

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ADAM SPENCER MITEFF,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

PAMELA MITEFF,

Respondent-Appellant,

and

JAMES MITEFF,

Respondent.

UNPUBLISHED

June 16, 2009

No. 288265

Washtenaw Circuit Court

Family Division

LC No. 06-000146-NA

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Respondent-mother, Pamela Miteff, appeals as of right from an order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i) [“The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age”] and MCL 712A.19b(3)(j) [“There is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he . . . is returned to the home of the parent”].¹ We reverse.

This case was initiated six months after the Department of Human Services (DHS) brought a separate petition that only involved respondent-father and his teenage daughter. The daughter alleged emotional and verbal abuse by respondent-father. She was removed from respondent-father’s home and placed with her biological mother. Respondent-mother was not

¹ Respondent-father, James Miteff, has filed a separate appeal with this Court (Docket No. 288266), which remains pending.

involved in that prior petition or proceedings, nor was the minor child that is the subject of this appeal. As a result of the DHS investigation pertaining to respondent-father's teenage daughter and her subsequent allegations, on September 5, 2006, DHS removed the 23-month old child who is the subject of this appeal from the home of respondent-mother and respondent-father. The relevant allegations contained in the petition involving this child included (a) the prior determination that respondent-father verbally and emotionally abused his teenage daughter, (b) that respondent-mother and the minor child were present when this abuse occurred, (c) the presence and inappropriate handling of firearms in the home by respondent-father, and (d) the minor child's speech delays.

Respondent-mother and respondent-father, both having the same attorney, admitted to the petition allegations pertaining to respondent-father's verbal and emotional abuse of his teenage daughter and that the minor child was present when these events occurred. Respondents also pled "no contest" to the allegation regarding the minor child's speech delay. Based on these admissions, the trial court assumed jurisdiction. Despite completion by respondents of all evaluations required and participation in assigned classes, on March 5, 2008, the trial court ordered DHS to file a petition for termination based on its determination that it remained unsafe for the minor child to return home and the length of time the child had been in foster care.

At the conclusion of trial, the court terminated both respondents' parental rights. Although recognizing that respondent-mother benefited from the services proffered during the proceedings, the trial court criticized her failure to develop a plan to physically separate from respondent-father, secure employment or file for divorce. The trial court indicated it was not convinced that respondent-mother "would be able to protect [the minor child] from this father, citing to respondent-mother's failure to intervene in a specific incident of verbal and emotional abuse by respondent-father directed to his teenage daughter and its belief that the incident was not an isolated event. In discussing the best interests of the minor child, the trial court cited the child's need for permanence and stability, the failure of the parents to focus on the child's needs during the proceedings and its belief that respondent-mother "is unable or unwilling to protect him."

In order to terminate parental rights, a trial court must find that a petitioner has proven at least one of the statutory grounds cited for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). In turn, this Court reviews for clear error a trial court's decision to terminate a respondent's parental rights. MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 355-357; 612 NW2d 407 (2000); *Sours, supra* at 633. "This standard controls our review of 'both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest.'" *In re B and J, Minors*, 279 Mich App 12, 17; 756 NW2d 234 (2008) quoting *In re Trejo, supra* at 356-357. A finding is deemed to be clearly erroneous if, despite the existence of evidence in its support, this Court is left with a firm and definite conviction that a mistake has occurred. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). This Court does give regard to the special opportunity of the trial court to determine the credibility of testifying witnesses. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337-338; 455 NW2d 161 (1989).

On appeal, respondent-mother contends the trial court erred in terminating her parental rights because clear and convincing evidence did not exist to prove any statutory ground for

termination. At the outset, we note that a substantial portion of respondent-mother's argument on this issue pertains to the weight or credibility attributed by the trial court to various witnesses. Respondent-mother's request that this Court address issues of credibility is inappropriate as deference is given to the finder of fact with regard to this determination. MCR 2.613(C); *In re Miller*, *supra* at 337-338. However, other factors and law exist to permit an analysis of the issue.

"It is undisputed that parents have a fundamental liberty interest in the companionship, care, custody, and management of their children." *In re B & J, Minors*, *supra* at 23. In addition, there is recognized to exist "a strong public policy favoring the preservation of the family." *Id.* at 18. The circumstances of this case are difficult both because of its connection with the prior petition involving respondent-father's teenage daughter and the necessity of acknowledging those events while separating the behavior and level of culpability of each respondent. Although concerns exist with regard to respondent-mother, the trial court failed to provide her with an opportunity to succeed and terminated her rights to the minor child based primarily on association with respondent-father rather than on an objective analysis and determination of her own abilities.

From any perspective respondent-mother was placed in an untenable position. Her child was removed based on the actions of respondent-father to his teenage daughter, which did not directly involve her as a participant in the events or in the subsequent proceedings pertaining to her stepdaughter. The few allegations directly relevant to respondent-mother in the petition that is the subject of this appeal involving speech delay were acknowledged at the outset of the proceedings pertaining to the minor child as being insufficient to establish jurisdiction. However, because respondent-mother pled to these allegations based on legal advice received, jurisdiction was established despite their factual insufficiency.

