STATE OF MICHIGAN

COURT OF APPEALS

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In the Matter of MOSS Minors.

No. 311610
St. Clair Circuit Court
Family Division
LC No. 12-000052-NA

Before: MURRAY, P.J., and WILDER and OWENS, JJ.

OWENS, J.

Respondent appeals as of right from an order terminating her parental rights to her youngest daughter and her son. The trial court found, for the reasons stated in the referee's findings of fact and conclusions of law, that there was clear and convincing evidence to terminate respondent's parental rights based on MCL 712A.19b(3)(g) and (j), and that termination would be in the best interests of the children. For the reasons set forth below, we affirm.

First, respondent argues that there was not clear and convincing evidence to terminate her parental rights pursuant to MCL 712A.19b(3)(g) and (j). We disagree. To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* at 296-297.

The trial court terminated respondent's rights under MCL 712A.19b(3)(g) and (j), which provide as follows:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
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> (g) The 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.
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> * * *
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> (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 or she is returned to the home of the parent.

The record shows that respondent's substance abuse affects her ability to provide proper care and custody for the children. Testimony showed she used drugs in the presence of the children and that she took them with her to purchase drugs on at least one occasion. Respondent was also living at a homeless shelter with the children and there was no evidence that she would be able to provide suitable housing for the children in the reasonably foreseeable future.

Moreover, the facts do not show that there is a reasonable expectation that respondent would be able to provide proper care and custody within a reasonable amount of time considering the children's ages. She has a long history of mental illness that has been difficult to manage. She repeatedly experienced psychotic episodes, including auditory hallucinations in which she was told to harm her children. Although respondent was seeking treatment, the testimony at trial established that previous attempts at treatment were unsuccessful. She was admitted at least three times for psychiatric care at hospitals in Michigan, Illinois, and Florida, and respondent testified about difficulties arising when her medications ran out. She also testified to numerous problems in adjusting her medications to successfully control her symptoms.

In addition, the record shows that there is a reasonable likelihood, based on the conduct or capacity of respondent, that the children would be harmed if returned to respondent's home. Respondent has a long history of substance abuse and mental illness, and her treatment has been unsuccessful for both. At the termination hearing, it was undisputed that respondent had thoughts of harming her youngest daughter and that she acted on those thoughts by attempting to suffocate her. Although respondent testified that she no longer had thoughts of harming her daughter since she received the proper medication, the trial court found the risk of harm to the children would be too great if respondent went off her medication for any reason. Furthermore, respondent's oldest daughter was previously removed and placed in foster care because respondent had thoughts of harming her. The record shows that respondent falsified drug tests in order to regain custody and that after regaining custody, respondent continued to have thoughts of harming her daughter.

Given the facts of record, we conclude that the trial court did not clearly err in finding by clear and convincing evidence statutory grounds for termination under MCL 712A.19b(3)(g) and (j).

Next, respondent argues that petitioner failed to prove by clear and convincing evidence that termination of her parental rights was in the best interests of the children. We disagree. Although respondent asserts that the trial court must find by clear and convincing evidence that termination is in the best interests of the children, there is no statute, court rule, or caselaw

requiring such. The statute clearly states that the statutory grounds for termination must be proven by clear and convincing evidence, but does not provide a standard of proof for the best-interests determination. MCL 712A.19b(3) and (5). MCL 712A.19b(5) provides the following regarding the best-interests determination:

> 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.

Before it was amended in 2008, the statute read:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is *clearly* not in the child's best interests. [2000 PA 232, as amended by 2008 PA 199, MCL 712A.19b(5) (emphasis added).]

Accordingly, because of the statutory language at the time, our Supreme Court concluded that once the trial court finds that there are statutory grounds for termination, the trial court must terminate parental rights unless it finds by clear evidence that termination is not in the child's best interest. *In re Trejo*, 462 Mich at 354. However, because the statute as amended in 2008 does not include the term "clearly," the clear evidence standard no longer applies to the best-interests determination.[1] Thus, the current statute does not provide a standard of proof. For the reasons that follow, we hold that the preponderance of the evidence standard applies to the best-interests determination.

Initially, we note that in civil cases, the Legislature's failure to spell out a standard of proof would usually require application of the preponderance of the evidence standard. *Residential Ratepayer Consortium v Pub Service Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993). However, termination of parental rights cases are not strictly civil cases, as recognized by the United States Supreme Court in *Santosky v Kramer*, 455 US 745, 762; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Rather, they bear "many of the indicia of a criminal trial." *Id.* Further, the Michigan Court Rules, which are adopted by our Supreme Court, are silent on the standard of proof required for the best-interests determination, as is Michigan caselaw. See MCR 3.977(E)(4), (F)(1)(c), and (H)(3)(b). So in the absence of explicit Michigan law on the issue, we must determine whether the preponderance of the evidence standard can be constitutionally applied to the best-interests determination. To do so, we look for guidance to *Santosky*, the leading case from the United States Supreme Court regarding the requisite standard of proof in termination of parental rights proceedings.

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[1] Assuming, without deciding, that "clear evidence" is similar to the clear and convincing evidence standard, the pre-2008 statute provided a heightened standard of proof to prevent termination rather than to permit termination.

