# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of MARIAH MONE' MCKISSACK, SARIYAH MIRANDA MCKISSACK and KIMIYAH MICHELLE MCKISSACK, Minors.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

GREGORY JAMES MCKISSACK,

Respondent-Appellant,

and

SUNJAH MONIQUE HARRIS,

Respondent.

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UNPUBLISHED
May 14, 2009

No. 287522
Wayne Circuit Court
Family Division
LC No. 03-419427-NA

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

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

## I. Background Facts and Proceedings

In May 2003, petitioner initiated child protective proceedings regarding the two oldest involved minors, MM and SM. Respondent was incarcerated throughout 2003 and did not receive notice of the proceedings until August 2004. Three months after respondent's October 2004 release from prison, the circuit court terminated his parental rights.

In January 2006, this Court reversed the January 2005 termination of respondent's parental rights, holding that "[a]ll proceedings before the termination hearing itself were void with respect to respondent McKissack because he was not properly notified of them." *In re McKissack*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket Nos. 262816, 262817), slip op at 3. This Court also determined that inadequate evidence supported the circuit court's decision to terminate respondent's parental rights. *Id*. at 5.

After remand to the circuit court, respondent entered a parent-agency treatment plan. Respondent complied with all provisions of the plan, and in February 2007 the circuit court placed his two children with him.[1] The circuit court conducted review hearings regarding respondent's progress in March, May and August 2007. Throughout that period, as reflected in the hearing transcripts, respondent properly cared for his three daughters.

At a permanency planning hearing conducted on November 8, 2007, a caseworker reported an episode of domestic violence in respondent's home between respondent and his girlfriend, Christine Wells. The caseworker asserted that if additional information obtained during an ongoing DHS investigation suggested "any risk factors," the worker would recommend that Wells leave the home. The caseworker continued, "If, for any reason, Ms. Wells … continued to reside in the home, we want intensive in-home services and couples therapy with a domestic violence component if the family is going to stay intact." At the conclusion of the hearing, the circuit court acknowledged that reunification with respondent remained the permanency plan.

On December 29, 2007, a foster care worker filed a "supplemental change of plan" petition alleging that respondent had been arrested on December 28, 2007, and was currently incarcerated "on Domestic Violence charges and a PPO violation allegedly for felonious stalking." The supplemental petition sought an order removing the children from respondent's home. On December 29, 2007, a referee conducted a preliminary hearing. A caseworker confirmed that police had arrested respondent, but provided no further details. The same caseworker also testified that nine-year-old MM had alleged "physical abuse" by respondent. The referee found probable cause to place the children with a relative, and scheduled a February 2008 pretrial hearing.

At the February 2008 hearing, a caseworker testified that respondent had attended all supervised visitations but one,[2] the visits went "very well," the children were "definitely" bonded to respondent, and respondent was "definitely" bonded to his children. Petitioner presented no evidence regarding respondent's arrests or MM's abuse allegation, and answered affirmatively when asked, "And there's been interaction and loving and nurturing between parent and child?" The circuit court stated that the permanency plan for the involved minors remained reunification, and ordered that petitioner supply respondent with "anger management and domestic violence counseling," and that respondent obtain "legal income, [and] safe and suitable housing." Respondent's counsel advised the court as follows: "The worker ensured me that she would get the Court's order this week so that we can follow through and get him started in those classes which he has told me he has promised he will attend immediately."

On April 8, 2008, the circuit court commenced an adjudication trial regarding the supplemental change of plan petition recommending continued placement of the children outside the home but with a goal of reunification. Respondent testified that "on or about before

[1] KM, respondent's youngest child, was born in April 2006. Respondent apparently separated from the children's mother, who was also a respondent in an ongoing child welfare proceeding.

[2] The single missed session was cancelled due to inclement weather.

Thanksgiving of 2007," he lived with Wells, and there was "a history of domestic violence" between them. Respondent also admitted that he had "used excessive force in disciplining" MM. The circuit court then conducted a termination hearing with respect to the minor children's mother. The circuit court found statutory grounds to terminate the mother's parental rights, but determined that termination was clearly not in the children's best interests. After the court announced its decision, counsel for petitioner stated, "[A]t this time there's no petition for permanent custody pending, so the permanent plan for those three children is reunification." However, at the conclusion of the hearing petitioner's counsel announced that he had previously misspoken, and that petitioner planned to file a permanent custody petition "against both the mother and father."

On May 2, 2008, petitioner filed a supplemental petition seeking termination of respondent's parental rights, and on July 18, 2008, the circuit court commenced a termination hearing. Petitioner called two witnesses: Stephanie Laube, the children's former foster care worker, and Claudia Youhana, who replaced Laube in June 2008. Laube testified that respondent fully complied with all aspects of the 2006 parent-agency agreement, and that his children had returned to his custody in February and March 2007. Laube recounted that the children were later removed from respondent's home on December 28, 2007, after he was twice arrested for domestic violence involving Wells. Laube believed that the charges in both cases were dropped. In response to the prosecutor's question concerning what had happened during the incidents leading to respondent's arrests, Laube stated, "Specifically, I don't know what happened. There was an altercation fo [sic] some sort." Laube admitted that she never discussed the "altercation" with respondent, and lacked any personal knowledge regarding the alleged abuse of MM. Despite Laube's earlier determination that respondent would benefit from parenting classes, and in disregard of her February 2008 commitment to swiftly initiate services, Laube admitted that she failed to make any referrals until May 2008. Laube added that parenting classes were not scheduled to begin until August 2008.

Laube conceded that respondent had actively participated and made "measurable progress" in domestic violence and anger management counseling after those services commenced in April 2008. Laube further acknowledged that respondent had secured suitable housing,[3] and had employment. Laube described that respondent did construction work, received payment in cash, and "keeps track of his income in a receipt book." Laube admitted that she made no effort to speak to respondent's employer, and never requested a letter verifying employment.[4]

Respondent attended all supervised visits with his children after their removal from his home, and Laube recounted that the visits "went well. The girls interacted with their father." Laube expressed that she knew of no problems or concerns associated with the visits. Nevertheless, Laube recommended termination of respondent's parental rights because "the

[3] Respondent lived in a home owned by his father. At the time of a home assessment (Laube did not have the date), the home lacked beds for the children. However, Laube agreed that beds could be provided "in a week max."

[4] No evidence suggested that respondent's income came from an illegal source.

domestic violence, anger management thing has been ongoing throughout the case and it led to this past removal." Laube added that in November 2006, "it was reported that Mr. McKissack slapped his girlfriend [Wells] and they were involved in a loud verbal argument while the girls were present and that was at an unsupervised visit."

Youhana agreed that as of early July 2008, respondent lived in a home suitable for the children. Her testimony concluded with the following exchange,

> Q. Ms. Youhana, why are you recommending termination?
>
> A. I just got the case, but from what I see, dad has been really compliant so far, but he just needs to keep contact with me and show his pay stubs.

Respondent presented testimony by his anger management and domestic violence therapists, Michelle Williams and Moses Boone. Williams testified that during the 3-1/2 months that she had worked with respondent, "he became more accountable and more receptive to learning the different skills and expressing himself." According to Williams, respondent's behavior had "improved." She recommended three more months of therapy "because that's what was authorized for." Boone testified that he received a referral on March 25, 2008, and had regularly worked with respondent since then. Boone described that respondent "[v]ery actively participated" in sessions, had made "measurable progress," and benefited from the sessions. Boone summarized,

> I've dealt with hundreds and hundreds of clients and it's always, for lack of a better word, a pleasure when I have a male that pronounces that he's really interested in caring for his children and working at it because to be honest with you, statistically speaking, we just don't have that many males that want to step up to that responsibility.

In a bench opinion explaining the basis for terminating respondent's parental rights, the circuit court stated, in relevant part,

> Now the more difficult case is the dad. I've had the impression that Dad was trying. Which counts for a lot.
>
> * * *
>
> Things looked good at an earlier time. Then things looked bad. There were allegations of domestic violence between Dad, and his girlfriend, two of them.
>
> . . . I took another look at that police report. The police report regarding one of those domestic violence incidents. It does not say anything bad about Dad.
>
> There were—there's the other case though. There are the reports of physical violence on children. We had in March of 2008 referral for domestic

violence counseling that was started. Anger management, that was ongoing at the last hearing I had.

