respondent stopped taking of her own accord, and then Paxil, on which respondent overdosed in late April 2003. Hankey could not opine whether respondent's mood had stabilized with Paxil because she had not seen respondent recently and did not know whether respondent consistently took her medication.

The ongoing episodes of respondent's angry outbursts, together with respondent's failure to complete anger management counseling, her inability or neglect to consistently interact with or redirect the children during visits, and her other failures to comply with court-ordered treatment requirements clearly and convincingly established respondent's inability to provide the children with proper care and custody. MCR 3.976(E)(1); see also *In re Trejo*, *supra* at 346 n 3, 360-361 n 16.

C. No Reasonable Expectation of Ability to Provide Proper Care and Custody Within a Reasonable Time

The last consideration pursuant to § 19b(3)(g) is whether a reasonable expectation exists "that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." According to the testimony of respondent and David Walker, her most recent anger management counselor, for approximately a four-month period respondent attended two of three scheduled counseling sessions, reported feeling less agitated and depressed and more in control of her anger, and had begun to control her anger well during therapy sessions. While this testimony reflects laudable progress by respondent, she only began more actively participating in anger management counseling and taking her medication for depression within several months of the termination hearing. Given the lengthy history of respondent's anger management problem and its frequent recurrence during the instant child protective proceedings, respondent's several year history of an inability to ensure the children's attendance at school and her failure during the instant proceedings to display appropriate parenting skills during visits with the children, and the children's continuing behavioral difficulties and needs for special educational attention, counseling, and medication, we find no reasonable likelihood that respondent could provide the children with proper care and custody within a reasonable time given the children's ages. *In re Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991).[4] Respondent asserts that she was not given a reasonable time after her psychiatric problems were diagnosed and she was placed on Paxil. However, given the history here, the court was not obliged to accept respondent's contentions that her deficiencies as a parent would disappear because she was taking Paxil.

III

Respondent next raises the unpreserved suggestion that the circuit court should not have dismissed a 1999 child protective proceeding involving respondent and the children. We decline

[4] Because clear and convincing evidence supports the circuit court's order of termination pursuant to § 19b(3)(g), we need not address the alternate statutory grounds on which the court relied.

to address this issue, given its unpreserved nature and respondent's failure to offer any authority in support of her suggestion that the court somehow erred in dismissing the 1999 child protective proceeding. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

IV

Respondent further asserts that the circuit court erred when it failed to grant a motion to disqualify caseworker Sheldon from continuing as the supervisor of respondent's case. Respondent claims that Sheldon was prejudiced against both her and her oldest daughter, Rayvina, because Rayvina had assaulted Sheldon, who pursued a felony charge against Rayvina. But only Rayvina's counsel raised before the circuit court the objection to Sheldon's continued participation in the case. Because respondent failed to preserve this issue before the circuit court by raising her own objection to Sheldon's status as the caseworker, or joining in Rayvina's counsel's objection, and because respondent once more fails to include within this argument any relevant authority in support of her suggestion that Sheldon improperly occupied the role of Rayvina's foster care worker, we conclude that respondent has abandoned appellate review of this claim. *Etefia*, *supra* at 471.

V

Respondent lastly alleges that the circuit court erroneously determined that termination of her parental rights would serve the children's best interests. MCL 712A.19b(5). We review for clear error a circuit court's best interest determination. *In re Trejo*, *supra* at 356-357.

None of the parties disputed that the children and respondent appeared well-bonded, loved each other, and desired to live together. The children displayed happiness to see respondent during her regular visits. The testimony of the children and respondent indicated that she cooked for the children, played with them, and supervised their homework. Respondent spoke many times with the children's teachers regarding the children's behavior problems and made at least some efforts to implement behavior modification plans for the children.

Despite the undisputed bond between respondent and the children, the evidence discussed within part II, *supra*, demonstrates that respondent nonetheless simply cannot properly care for the children. For example, while the children resided in respondent's custody, respondent substantially neglected their educational needs and inappropriately disciplined them because of her anger management problem. Most of the children have serious behavioral problems and related emotional issues. Considering that the children had ongoing behavioral problems while in respondent's custody, the facts that two of the children were institutionalized after their arrival in foster care, and that all of the children require therapy, do not support respondent's suggestion that the children's difficulties stemmed solely from their placements in foster care. The behaviors of Antoineque and Malik improved since their placements in foster care, and Andrell enjoyed his foster care placement. It was not until several months before the termination hearing that respondent even began to actively address her longstanding anger management problem and report progress in medicating her major depressive disorder. In light of the extended duration of both the children's and respondent's behavior difficulties and respondent's failure to significantly progress toward controlling her anger management and depression, we cannot conclude that the circuit court clearly erred in finding that termination of respondent's parental rights served the children's best interests. MCL 712A.19b(5).

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio