STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JACQUELINE JOANNE BURKEEN, KRISTEN MARGARET BURKEEN, and HUNTER BERNARD BURKEEN, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

NICOLE SUZANNE BURKEEN,

Respondent-Appellant,

and

JOSEPH PAUL BURKEEN,

Respondent.

UNPUBLISHED
November 18, 2008

No. 285620
Lapeer Circuit Court
Family Division
LC No. 06-010281-NA

In the Matter of JACQUELINE JOANNE BURKEEN, KRISTEN MARGARET BURKEEN, and HUNTER BERNARD BURKEEN, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JOSEPH PAUL BURKEEN,

Respondent-Appellant.

No. 285621
Lapeer Circuit Court
Family Division
LC No. 06-010281-NA

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

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from a circuit court order terminating their parental rights to the minor children under MCL 712A.19b(3)(c)(i) [the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the children's ages], (g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that the parent might do so within a reasonable time given the child's age], and (j) [a reasonable likelihood exists, based on the parent's conduct or capacity, that the child will suffer harm if returned to the parent's home]. We affirm.

These child protective proceedings began after allegations surfaced that respondent-father had physically abused respondents' eldest child and committed domestic violence against respondent-mother, culminating in respondent-father's arrest for domestic violence in February 2007. During a subsequent Child Protective Services (CPS) investigation, CPS discovered that the children had witnessed several incidents of domestic violence in their home, and learned that respondent-father had engaged in other angry, disturbing and violent behaviors. CPS opined that respondent-mother had failed to shield the children from respondent-father's disturbing behaviors. When CPS sought to supply respondents with services, including in-home assistance, respondents failed to participate. After respondent-father repeatedly visited the familial home in contravention of a no-contact order, CPS removed the children from respondents' care.

On April 3, 2007, petitioner filed a petition documenting the CPS investigation and requesting that the circuit court place the children in its temporary custody. At a preliminary hearing on April 5, 2007, a CPS worker additionally apprised the circuit court that respondents had substance abuse issues, primarily with alcohol, and that they were in the process of losing their home through foreclosure. The circuit court authorized the petition on April 5, 2007, and placed the children in petitioner's temporary custody. On May 23, 2007, after a two-day adjudication trial, a jury found that "one or more of the statutory grounds alleged in the Petition concerning the children have been proven" by an evidentiary preponderance. MCL 712A.2(b). Consequently, the circuit court exercised jurisdiction over the children.

On June 22, 2007, respondents entered a parent-agency agreement that required them to submit to weekly random drug or alcohol screens, complete parenting classes, undergo psychological and psychiatric evaluations, engage in individual counseling sessions, secure employment and a suitable residence, and attend supervised visits with the children. At a dispositional review hearing held the same day, the circuit court ordered respondents to comply with their treatment plan.

From the outset, however, respondent-father exhibited resistance toward participation in services. He refused to comply with counseling, and had positive drug or alcohol screens. Respondent-father did complete a psychological evaluation, and began attending supervised visits with the children, although he did not demonstrate an ability to positively interact with them, especially the girls. On July 25, 2007, respondent-father's minimal progress derailed entirely. Early that morning, deputies arrested respondent-father after they arrived at the family home, heard him yelling, and witnessed him place both hands on respondent-mother's head and

"start[] slamming her head into the wall." Respondent-father pleaded no contest to attempted felonious assault and domestic violence, for which he spent 93 days in jail, eventually being released in late October 2007.[1]

Respondent-mother initially complied with services by attending drug or alcohol screens, commencing parenting classes and counseling, regularly attending visits with the children, completing a psychological evaluation, and maintaining regular contact with her caseworker. Respondent-mother's compliance continued after respondent-father's incarceration. Between October 2007 and December 2007, however, respondent-mother almost completely ceased participating in services. In mid-January 2008, petitioner filed a supplemental petition requesting that the circuit court terminate respondents' parental rights under MCL 712A.19b(3)(c)(i), (g) and (j).

Several witness testified at the two-day termination hearing, which occurred in April and May 2008. Donna Greenhaw, respondent-mother's therapist between August 8, 2007 and November 26, 2007, recalled that respondent-mother attended seven sessions and missed seven during this period. Greenhaw recounted that she and respondent-mother, who had an avoidant and dependent personality, addressed depression, domestic violence, and reunification issues. According to Greenhaw, respondent-mother opened up somewhat after several meetings and acknowledged having endured domestic violence, but eventually "closed back down." Greenhaw opined that respondent-mother did not achieve "significant" progress, specifically that she failed to "understand[] the impact of the domestic violence on the children and also . . . what was needed for reunification." In Greenhaw's estimation, respondent-mother still required "in depth therapy" to address domestic violence.

Lauren Prokopy, who had provided therapy to respondent-father in eight sessions since November 9, 2007, opined that he had made "some progress" in discussing anger and depression issues. Prokopy projected that respondent-father's mental difficulties would require at least a year of treatment to successfully address, assuming that his participation continued.

Three foster care workers[2] summarized the remainder of respondents' treatment plan compliance. The testimony of the workers reflected that (1) both respondents underwent psychological evaluations, but neither submitted to psychiatric evaluations; (2) neither respondent substantiated employment or a sufficient legal income source, although respondent-mother verbally advised a case worker around October 2007 that she had begun cleaning houses

[1] At the termination hearing, Deputy David Ferguson recounted that on July 25, 2007, he had observed a healing laceration on respondent-mother's head and some bruising on her thigh that she attributed to another disturbing, ultimately sexual assault by respondent-father during the previous week.

[2] Psychologist Walter R. Drwal, who evaluated respondents in April 2007 and May 2007, found with respect to respondent-father that he suffered an impaired ability to gauge situations and formulate appropriate responses, which Drwal described as "characterological" in nature. Regarding respondent-mother, Drwal characterized her as having a dependent and submissive personality, and opined that her prognosis for recovery remained poor if she could not distance herself from respondent-father.

with a friend; (3) although both respondents had enrolled in and attended some parenting classes, neither successfully completed the course; (4) respondents had lost their family home to foreclosure and had not informed the workers of any suitable, replacement housing; (5) respondent-mother failed to maintain regular case worker contact since late September 2007 or October 2007, while respondent-father never had kept in touch with the workers; (6) respondent-mother initially demonstrated positive interactions with the children during supervised visits to the point that by mid-September 2007 she had two overnight, unsupervised visits with the children at her brother's residence that reportedly went well, but thereafter she simply "disengaged"; respondent-father had no visits with the children after his incarceration; (7) with respect to weekly drug or alcohol screens, respondent-mother regularly submitted drug screens through approximately August 2007, but between October 2007 and mid-January 2008 she submitted only three negative drug screens, attended two more but could not drop, and otherwise missed her remaining weekly appointments; as a condition of respondent-father's probation, he had to submit to random drug testing after his October 29, 2007 release from jail, but his probation officer testified that he had failed to appear for screens in March 2008 and April 2008.

The case workers recommended termination of respondents' parental rights given their lack of substantial progress and the children's strong needs for a stable, violence-free environment, for which all three children had expressed readiness. In a careful and detailed bench opinion, the circuit court found that clear and convincing evidence supported all three statutory grounds for termination. The court further concluded that termination would serve the children's best interests.

Respondents now contend that the circuit court lacked clear and convincing evidence to support any of the statutory grounds for termination. 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 foremost condition leading to the May 2008 adjudication constituted the long history of respondent-father's domestic violence against respondent-mother, which the children frequently witnessed. Our review of the record reveals clear and convincing evidence that this condition continued to exist more nearly a year later at the time of the termination hearing, and that no likelihood of rectification existed within a reasonable time given the children's ages. Even within the month after respondents first signed the parent-agency agreement, respondent-father at least twice had brutally assaulted respondent-mother. Respondent-father, who until his incarceration displayed a marked aversion to participating in any recommended services, only just began counseling to address his anger and depression after his release from jail in late October 2007. In the estimation of respondent-father's new counselor, even were he to demonstrate a consistent commitment to therapy he would require at least a year of additional therapy to successfully confront his anger and depression. Respondent-mother, who had a dependent and submissive personality, had a relationship with respondent-father that extended back more than 17 years. Although respondent-mother commendably began involving herself in several aspects of her treatment plan, she could not commit to individual therapy for more than a

few months or even to completing parenting classes, and for an extended period she ceased visiting with her children and complying with her treatment plan. In mid- to late-September 2007, the jail in which respondent-father resided intercepted a letter from respondent-mother proclaiming her love for him and disparaging the court-ordered reunification requirements. In light of the entire record in this case, the circuit court did not clearly err in finding termination warranted under subsection (c)(i).[3]

We also find in the record clear and convincing evidence that respondents had failed to provide their children proper care and custody, and that no likelihood existed that they could do so in a reasonable time given the children's ages. The record amply demonstrates respondents' failure to supply the children proper custody, specifically their provision of an unfit home environment in which respondent-father repeatedly physically abused respondent-mother while the children were present. The inability of respondents to give the children proper care becomes plain on a review of their lack of substantial progress in any area of their parent-agency agreement: the failure of both respondents to complete parenting classes, demonstrate a sustained commitment to individual therapy or drug screens, maintain visits with the children, make any documented efforts to locate employment, a sufficient income source or appropriate housing, or even maintain contact with their case workers. Given the longstanding nature of respondents' dysfunctional relationship and their half-hearted efforts to escape from it, the circuit court did not clearly err by invoking subsection (g) as a basis for termination of their parental rights.[4]

Both respondents suggest on appeal that they did not receive due process in the proceedings that culminated in the termination of their parental rights. The essence of their claim is reflected in respondent-mother's protestation that petitioner "did not comply with their statutory requirement to provide services to appellant" for at least 182 days. We find this claim unpersuasive on multiple grounds. First, respondents do not cite any provision of the juvenile code that mandates petitioner to offer services for precisely 182 days. Second, the record does not support respondents' contention that petitioner hastily sought termination. Termination under subsection (c)(i) plainly contemplates the prerequisite that "182 or more days have elapsed since the issuance of an initial dispositional order." In this case, however, the circuit court entered the initial dispositional order on June 22, 2007, petitioner filed the permanent custody petition on either January 14 or 15, 2008, and the termination hearing occurred on April 30, 2008 and May 1, 2008; consequently, more than 200 days elapsed between entry of the initial dispositional order and petitioner's filing of the supplemental permanent custody provision, and

[3] Respondent-mother disingenuously suggests that in late-October 2007, petitioner imposed on her a new treatment plan. The record reveals to the contrary that in an effort to recommence respondent-mother's participation in treatment, case workers urged her to engage in a short-term plan, but this plan consisted of the same elements contained in respondent-mother's initial treatment plan.

[4] The evidence already discussed, together with the abundant testimony at the termination hearing concerning the detrimental effects visited on the children by the open and frequent domestic violence in respondents' relationship, clearly and convincingly establishes the statutory ground in subsection (j), as well.

more than 300 days elapsed between entry of the initial dispositional order and the termination hearing. To the extent that respondents complain that petitioner already had decided to terminate their rights by mid-December 2007, when it announced its intent to suspend services, we observe that neither respondent made any documented effort to take some action toward retaining their parental rights. In summary, respondents have not established a statutory or constitutional due process violation, or any unfair prejudice arising from the course of the circuit court proceedings. MCR 3.902 (providing that "[l]imitations on corrections of error are governed by MCR 2.613"); MCR 2.613(A) ("[A]n error or defect in anything done or omitted by the court or the parties" does not warrant "granting a new trial, . . . setting aside a verdict, or . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.").

Furthermore, the circuit court did not clearly err in its best interests determination under MCL 712A.19b(5).[5] The record establishes that the children and respondent-mother clearly shared a bond and loved each other, that respondent-mother had the capacity to act as a loving and caring mother when the children resided in her custody. Although these facts weighed against termination, they did not "clearly overwhelm" respondent-mother's failure to seriously begin to address her underlying dependence-related issues so that she could ensure that the children enjoyed the safe, stable, and violence-free environment paramount to their well being. *In re Trejo*, 462 Mich 341, 364; 612 NW2d 407 (2000). Additionally, testimony by a caseworker revealed that the children felt "very uncomfortable" and hesitant to return home, and by the time of the termination hearing were "ready" to "move on" with their lives, even expressing the hope that their foster parents might adopt them. In summary, the circuit court correctly concluded that the termination of respondent-mother's parental rights would advance the children's best interests.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

[5] Respondent-father does not challenge the circuit court's best interest determination.