It really doesn't make much difference to me whether Dad was living in his uncle's home, or in his father's home. My view was that Dad had safe and suitable housing, that was not a problem. Substance abuse assessment and treatment, I believe he was in compliance with that. I believe he was keeping up with his probation requirements. I never had any doubt that Dad had legal income that was probably sufficient for him to support himself and the children. The big worry that I had was over Dad's temper, domestic violence. Excessive physical discipline.

The testimony by the therapists both Michelle Williams and Moses Boone were very helpful to Dad. The cross-examination by Mr. Kerman and Mr. Rintz were [sic] very destructive. What am I to do with a situation like this? Well, I'm going to look at the statute.

And regarding the dad subsection (3)(c)(i), it reads that the parent was the respondent in a proceeding brought under this chapter 182 or more days have elapsed since the issuance of the initial dispositional order.

That the Court by clear and convincing evidence finds the conditions that lead to the adjudication continue to exist, and there's no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's age.[5]

I found grounds fair. I feel that Dad still has a problem with anger. Dad has had problems in other states, I have testimony regarding that. And Dad has had problems here.

Having found grounds under subsection (3)(c)(i), I'm asked to find grounds under subsections (g) and (j). Subsection (g) the parent without regard to intent fails to provide proper care and custody for a child, and there's no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

The legislature has described to me through the permanency planning statute what a reasonable time is. And that's a year. This case has gone on longer than a year. I still have worries, and I can find by clear and convincing evidence I still find worries regarding Dad's temper, regarding violence from him. These kinds of worries cause me to believe that he cannot provide proper care and

[5] Although the circuit court determined that MCL 712A.19b(3)(c)(i) supplied a ground for termination, this subsection does not apply under the circumstances presented because less than 182 days elapsed between the April 8, 2008 adjudication and the August 20, 2008 order terminating respondent's parental rights.

> custody. And there's no reasonable expectation that Dad would be able to provide proper care and custody within a reasonable time considering the children's ages.
>
> Finally I have under subsection (j) it reads, and there's a reasonable likelihood based on the conduct and capacity of the dad, the child would be harmed if returned to the home of the parent.
>
> I believe that Dad still has a problem with his temper, and violence. So if the children were returned to the dad, as they were returned before, we'd have more trouble.

The circuit court additionally noted that termination "is in the . . . best interest" of the children, who needed stability.

## II. Analysis

The first ground for termination of respondent's parental rights discussed by the majority, MCL 712A.19b(3)(g), requires proof by clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." The second ground for termination affirmed by the majority, MCL 712A.19b(3)(j), requires proof by clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." In my view, petitioner failed to carry its burden of proof regarding either of these statutory grounds, and the circuit court clearly erred by terminating respondent's parental rights.

It bears reiteration that the proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). 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

> produces 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, alteration in original).]

The circuit court based its termination decision on respondent's "temper," his "problem with anger," and his past "violence." But the record contains little actual evidence supporting these grounds for termination. The circuit court acknowledged that the November 2007 episode of domestic violence was initiated by Wells, not respondent, and that the police report documenting that incident "does not say anything bad about Dad." Although Laube believed that respondent was involved in two other episodes of domestic violence, she admitted that she did not know what happened in either incident, the police reports are not contained in the record supplied to this Court, respondent moved out of the home he had shared with Wells, and the

police dropped all charges against respondent. Given the dearth of actual evidence presented to the circuit court regarding respondent's "temper" and his "anger problem," I cannot conclude by clear and convincing evidence that respondent failed to provide his children with proper care and custody. Furthermore, no evidence supported the existence of a reasonable likelihood that respondent could not properly care for his children within a reasonable time.

