STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of OLIVIA JOE BEAN, a/k/a OLIVIA JOE HERRIN, and EVANN EDWARD WALKER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ELIZABETH PEARL HERRIN,

Respondent-Appellant,

and

JOSEPH EMERY BEAN,

Respondent.

UNPUBLISHED
December 30, 2008

No. 285467
Oakland Circuit Court
Family Division
LC No. 07-731815-NA

In the Matter of OLIVIA JOE BEAN, a/k/a OLIVIA JOE HERRIN, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JOSEPH EMERY BEAN,

Respondent-Appellant,

and

ELIZABETH PEARL HERRIN,

No. 285468
Oakland Circuit Court
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Respondent.

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

PER CURIAM.

In Docket No. 285467, respondent mother appeals as of right the trial court's order terminating her parental rights to the two minor children, Evann Walker and Olivia Bean, a/k/a Olivia Herrin, under MCL 712A.19b(3)(c)(i), (g), and (j). In Docket No. 285468, respondent father appeals as of right the order terminating his parental rights to his daughter, Olivia, under the same statutory sections. This Court has consolidated the appeals. We affirm the order terminating respondent mother's parental rights. We reverse the order terminating respondent father's parental rights and remand for further proceedings.

On March 10, 2007, respondent mother gave birth to Evann at Royal Oak Beaumont Hospital. At the time of Evann's birth, respondent mother tested positive for cocaine and hepatitis C. She later admitted she had used marijuana the day she was admitted to the hospital. Evann's meconium tested positive for marijuana and cocaine. Olivia, then two years old, was being cared for by her paternal grandmother and respondent father around this time. Respondent father's father had prior domestic violence convictions. Respondent mother, who had a history of unstable housing, had previous protective service referrals in Macomb County alleging neglect. A petition for temporary custody was subsequently filed in Oakland Circuit Court, and respondent mother, respondent father, and Evann Edward Walker[1] pleaded responsible to the allegations in the petition.[2] The children were placed in the custody of the Department of Human Services (DHS) for care and planning.

The parties subsequently entered into a parent-agency agreement, which required respondent mother to (1) clear up her bench warrants, (2) participate in urine screens three times per week, (3) attend a substance abuse assessment, (4) attend parenting classes, (5) participate in individual therapy, (6) obtain and maintain suitable housing and employment, and (7) attend visits with the children after submitting three negative drug screens. Respondent father was required to (1) submit random drug screens three times per week, (2) obtain housing and employment, (3) attend parenting classes, (4) attend visits with Olivia, and (5) attend a substance abuse assessment.

At the time the wardship trial commenced on March 4, 2008, respondent mother had been incarcerated in Macomb County for approximately 90 days, and with the exception of a brief stint at a substance abuse treatment facility, had failed to satisfy the conditions of the parent-agency agreement. Respondent father, on the other hand was more successful, completing a

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[1] Evann Edward Walker is Evann's father and has a significant criminal history. Although the trial court terminated Evann Edward Walker's parental rights in the proceedings below, he is not a party to this appeal.

[2] The parties previously waived probable cause at the March 26, 2007, preliminary hearing.

number of drug screens, including three in a row as required to see Olivia while missing only several due to transportation issues or work. All drug tests results were negative, and respondent father notified the foster care worker, Tiffany Barber, when there were work conflicts. Although he did not call DHS to request a visit with Olivia, respondent father did inquire about seeing Olivia at the January 9, 2008, court hearing. Additionally, while failing to provide pay stubs or verification, respondent father obtained employment for a month around December 2007, and testified that he had completed parenting classes and would begin a new job the week after trial. Respondent father also completed a substance abuse assessment, which concluded that substance abuse treatment was unnecessary, and took random drug tests, the results of which were negative. Notably, Barber recommended that respondent father be granted three months to complete services and begin seeing Olivia despite his sporadic contact with her. Following trial, the court found petitioner had established MCL 712A.19b(3)(c)(i), (g), and (j), with regard to all parents and continued the matter for a best interests hearing.

The best interests hearing commenced April 14, 2008. Psychological evaluations presented at the best interests hearing concluded that it would take substantial time for respondent mother to progress sufficiently to display the responsibility necessary to care for a child and that respondent father lacked sufficient motivation and maturity to place Olivia's needs and wants above his own. Barber concurred with the recommendation, testifying that termination was in the children's best interests. Despite respondents' opposition, the trial court agreed and terminated respondents' parental rights because termination was not contrary to the best interests of the children

On appeal, the parties first argue that the trial court erred in finding jurisdiction in this matter where Evann was born in Oakland County, but respondent mother did not have stable housing in Oakland County, and Olivia resided in Macomb County with respondent father. Because respondents challenge the trial court's statutory authority for jurisdiction, rather than the court's exercise of jurisdiction, this Court may review the issue although it was not raised below. *In re Hatcher*, 443 Mich 426, 436; 505 NW2d 834 (1993).

MCL 712A.2(b) confers jurisdiction over children "found within the county" whose parents have neglected them. Pursuant to MCR 3.926(A), a child is "found within the county," under the meaning of MCL 712A.2, "in which the offense against the child occurred, in which the offense committed by the juvenile occurred, or in which the minor is physically present." At the time proceedings began, Evann was physically present in Oakland County. Furthermore, Oakland County had proper jurisdiction over both children because respondent mother's offense against the children occurred in Oakland County. Evann was born in Oakland County, and he tested positive for marijuana, cocaine, and hepatitis C at birth. Respondent mother admitted that she had a history of unstable housing but claimed that she had the supplies she needed for Evann at her boyfriend's parents' home in Oakland County, and the initial complaint alleged that she was a resident of Oakland County. Therefore, the children were "found within" Oakland County pursuant to MCL 712A.2(b), and the trial court did not err in assuming jurisdiction in this matter.

Next, respondents challenge the trial court's orders terminating their parental rights. We review for clear error the trial court's determination that statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Once the trial court determines that a statutory ground for termination has been established, termination of parental rights is mandatory unless the court

also finds that termination is clearly not in the child's best interest. MCL 712A.19b(5)[3]; *Trejo, supra* at 344. We review the trial court's best interests determination for clear error. *Id*. at 356-357.

With regard to respondent mother, the trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. The conditions leading to adjudication were respondent mother's drug use during her pregnancy with Evann and her history of unstable housing. At the time of the termination trial, respondent mother was incarcerated and had not completed any substance abuse treatment. It would have taken respondent mother a substantial amount of time, upon her release from jail, to complete substance abuse treatment and find employment and housing. Thus, the trial court did not err in finding that the conditions of adjudication continued to exist, that respondent mother had failed to provide proper care and custody to the children, and there was no reasonable likelihood she would be able to do so within a reasonable time given the children's very young ages. The trial court also did not clearly err in finding a reasonable likelihood that the children would be harmed if returned to respondent mother. Even setting aside the fact that respondent mother was in jail and the children could not be returned to her home, respondent mother's conduct placed Evann in danger by using marijuana and cocaine during her pregnancy. Because she had not completed substance abuse treatment or submitted clean drug screens, there was a strong likelihood that she would use marijuana and cocaine again and place her children in harm's way.

In making its best interests determination, the trial court found that respondent mother was not ready to put the children's interests above her own. Respondent mother's actions in this case reflected her inability to put her children's interests above her own where she continued to use drugs and not comply with drug screens, and continued criminal behavior, which prevented her from meeting any of the goals of the parent-agency agreement. Respondent mother had very little bond with Evann, whom she only saw a few times after his birth, and whatever bond she had with Olivia had to be greatly lessened because she saw her only a few times in the year preceding the best interests hearing. Therefore, we find that the trial court did not clearly err in its best interests determination with regard to respondent mother and in terminating her parental rights to the children.

However, we find that the trial court clearly erred in determining that the statutory grounds for termination of respondent father's parental rights were established by clear and convincing evidence. Regarding the clear and convincing evidence standard, this Court has explained:

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[3] The termination order in this case was entered before the 2008 amendment to MCL 712A.19b(5) went into effect July 11, 2008. The statute now provides:

> If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.

> Clear and convincing evidence is defined as evidence 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. . . . Evidence may be uncontroverted, and yet not be clear and convincing. . . . Conversely, evidence may be clear and convincing despite the fact that it has been contradicted. [*Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000) (quotations and citations omitted).]

First, the court clearly erred in finding that the conditions leading to the adjudication continued to exist. MCL 712A.19b(3)(c)(i). At the time of adjudication, respondent father was caring for Olivia at his parents' home, which was deemed unsuitable only because his father had domestic violence convictions. Respondent father was unable to move at that time. Notably, housing and income were the *only* conditions of adjudication relating to respondent father.