"In order to comply with the guarantees of substantive due process, the state must prove parental unfitness by 'at least clear and convincing evidence' before terminating a respondent's parental rights." *In re B & J, Minors*, *supra* at 23 (citation omitted). Specifically, parental rights may be terminated if "182 or more days have elapsed since the issuance of an initial dispositional order" the trial court determines that "[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified with a reasonable time considering the child's age." MCL 712A.19b(3)(c)(i). With reference to the allegations pertaining to the minor child's speech delay, it is clearly evident that any concerns were resolved before trial initiated. Respondent-mother acknowledged her deficiencies and participated in all parenting classes required by DHS, which all witnesses agreed resulted in a benefit and affirmative development of her parenting skills. Notably, compliance with a parent-agency agreement serves as evidence of a parent's ability to provide appropriate care. *In re JK*, *supra* at 214. Even the professionals relied on and found to be credible by the trial court from the University of Michigan Family Assessment Clinic (FAC) opined that respondent-mother was a "fit parent" and capable of parenting the minor child. Hence, any reference in the trial court's opinion to allegations pertaining to the minor child's speech delay is irrelevant and improper as a basis for the termination of respondent-mother's parental rights.

The only relevant concern is the purported inability of respondent-mother to protect the minor child, in the future, from his father. It should be emphasized that this concern is speculative in that there existed no allegations that the minor child had been directly in danger or suffered any ill effects at the hands of respondent-father or respondent-mother, merely that a

potential existed for respondent-father to subject the child at some future time to inappropriate behavior. This is particularly true, given the alleged conditions that led to the trial court assuming jurisdiction existed for an extended period of time and DHS did not intervene until several months after they became aware of respondent-father's teenage daughter's assertions without any allegation or demonstration of injury to the minor child. Despite having emphasized throughout trial and in assuming jurisdiction the danger for the minor child remaining in respondents' home due to the presence of guns and their inappropriate handling, these allegations truly went solely to respondent-father's behavior and, ultimately, in its opinion, were not even addressed as a concern. In fact, there was no testimony or allegations pertaining to respondent-mother that she inappropriately handled any firearms in the home in the presence of the minor child or neglected to adhere to any safety procedures.

Ultimately, respondent-mother lost her parental rights through guilt by association. The only legitimate concern raised was respondent-mother's ability to protect the child from respondent-father and she was never afforded the opportunity to demonstrate this ability. There existed conflicting professional opinions regarding respondent-mother's ability with FAC personnel suggesting she was not capable, while family members and other professionals, including her therapist, indicated strength of personality, which could both control and resist pressure asserted by respondent-father. While this Court cannot challenge the credibility determinations made by the trial court on this issue, it can address the failure of the trial court to afford respondent-mother an opportunity to demonstrate her capabilities. Respondent-mother was effectively placed in a Catch-22 situation. On two separate occasions, she voluntarily agreed to leave the marital home in order to regain custody of her son, but neither the trial court nor DHS indicated that such an action, as a first step, was sufficient. Although neither the court nor DHS provided respondent-mother with any specific direction or requirements, at the conclusion of trial it was implied that because she failed to establish a separate residence, obtain employment and demonstrate an ability to distance completely both herself and the minor child from respondent-father she would not be permitted to retain her parental rights or even secure unsupervised access to her minor child. It was merely assumed, based on her purported failure to intervene with another child who was not hers, that she was incapable of protecting her son. At the very least, respondent-mother should have been provided the opportunity to fail before having to relinquish all rights to her son. The burden of proving parental unfitness is on the petitioner. *In re AMAC*, 269 Mich App 533, 537; 711 NW2d 426 (2006). However, in this case, while the bulk of the testimony indicated that respondent-mother was a "fit" parent and did not present a risk personally to the child, the burden of proof was effectively shifted to respondent-mother to prove that she could defend the child against a speculative harm posed by another individual.

While respondent-mother frames this issue as DHS and the trial court requiring an "anticipatory divorce," in reality it is the misapplication or expansion of the concept of anticipatory neglect. The doctrine of anticipatory neglect permits an assumption that "[h]ow a parent treats one child is certainly probative of how that parent may treat other children." *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973). See also *In re Dittrick*, 80 Mich App 219, 222; 263 NW2d 37 (1978). Importantly, while this concept is probative, it is not dispositive and must operate within certain boundaries. As noted in *In re Gazella*, 264 Mich App 668, 681; 692 NW2d 708 (2005) (citation omitted), "[T]he principle of anticipatory neglect . . . may provide an appropriate basis for invoking probate court jurisdiction." The speculative nature of

this doctrine was not intended to serve as the sole basis for the termination of an individual's parental rights without a concurrent demonstration of parental unfitness. Based on the testimony of the experts cited with authority by the trial court, who opined that respondent-mother was a fit and capable parent; the termination of her parental rights solely on the speculative basis of anticipatory neglect was improper. The proofs adduced in the trial court demonstrated that respondent-mother possessed at least minimally sufficient parenting skills with respect to her son and that, irrespective of her past alleged failure to protect her teenage step-daughter from respondent-father, evidence existed that she appeared willing and capable of providing for the minor child. Because a family court's finding that there is no reasonable expectation that the parent will be able to provide proper care and custody for a child in the future must rest on more than mere conjecture, the family court in this case clearly erred in terminating respondent-mother's parental rights. *In re Sours, supra* at 633.

Respondent-mother also raises issues on appeal alleging error by the trial court regarding the taking of judicial notice of the prior court file regarding respondent-father's teenage daughter, the initiation of the termination petition based on the length of time the minor child had been in foster care, the failure to provide reasonable services to respondent-mother to aid reunification and the trial court's determination that the best interests of the minor child necessitated termination of her parental rights. However, based on our determination regarding the failure to demonstrate clear and convincing evidence to substantiate the termination of respondent-mother's parental rights, these additional issues are rendered moot and need not be addressed. In addition, we would also note that respondent-mother discusses within the body of her appellate brief issues pertaining to the restriction of evidence by the trial court regarding the number of witnesses permitted to testify at trial and allegations of bias by the trial court. However, because respondent-mother failed to properly assert these requests within the statement of issues presented, they are deemed waived and not subject to appellate review. MCR 7.212(C)(5); *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003).

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot