STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of AIRIANA RAE PUMFREY,
Minor.

CHARLES WHITE and JEANNA WHITE,

Petitioners-Appellees,

v

DENNIS PUMFREY,

Respondent-Appellant,

and

FAWN WHITE,

Respondent.

UNPUBLISHED
May 20, 2008

No. 281117
Cass Circuit Court
Family Division
LC No. 07-000044-NA

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the circuit court improperly terminated respondent's parental rights.

I. Background Facts and Proceedings

Respondent and Fawn White are the parents of ARP, who was born in 2001. Respondent and Fawn never married; respondent acknowledged paternity a few days after ARP's birth. Fawn did not appeal the circuit court's termination of her parental rights, and thus is not a party to this proceeding.

Respondent lived with Fawn and ARP for a short time after ARP's birth, but moved out before ARP's first birthday. After her parents' separation, ARP resided with Fawn. Petitioners Charles and Jeanna White, Fawn's father and stepmother, frequently cared for ARP for days or weeks at a time, as did respondent's parents.

In 2003, Fawn left ARP in petitioners' custody, and moved to North Carolina. Fawn provided petitioners with a six-month power of attorney, which she voluntarily renewed at least

twice. In February 2004, after Fawn failed to renew an expired power of attorney, petitioners filed a guardianship petition. Respondent appeared at the initial guardianship hearing and objected to petitioners' appointment as ARP's guardians. The circuit court appointed petitioners as ARP's temporary guardians, and scheduled a contested hearing for May 26, 2004.

ARP celebrated her third birthday on April 28, 2004. Respondent attended her birthday party, brought gifts, and stayed for three or four hours. Respondent did not attend the contested hearing conducted on May 26, 2004, and the circuit court appointed petitioners as ARP's full guardians. The order appointing petitioners is not part of the lower court record. The parties agree, however, that it did not contain a requirement that respondent pay child support, and petitioners never requested that respondent contribute to ARP's support.

The testimony at the most recent proceedings in 2007 agreed that after petitioners' appointment as ARP's guardians in 2004, they made a "conscious decision" to deny respondent any opportunity to visit ARP. Charles White testified that he "felt it in [ARP]'s best interest … to not allow that contact," and admitted that he "thwarted" respondent's efforts at visitation. Within two weeks of petitioners' appointment as ARP's guardians, respondent appeared at their home and asked to visit his daughter. He denied having received notice of the May 2004 guardianship hearing. Charles White told respondent that visitation "was not established in the guardianship," and that "[i]f he wanted visitation [rights], he had to petition the court."

Despite petitioners' openly expressed hostility, respondent attempted to contact his daughter by repeatedly calling petitioners' home. Charles White admitted that petitioners utilized caller ID to screen and refuse respondent's calls, explaining, "I told Dennis earlier once … that, visitation, [he] had to petition the court, the visitation rights would be established at that point in time. And I saw no sense of going through the same argument every time." Respondent testified that he could not afford an attorney in 2004, but subsequently obtained gainful employment. In June 2006, respondent attempted to visit ARP at petitioners' home. According to respondent, he knocked on the door and observed Jeanna White "escort my daughter into the other room," but no one answered the door. Petitioners admitted that they allowed ARP to speak to Fawn on several occasions when she called.

In March 2007, petitioners filed a petition seeking termination of respondent's parental rights pursuant to MCL 712A.19b(3)(f)(i) and (ii), which provide as follows:

> (f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:
>
> (i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

Respondent contested jurisdiction, and in July 2007 the circuit court conducted a jury trial. The jury found that the circuit court had jurisdiction over ARP pursuant to MCL 712A.2(b)(5), the statutory ground alleged in the petition.

On September 6, 2007, the circuit court commenced a termination hearing. At the conclusion of the hearing, the court found that respondent failed to attend any of the annual guardianship review hearings, and never petitioned for visitation. Based on respondent's failures to pay any child support and to make "regular and substantial visits," the circuit court held that the statutory ground for termination in subsection 19b(3)(f) had been proven by clear and convincing evidence. The court additionally observed that "[ARP] needs permanency," and that "permanency can only be provided at this time with allowing [petitioners] to proceed with adoption."

II. Governing Legal Principles

In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court reaffirmed and emphasized the constitutionally protected rights of natural parents: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" (Citation omitted). The Supreme Court held in *Stanley* that the Fourteenth Amendment's Due Process Clause required a parental fitness hearing before a state could constitutionally deprive a parent of parental rights. *Id*. at 657-658.

Subsequently, in *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the United States Supreme Court addressed the constitutionally required standard of proof in parental rights termination cases. The Supreme Court's analysis began with the observation that standards of proof "are shaped by the risk of error inherent in the truth-finding process . . . ." *Id*. at 757. In parental rights termination proceedings, the Supreme Court determined, "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *Id*. at 758. Because a parent facing the termination of his or her parental rights risks the loss of a fundamental liberty interest, the Supreme Court held that a court's termination decision must rest on at least clear and convincing evidence. *Id*. at 768-770.

The clear and convincing evidence standard is "the most demanding standard applied in civil cases." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

> produce(s) in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (internal quotation omitted).]

Petitioners sought the termination of respondent's parental rights solely pursuant to MCL 712A.19b(3)(f)(i) and (ii). Petitioners therefore bore the burden of proving respondent's unfitness by clear and convincing evidence. In my view, they failed to do so.