By the time of trial, however, respondent father had a home and was to begin a job paying $18 per hour the following week. Regarding housing, there was no indication in the record that this home was "unsuitable" or that respondent father's father was living there. See *Trejo*, *supra* at 359-360 (upholding the trial court's finding that the conditions of adjudication continued to exist where the respondent's housing situation was "unsuitable"). Also, while a home study had yet to be completed at the time of trial, this was due to respondent father's inflexible work schedule. Given that respondent father was to begin a new job, this condition could be satisfied within a reasonable period of time.

Besides housing, the trial court expressed doubt that respondent father would maintain employment. However, the trial court based this assumption on the fact that respondent father's previous job lasted only a month. Despite the previous job's brevity, the record does not indicate the reason for the job's duration or even whether respondent father's new job is in any way related. Further, the circumstances of the previous job's termination were not disclosed at trial. Thus, the court's doubt that respondent father could maintain employment appears to be mere conjecture. Such unfair conjecture, however, is insufficient to overcome the hurdle of clear and convincing evidence and "this Court will not sanction termination of [respondent father's] parental rights on this basis." *In re Sours*, 459 Mich 624, 636; 593 NW2d 520 (1999). Furthermore, we note that as respondent father would begin his new job the week after trial, the condition of unemployment was assuredly to be rectified within a reasonable period of time. In light of this, it can hardly be said that the evidence was "so clear, direct and weighty and convincing" that the conditions leading to adjudication continued to exist. *Kefgen*, *supra* at 625.

Second, the evidence did not establish that respondent father would not be able to provide proper care and custody for Olivia within a reasonable time. MCL 712A.19b(3)(g). At the time of adjudication, Olivia was living with respondent father and there were no allegations of neglect. Respondent father testified at the termination trial that he had completed a 12-week parenting class. Although the trial court cited respondent father's failure to provide proof that he had completed the class, respondent father testified that the parenting class program indicated it would fax the necessary verification to Barber. Respondent father also indicated that he had mailed this verification to Barber the week before trial. In any event, there was no indication that respondent father actually needed a parenting class.

Similarly, the court's requirement that respondent father complete thrice-weekly drug screens before visiting Olivia was questionable. Indeed, while respondent father admitted marijuana use in the past, he completed a number of negative drug screens during the pendency of this matter, including three drug screens in a row as required to see Olivia on two separate occasions, and even completed a substance abuse assessment, which concluded that substance abuse treatment was unnecessary. Respondent father also maintained contact with the foster care worker, who recommended he be given additional time to complete his parent-agency agreement. Also noteworthy was respondent father's assertion that he had obtained clothing and a bed for Olivia in his home. In light of this, the trial court clearly erred in finding that respondent father had failed to provide proper care and custody for Olivia, and that there was not a reasonable likelihood that he would be able to provide proper care and custody within a reasonable time.

Third, the trial court clearly erred in finding that there was a reasonable likelihood of harm if Olivia were returned to respondent father's home. MCL 712A.19b(3)(j). As previously noted, respondent father completed a substance abuse assessment, which concluded substance abuse treatment was unnecessary. He had a home and employment, and he testified that he attended a parenting class. Also, there was no indication that respondent father's father was living with, much less involved with Olivia. While the trial court indicated that Olivia was likely to be harmed if placed in respondent father's custody "based on the fact that he has not been able to be consistent and follow through," there was little evidence that these conditions would cause harm where respondent father substantially completed the requirements of the parent-agency agreement. Where a respondent makes progress in addressing parenting problems, termination of parental rights may be improper. *In re Boursaw*, 239 Mich App 161, 168-178; 607 NW2d 408 (1999), overruled on other grds *Trejo*, *supra* at 353-354. Indeed, as this Court observed in ruling the trial court failed to support its finding under MCL 712A.19b(3)(j) with clear and convincing evidence:

> While respondent may not yet be a model parent, we believe the record shows that, at the time of the termination hearing, she had made significant strides toward remedying the problems that had brought this matter to petitioner's attention. Furthermore, we cannot stress too strongly that "[t]he 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 . . . ." [*Boursaw*, *supra* at 176, quoting *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).]

Therefore, the evidence does not leave "a firm belief or conviction" of any likelihood of harm should Olivia be placed in respondent father's custody. *Kefgen*, *supra* at 625. In light of these findings, we conclude that the trial court clearly erred in terminating respondent father's parental rights.

In Docket No. 285467, we affirm the trial court's order terminating respondent mother's parental rights to the children. In Docket No. 285468, we reverse the trial court's order terminating respondent father's parental rights to his daughter and remand for further

proceedings. We do not retain jurisdiction.

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