

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

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In the Matter of SHAYLA ALEXIS DAECH,  
SKYLAR RAE' DAECH and DAYMISON  
MICHAEL DAECH, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHAUNA DAECH,

Respondent,

and

DALLAS DAECH,

Respondent-Appellant.

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UNPUBLISHED  
November 1, 2007

No. 276903  
Oakland Circuit Court  
Family Division  
LC No. 04-694325-NA

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Respondent-appellant, the father of the involved minor children, appeals as of right a circuit court order terminating his parental rights pursuant to MCL 712A.19b(3)(c)(i) [the conditions leading to adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the children's ages], and (g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that he might do so within a reasonable time given the children's ages]. We affirm.

I. Facts and Proceedings

In March 2004, the children's mother obtained a personal protection order (PPO) against respondent, based on allegations of domestic violence and child abuse. She and the children remained in the marital home and respondent moved in with a friend. Respondent moved for termination of the PPO in April of 2004. The trial court modified the order by permitting respondent one hour supervised visits with his children at a shelter.

On May 26, 2004, the children's mother left them at home and unsupervised. During her absence, three-year-old Shayla started a fire in the microwave. The mother returned and discovered the house full of smoke. She took the two older children to respondent's home. Respondent, who feared violating the PPO, instructed his roommate to refuse to accept the children. The mother left the two older children on respondent's front porch, and dropped off the youngest child at the home of a friend. She did not return for the children the next day. Respondent called Children's Protective Services (CPS) to report these events. Respondent's mother also contacted CPS and informed them that the children's mother had threatened to kill herself and respondent, and was addicted to crack cocaine.

On May 28, 2004, the Oakland County prosecutor filed a petition alleging that the minor children lacked proper care and custody. As to respondent, the petition contained two allegations: (1) that he had a criminal record, including two counts of felony breaking and entering (1991), a companion probation violation, a second offense of operating under the influence of alcohol (2002), and a deferred marijuana possession charge, and (2) that the PPO forbidding unsupervised contact with his children remained in effect through March 2005.

A referee conducted a preliminary hearing to address the petition's allegations on May 28, 2004, during which respondent and a protective services worker testified. The testimony revealed that respondent lived in a rented room, and that his residence had no space for the children. Although the prosecutor sought jurisdiction against respondent because he provided an unfit home "by reason of . . . criminality" pursuant to MCL 712A.2(b)(2), the referee declined jurisdiction on that ground. Instead, the referee determined that in light of the PPO, respondent could not provide the children proper care and custody. The referee authorized the petition and placed the children in petitioner's temporary custody.

The circuit court conducted an adjudication trial on July 26, 2004. Respondent offered a no contest plea to the allegations in the petition. The court ordered a psychological evaluation and a substance abuse assessment, and allowed respondent supervised parenting time twice a week.

By the time of a dispositional review hearing on September 9, 2004, respondent had not obtained a psychological evaluation, and the court suspended his parenting time. Respondent's substance abuse evaluation recommended random drug screens. The court ordered random screens, a psychological evaluation, and that respondent participate for treatment evaluation at the Oakland County Juvenile Clinic. Respondent obtained a psychological evaluation and in October 2004, the court reinstated his supervised parenting time.

At the next dispositional review hearing in January 2005, respondent admitted that two of his drug screens were positive for marijuana and that he did not provide further samples. He also testified that he was paid "under the table" by a moving company, and had no pay stubs. The circuit court suspended his parenting time until he substantiated two months of negative drug screens, and ordered respondent to obtain legal employment.

By April 2005, respondent legally earned \$12.00 per hour but had not provided any drug screens, was not in therapy, and had not attended parenting classes, all of which were required by his parent-agency treatment plan. At a permanency planning hearing one month later, he admitted that his home did not have gas service. All three of his drug screens were positive for

marijuana, albeit in decreasing amounts. The circuit court expressed at the hearing that if respondent continued to submit negative drug screens, it would give the children's guardian ad litem the "discretion to allow him to have some parenting time." The circuit court also allowed respondent an additional 90 days to obtain therapy and attend parenting classes.

On August 23, 2005, petitioner filed a supplemental petition requesting termination of respondent's parental rights, as well as those of the children's mother. The supplemental petition alleged as to respondent "neglect... in the form of criminality, including convictions indicative of substance abuse," as well as his failure to engage in mental health therapy and substance abuse treatment, failure to attend parenting classes, and failure to maintain adequate housing with gas service. The supplemental petition further averred that respondent submitted drug screens positive for marijuana in October and November 2004 and in May 2005. In June and July 2005, according to the supplemental petition, respondent failed to provide any drug screens. As a result of positive screens he had not been permitted to visit his children since January 2005. Petitioner requested termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (g) and (j).

The circuit court held a termination hearing on September 30, 2005, at which a foster care worker testified to most of the facts alleged in the petition. She admitted that respondent worked for a moving company and was paid legally, had obtained gas service for his home, and that the home was suitable for the children's residence. She also testified that he appeared for 22 of the initial 27 scheduled parenting time visits prior to January 2005, when the circuit court suspended them. After summarizing this witness's testimony, the circuit court opined, "I'm not clearly convinced [respondent]'s not in substantial compliance," and dismissed the supplemental petition. The circuit court told respondent that it would permit supervised parenting time pending two negative random drug screens, and ordered attendance at two AA or NA meetings per week.

The circuit court conducted a dispositional review hearing on January 6, 2006. A case worker testified that respondent had not complied with the court's order for parenting classes, drug screens, income verification, or the substance abuse assessment. The court noted that respondent had tested positive for marijuana in October 2005 and had missed eight of fourteen random tests. The circuit court then explained as follows that it found termination of respondent's parental rights warranted:

Okay. I'll tell you what. I'm – I'm reversing myself on my October 14<sup>th</sup> ruling and I'm terminating your rights.

\* \* \*

Because I don't think you get it.

I think the statutory grounds are there, you're in violation of the Parent Agency Agreement and that's sufficient for me to terminate your parental rights to your children.

You're done seeing your kids, you're through. I'm reversing myself.

In a January 10, 2006 order, the circuit court “reinstated” the supplemental petition dated August 23, 2005, and expressed its finding that clear and convincing evidence supported termination of respondent’s parental rights.

At the best interests hearing conducted on March 8, 2006, a single social worker testified. The witness admitted that she had not visited respondent’s home recently and had not contacted his employer. She further admitted that respondent had completed his substance abuse assessment and submitted six negative drug samples. The circuit court concluded, “It appears to me he’s complied with the Parent Agency Agreement,” and once again set aside the order terminating respondent’s parental rights. The court ordered that the children’s temporary wardship continue, and reinstated the elements of respondent’s prior treatment plan.

By June 1, 2006, respondent completed parenting classes, supplied proof of his employment, submitted negative drug screens, participated in a substance abuse assessment, and visited his children. The circuit court ordered that respondent continue to meet the same treatment plan goals and offered the potential of increased, unsupervised parenting time if he participated in therapy.

By the time of a permanency planning hearing in September 2006, however, respondent no longer had gas service at his home or a driver’s license, and had not enrolled in individual therapy. He had submitted seven negative drug screens but missed one in August 2006. The guardian ad litem and case workers testified that the children were “thriving” in the foster care placement where they had lived for more than two years. The circuit court ordered petitioner to file a petition for permanent wardship.

On October 31, 2006, petitioner filed a second supplemental petition. It alleged that respondent had made minimal progress “in [his]... personal situation which did not clearly overwhelm the parents’ longstanding history of instability and the lengthy period of time” that the children had been in foster care. The petition detailed respondent’s missed drug screens since March 8, 2006, which totaled thirteen as of August 8, 2006. He did not complete any drug screens in September and October 2006. Respondent had been referred for individual counseling on multiple occasions, but he never attended any sessions. He was discharged from Alpha Family Counseling in June 2006 due to his cancellations of and failures to appear for appointments. Additionally, the petition averred that respondent failed to provide documentation of NA or AA attendance. In June 2006, respondent was convicted of possession or sale of stolen or counterfeit insurance certificates, a felony. In July 2006, the gas service at his home was shut off for nonpayment.

A trial was conducted on December 8 and 11, 2006. Respondent admitted that he had missed many drug screens, was addicted to marijuana, and had no driver’s license. His gas service had been restored and he had attended therapy for about one month. Respondent also testified that he went to AA or NA meetings for approximately one month during the preceding two years.

On December 12, 2006 the circuit court terminated respondent’s parental rights pursuant to MCL 712A.19b(3)(c)(i) and (g), finding that the conditions leading to the adjudication continued to exist and there was no reasonable likelihood that they would be rectified within a reasonable time, and that respondent without regard to intent failed to provide proper care and

custody for his children, with no reasonable likelihood that he would be able to do so within a reasonable time. At respondent's request the court scheduled a best interests hearing. It also directed that he undergo an updated psychological evaluation.

At the best interests hearing in March 2007, a psychologist testified that when respondent presented for his February 2007 appointment he "appeared to be high," and "smelled like marijuana." This witness told the court that respondent's probation officer had reported that respondent violated the terms of his probation by working only part time and testing positive for marijuana in his two most recent drug screens. Respondent still had no driver's license. The psychologist reiterated respondent's opinion that the children's foster care placement was "stable for them... for once in their life." The psychologist opined that the children were "better off... in the placement," and that "the conditions that existed before still exist [substance abuse and inappropriate behavior], ... [and] that [respondent] does not make good decisions and would put the children at risk."