III. Standard of Review

To the extent that this case presents an issue of statutory interpretation, this Court applies de novo review. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). We review the circuit court's factual findings for clear error. *In re ALZ*, 247 Mich App 264, 271; 636 NW2d 284 (2001). A factual finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been committed. *Id*. at 271-272.

IV. Analysis

The asserted ground for termination of respondent's parental rights, MCL 712A.19b(3)(f), requires proof of two separate facts: that respondent "failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition," subsection (f)(i), and that respondent, "having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition," subsection (f)(ii). As discussed above, proof of these two facts must be clear and convincing to justify the termination of parental rights.

In my view, the record lacks clear and convincing evidence that respondent had the ability to visit, contact or communicate with his daughter. Petitioners deliberately denied respondent any opportunity to visit or communicate with ARP. But the record reveals no legal or factual basis for petitioners' decision to separate respondent from his child. In my judgment, the circuit court clearly erred by endorsing petitioners' position that respondent had to obtain a court order before he could visit his child, particularly in the absence of actual evidence to this effect. The circuit court compounded this error by sanctioning petitioners' improper conduct as the basis for terminating respondent's parental rights.

The majority and the circuit court assert that respondent could have petitioned for the right to visit his daughter, even though nothing in the record supports the proposition that petitioners properly denied him visitation in the first place.[1] According to this reasoning, the appropriate penalty for respondent's failure to do something that he should never have been forced to do is to forever deprive him of a fundamental right.[2]

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[1] The guardianship order is not within the record provided to this Court. According to MCL 700.5204(5), when a court appoints a guardian it "may at any time order the minor ward's parents to pay reasonable support and order reasonable parenting time and contact of the minor ward with his or her parents."

[2] In *Stanley*, *supra* at 651, the United States Supreme Court observed that "[t]he private interest … of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."

This Court addressed a similar situation *In re ALZ*, *supra*, and I find the majority's effort to distinguish that case wholly unpersuasive. The respondent in *ALZ* had no contact with his child for almost four years because the petitioner mother instructed him to "leave them alone or stay out of their lives." *Id*. at 266. In December 1998, the respondent wrote to the mother and acknowledged that he had "not been in [ALZ's] life for the past four years," but requested an opportunity to get to know his daughter, which the mother refused. *Id*. at 266-267. In February 1999, the respondent formally commenced proceedings to establish his paternity and sought parenting time. *Id*. at 268. The mother and her new husband responded by petitioning for termination of the respondent's parental rights based on his failure to support or contact the child for a period of two years or more, and requesting a stepparent adoption. *Id*. The family court refused to permit the adoption, finding that "the mother's position refusing contact any any (sic) reintegration plan, resulted in his inability to have contact with the child." *Id*. at 271. This Court affirmed, explaining,

> The family court concluded that respondent did not have the ability to visit, contact, or communicate with A.L.Z. because of petitioner mother's refusal to allow respondent to establish contact with the child. Upon review of the record, we find no error in the lower court's conclusion on this issue. [*Id*. at 273.]

The majority attempts to distinguish *In re ALZ* because in that case, the "respondent's paternity had not been established, so 'he was effectively a nonparent' and did not have a legal right to visit or communicate with the child and could not seek court intervention without first establishing paternity." As this Court pointed out in *ALZ*, however, the respondent did not seek an order of filiation during the first 3-1/2 years that the petitioners denied him visitation with his daughter, but waited to establish paternity until the child had reached six years of age. Nevertheless, this Court affirmed the circuit court's determination that the respondent's December 1998 letter and February 1999 filing of a family court action for paternity and visitation "constituted ongoing requests for contact with A.L.Z., but that petitioner mother's resistance to these requests resulted in respondent's inability to contact the child . . . ." *Id*. at 274.

Obviously, the respondent in *ALZ* could have established paternity sooner than he did. But his failure to take legal action for the first 3-1/2 years of his daughter's life did not result in termination of his parental rights only because ALZ's mother prevented him from visiting his child. In my view, the same analysis should apply here. I would hold that the circuit court clearly erred when it construed the statutory terms "ability to visit, contact, or communicate" to include respondent's *potential* ability to interact with his daughter, conditioned on a court appearance and a court order. I would construe the statute to require that a parent possess an actual ability to visit, unimpaired by the existence of a barrier improperly erected by a third party. In my view, clear and convincing evidence of parental unfitness requires more than a showing that a parent failed to hire an attorney and go to court to vindicate an improperly denied right to visit his child.

The instant record contains clear, convincing and unrebutted evidence that respondent did *not* have the ability to visit, contact or communicate with his daughter because petitioners made it their mission to deprive him of that ability. I additionally reject the majority's facile suggestion that respondent should have written letters to his daughter. Given petitioners' attitude toward respondent and their abject unwillingness to allow him to merely speak to ARP on the

telephone, it is a virtual certainty that any letters would not have found their way to his four- or five-year-old child.

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky*, *supra* at 753. Respondent should have been more proactive, and probably should have tried harder to assert his right to visit his daughter. His faults, however, pale in comparison to those generally resulting in the termination of parental rights. In the vast majority of the termination cases considered by this Court, parents are afforded multiple opportunities to improve parenting skills before a circuit court deprives them of their rights, even when the parents have abused or otherwise harmfully neglected their children. Here, respondent tried to parent, and no record evidence exists tending to support either his unfitness while parenting ARP, or that he would parent badly if given an opportunity. Because the circuit court allowed the calculated misconduct of others to serve as a driving factor in extinguishing respondent's constitutional rights, I would reverse.

/s/ Elizabeth L. Gleicher