Our Legislature has mandated that "reasonable efforts to reunify the child and family" be made when a child has been placed outside the parent's home. MCL 712A.19a.[6] Petitioner's "reasonable efforts" consisted of referrals for domestic violence and anger management counseling, which it made *three months after* the children were removed from respondent's home. At that time, petitioner's expressed goal was reunification. During the three months that elapsed between the children's removal and the provision of services, respondent demonstrated his bond with the children by attending all visits and conducting himself appropriately. However, just two weeks after petitioner finally made the referrals, and well before it received any feedback from the service providers, petitioner elected not to reunify the family.

The circuit court opined that one year constituted a "reasonable time" under MCL 712A.19b(3)(g). But far less than one year had elapsed between the removal of respondent's children in late December 2007 and the July 2008 termination hearing. Given this Court's prior holding in this case that all proceedings before the January 2005 termination were void due to *petitioner*'s misfeasance, it is inequitable to consider to respondent's detriment any of the time that elapsed between May 2003 and February 2006. Throughout most of 2007, the children resided with respondent. And after the children's removal in 2007, petitioner failed to *initiate services for three months*, despite its expressed intent to pursue a reunification goal. In my view, petitioner's lackadaisical approach to reunifying this family should not be held against respondent. The evidence reflects that respondent consistently and readily admitted shortcomings and immediately sought to remedy them. I cannot agree that respondent's complete compliance with four months of services proved that he lacked the capacity to provide his children with proper care and custody "within a reasonable time."

I find petitioner's conduct troubling and inconsistent. While respondent's involvement in three episodes of domestic violence certainly warranted further investigation and the provision of services, petitioner performed neither function in a meaningful way. Laube's testimony illustrates that she made no effort to investigate the *allegations* of respondent's acts of domestic violence, which were unsupported by a police report or any other evidence, and to which respondent did not admit. MM's allegation regarding physical abuse indisputably warranted intense scrutiny. But I find nothing in the record establishing that respondent "abused" MM apart from Laube's allegation. No investigation appears to have taken place. And although respondent admitted that he had used excessive force in disciplining the child, one episode of poor parenting should lead to counseling and related interventions, not termination of parental rights.

[6] Exceptions to this rule exist, but none apply here.

Despite that Williams and Boone testified that respondent made exceptional progress, the circuit court concluded that respondent continued to have problems with his "temper" and "violence." Simply stated, no evidence supported this conclusion. The circuit court certainly could disbelieve Boone's and Williams's optimistic testimony concerning respondent's progress and his capacity to avoid further domestic violence. However, once the circuit court discredited these opinions, it had to identify some other clear and convincing evidence that (1) no reasonable expectation existed that respondent would be able to provide proper care and custody within a reasonable time considering the children's ages, and (2) a reasonable likelihood existed that a child would be harmed if returned to respondent's home. The majority concludes that because respondent engaged in domestic violence and improperly disciplined MM despite having received services in 2006, he could not qualify as a fit parent in the future. But the provision of previous services did not alter petitioner's obligation to make reasonable efforts to rectify the conditions that caused the children's removal. In enacting MCL 712A.19a(2), our Legislature specified the circumstances under which reasonable reunification efforts are unnecessary, and receipt of previous services is not one of these instances.

The instant record reveals that petitioner disregarded the legislative mandate for both reunification and reasonable efforts. And the circuit court entirely ignored these intimately related goals by concluding solely on the basis of *past* events that respondent would continue to engage in domestic violence. I assume that when the circuit court ordered domestic violence and anger management counseling, it intended these services not as mere formalities but as critically important measures meant to improve respondent's parenting ability. But instead of crediting respondent with the successes described by Williams and Boone, the circuit court considered only the events that had precipitated the services. By looking backward instead of forward, the circuit court preordained the outcome. Regardless of respondent's concerted endeavors to reform and his service providers' positive opinions of his progress, respondent still would be destined to fail. Here, the circuit court elected to exclude meaningful consideration of the information actually provided with respect to respondent's future ability to parent, and premised its decision on alleged but unproven past misdeeds. In my view, the circuit court's analysis constitutes clear error because the relevant statutory grounds for termination contemplate forward looking consideration of a parent's abilities, not a formulaic presumption founded solely on the events that brought the children into care.

Because the evidence did not clearly or convincingly support a conclusion that respondent could not safely parent his children within a reasonable time, I would reverse.

/s/ Elizabeth L. Gleicher