A foster care worker testified that respondent tested positive for marijuana in January and February 2007, and that he neglected to supply proof of continuing employment or attendance at NA or AA meetings. She opined that termination of respondent's parental rights would serve the children's best interests because he had failed to improve his parenting abilities, despite having had "ample time." This witness observed that the children had been in care for almost three years. Respondent acknowledged that he worked only part-time. He testified that he planned to complete therapy, and thought he would need "probably half a year to a year for my financial troubles to be over," including paying the fines necessary to have his driver's license restored.

The circuit court concluded that termination of respondent's parental rights would not contravene the children's best interests:

Now, both parties provided plans to the Court but the plans—both together, both of them separately, say we're not going to be financially stable for six months to a year.

This case came into court, these kids came into care 33 months ago, in May of 2004.

And, honestly, nothing's changed.

I'm sorry. Nothing's changed.

They might have good intentions but they're not showing it and these children do need permanency and they do need consistency and both parties have said to the therapist and they said on the stand that these kids are . . . in a good place and they're getting what they need; they're getting what they need that these parents . . . can't provide.

These parents are both on probation.

They're both underemployed.

They're not in a position to provide for these children.

And they had the burden at this point, they have the burden of showing me that the best interest of these children would be served by my not, by my not terminating.

And, unfortunately, they haven't done that.

And I'm sorry.

And I feel bad for you two . . . .

Mr. Daech, I think you got yourself way too ahead of yourself, that you're way into your problems of yourself and not into your kids.

I'll tell you this, when you're high there's not one thing you can do to help the kids.

\* \* \*

So, unfortunately, the Court finds that termination of respondent mother and . . . respondent father's parental rights are clearly not adverse to the best interest of the minor children.

On March 5, 2007, the circuit court entered an order terminating respondent's parental rights.

## II. Issues Presented and Analysis

Respondent first contends that insufficient evidence supported the circuit court's reliance on subsection (c)(i) as a basis for terminating his parental rights. This Court reviews for clear error a circuit court's finding that a ground for termination has been established by clear and convincing evidence "and, where appropriate, the court's decision regarding the child's best interest." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005) (internal quotation omitted); see also MCR 3.977(J). Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake. *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996).

The record establishes that with respect to respondent, the conditions leading to the children's adjudication as temporary court wards involved his PPO-based inability to care for them after the microwave fire in May 2004. Respondent's no contest plea to the adjudication in June 2004 acknowledged a history of substance abuse. Although the PPO against respondent expired by its own terms in March 2005, his inability to provide a house with consistent utility services, his difficulty in dealing with his substance abuse problem, and his failure to obtain therapy were persistent themes during the lengthy course of the child protective proceedings.

The circuit court afforded respondent many chances to demonstrate his ability to provide the children proper care and custody. Between the 2004 adjudication and dispositional orders and the December 2006 termination hearing, respondent failed to report for 80 random drug screens, including 20 to 30 during 2006. He attended only one individual therapy session. At

the December 2006 termination hearing, respondent candidly admitted that he felt addicted to marijuana and had smoked two to three joints a day for 17 years. He also admitted to a felony conviction rendered two years after the adjudication. Utility services were shut off at respondent's home on several occasions during the two and a half years that preceded the termination of his parental rights. Respondent did make periodic and commendable efforts to benefit from the services and advice offered to him, demonstrated by several months of negative drug screens and maintenance of legal employment. His successes were inconsistent, however, and his drug abstinence short-lived. The totality of the evidence supports the circuit court's conclusion that between May 2004 and December 2006, respondent had made no significant progress toward establishing a safe home environment for his children.

We find that this evidence clearly and convincingly establishes that the conditions leading to the adjudication continued to exist more than 182 days after entry of the initial dispositional order. Furthermore, we detect no reasonable likelihood that respondent's ongoing financial and longstanding substance abuse difficulties "will be rectified within a reasonable time considering the child[ren]'s age[s]." Subsection 3(c)(i). Respondent's substance abuse existed long before these child protective proceedings arose, and despite the circuit court's generous provision of approximately three years in which he could participate in treatment, he made little if any progress. Meanwhile, the young children spent most of their lives in foster care.<sup>1</sup>

Respondent also maintains that the circuit court's ruling after the September 2005 termination hearing that he had achieved substantial compliance with the parent-agency agreement operates as *res judicata* to preclude a different finding at the December 2006 termination hearing. Respondent emphasizes that both the 2005 and 2006 supplemental petitions for permanent custody essentially raise the same allegations of his neglect. Respondent ignores, however, that "when the facts have changed or new facts develop, the dismissal of a prior termination proceeding will not operate as a bar to a subsequent termination proceeding." *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991). In *Pardee, id.* at 249, this Court explained that the doctrine of *res judicata* does not prevent the "fresh litigation" of issues "that are appropriately the subject of periodic redetermination as is the case with termination proceedings where new facts and changed circumstances alter the status quo." Termination proceedings often involve a cumulative and ongoing factual scenario combining, over a considerable period of time, judicial and agency supervision. A court's denial of a petition to terminate parental rights seldom abruptly ends court or agency supervision.

It is one thing to say that such an order bars a second termination proceeding when there has been no change in the operative facts which led to the

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<sup>1</sup> Concerning MCL 712A.19b(3)(g), respondent's failure to provide the children proper care and custody involved his inability to care for them after the house fire in May 2004, and his failure to maintain payments on the marital home, where the children resided. Because the prolonged, nearly three-year duration of the child protective proceedings brought respondent little closer, if at all, to seriously addressing his substance abuse or his capacity to provide the children a proper home environment, the abundant evidence relevant to (c)(i) likewise clearly and convincingly establishes his inability to provide the children proper care and custody within a reasonable time, irrespective of his intent, especially given the very young ages of the children.

initiation of the first proceeding; it is very different – and clearly wrong – to contend that, if new substantial material facts come into existence which justify the filing of a new termination proceeding, evidence and facts which were or could have been considered in the earlier proceeding cannot be considered or reconsidered in the later one. [*In re Newman*, 49 Or App 221, 225-226; 619 P2d 901 (1980).]

A thorough review of the record in this case reveals that the facts and issues litigated between 2004 and March 2006 were not identical to those relied upon by the court in December 2006. The circuit court's 2006 redetermination of whether the statutory grounds warranting termination existed took into account new information regarding respondent's failures to comply with his court-ordered treatment plan and his capacity to provide the children proper care and custody. Although the petition and the testimony at trial included facts and allegations dating back to 2004, the record reveals that the circuit court properly based its decision to terminate respondent's parental rights on an assessment of the conditions that existed at the time of the December 2006 trial. *Res judicata*, therefore, does not apply. *Pardee, supra* at 249.

Respondent also challenges the circuit court's best interests finding pursuant to MCL 712A.19b(5). We initially note that the circuit court misstated the applicable burden of proof. At the outset of the circuit court's bench opinion concerning best interests, the court, quoting *In re Trejo*, 462 Mich 341, 352-354; 612 NW2d 407 (2000), correctly summarized that subsection 19b(5) imposes on neither party the burden to produce evidence relevant to the children's best interests. But after discussing the manners in which respondent failed to progress in treatment, the circuit court stated, "And [respondents] had the burden at this point, they have the burden of showing me that the best interest of these children would be served by my not, by my not terminating. And, unfortunately, they haven't done that." Reviewing the circuit court's best interests opinion in its entirety, however, we reject that the court *applied* an incorrect standard. Instead, the record indicates that the circuit court allowed both sides to present evidence, and properly weighed all of the evidence before rendering a decision. We view the court's misstatement regarding the best interests burden of proof as harmless error. MCR 3.902(A), MCR 2.613(A).

Furthermore, ample evidence supports the court's finding that termination of respondent's parental rights does not contravene the children's best interests. In light of the evidence of record establishing that (1) when the termination and best interests hearings occurred in late 2006 and early 2007, the children had spent most of their lives in foster care, (2) when faced with possibly losing his parental rights, respondent could not overcome his substance abuse problem by consistently participating in random drug screens and therapy, (3) respondent admitted that he would require six months to another year before he could overcome his financial difficulties, and (4) the children were thriving in their current placements,<sup>2</sup> we find no clear error

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<sup>2</sup> Respondent correctly observes that a legal or natural parent's fitness "must be measured by statutory standards without reference to any particular alternative home which may be offered the children." *In re Mathers* 371 Mich 516, 530; 124 NW2d 878 (1963) (internal quotation omitted). In this case, however, the circuit court properly considered the children's well being in foster care as relevant to its determination concerning the effect of termination on their best (continued...)



in the circuit court's determination that termination of respondent's parental rights is consistent with the best interests of the children.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Patrick M. Meter  
/s/ Elizabeth L. Gleicher

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(...continued)

interests, not with respect to whether the statutory grounds warranting termination existed. *Id.* (explaining that evidence regarding the advantages of a potential foster home may be relevant to an order of disposition).