Santosky examined the constitutionality of the state of New York's parental-rights-termination statute. *Santosky*, 455 US at 748. Specifically, *Santosky* analyzed whether New York's statute, which authorized the trial court to terminate a parent's rights to the child if the state proved by a fair preponderance of the evidence that the parent had permanently neglected the child, satisfied the due-process requirements of the Fifth and Fourteenth Amendments. *Id.* at 748-749. At the time, New York's termination proceedings consisted of two parts: (1) a factfinding hearing to prove permanent neglect; and (2) a dispositional hearing to determine what placement is in the child's best interests. *Id.* at 748. Under New York's statute, once the state established permanent neglect by a fair preponderance of the evidence at the factfinding hearing, the parent's rights to the child could be terminated if termination was determined to be in the best interests of the child. *Id.* at 748.

To determine the requisite standard of proof that due process would require for the factfinding stage of the termination proceeding, the Court weighed the three factors specified in *Mathews v Eldridge*, 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976). *Santosky*, 455 US at 758-768. *Mathews* stated that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

First, the *Santosky* Court noted that the private interest affected in a termination proceeding is "commanding," because victory by the state at the factfinding hearing declares the parent unfit to raise the child and makes termination of parental rights possible. *Santosky*, 455 US at 758, 760. Thus, the private interest affected favors a heightened standard of proof. *Id.* at 761. Second, the Court determined that the risk of an erroneous termination of parental rights is severe, and a heightened standard of proof would alleviate that risk more than a preponderance of the evidence standard would. *Id.* at 764-765. Finally, the Court concluded that a heightened standard of proof would not impair the state's interests "in preserving and promoting the welfare of the child" and "in reducing the cost and burden of such proceedings." *Id.* at 766-768. Thus, the Court held that the clear and convincing evidence standard is the minimal constitutionally mandated standard that must be applied at the factfinding stage of termination proceedings. *Id.* at 769.

In Michigan, termination proceedings consist of two stages, which are identical in function to the New York stages discussed in *Santosky*. First, we apply a clear and convincing evidence standard to determine whether there are statutory grounds for termination. MCL 712A.19b(3); MCR 3.977(E)(3), (F)(1)(b), and (H)(3)(a). This stage in the termination proceeding is very similar to the factfinding stage discussed in *Santosky*; we will refer to it as the statutory-grounds stage. See *Santosky*, 455 US at 748. Second, once a statutory ground for termination is established, the trial court must then determine whether termination is in the best interests of the child. MCL 712A.19b(5). This stage in the termination proceedings is also very similar to the dispositional stage that was briefly referenced in *Santosky*; we will refer to it as the

best-interests stage. See *Santosky*, 455 US at 748. As was the case in New York, there is not an established standard of proof for the best-interests determination in Michigan, and *Santosky* did not address what standard of proof is constitutionally required at the best-interests stage of termination proceedings. Thus, to determine the requisite standard of proof for the best-interests determination that due process would require, like the *Santosky* Court did, we must apply the test developed in *Mathews*.

Under the first *Mathews* factor, there are two private interests affected in a proceeding to terminate parental rights: (1) the parent's fundamental liberty interest in the care, custody, and management of the child, and (2) the child's interest in a normal family home. *Santosky*, 455 US at 758–59. At the statutory-grounds stage in a termination proceeding, the child and the parent "share a vital interest in preventing erroneous termination of their natural relationship," until the petitioner proves parental unfitness. *Id.* at 760. Thus, at the statutory-grounds stage, the use of error-reducing procedures, such as the heightened standard of proof of clear and convincing evidence, is favored. *Id.* at 760-761. However, the same is not true at the best-interests stage of a termination proceeding. This is because the interests of the child and the parent diverge once the petitioner proves parental unfitness. *Id.* at 760. During the best-interests stage of a termination proceeding, the child and the parent may become adversaries because the child's interests in a normal family home align more with the state's interest in terminating parental rights and providing the child with a stable home. See *id.* (noting that in New York, the trial court does not have to consider the parent's interests at the dispositional hearing to determine what is in the child's best interests). Although the parent still has an interest in maintaining a relationship with the child, this interest is lessened by the trial court's determination that the parent is unfit to raise the child. See *id.* at 760-761.

Further, the history of Michigan's termination-of-parental-rights statute indicates that the focus at the best-interests stage has always been on the child, and not the parent. Prior to 1994, while the statute and court rules were silent regarding whether termination had to be in the child's best interests, caselaw held that a juvenile disposition, including termination of parental rights, must be made in the child's best interests. See *In re Franzel*, 24 Mich App 371, 377; 180 NW2d 375 (1970). In 1994, the statute was amended to add language requiring the trial courts to terminate parental rights once a statutory ground was proven, unless it was clearly not in the best interests of the child. 1994 PA 264. Once the state presented clear and convincing evidence that at least one ground for termination was established, then "the liberty interest of the parent no longer include[d] the right to custody and control of the children." *In re Trejo*, 462 Mich at 355. Accordingly, termination was mandatory if a statutory ground was established, unless the trial court determined that it was clearly *not* in the child's best interests. Thus, the focus was on the child's interests and not the parent's. Most recently, the statute was amended in 2008 to require the trial courts to find, in addition to a statutory ground, that termination of parental rights is in the child's best interests before termination may be ordered. 2008 PA 199. Now, if the trial court finds that a statutory ground for termination is established *and* termination is in the child's best interests, then it must order termination of parental rights. MCL 712A.19b(5). However, to determine whether termination is in the child's best interests, the focus still remains on the child. Thus, it is clear that once a statutory ground for termination is established, the interests of the child and the parent no longer coincide, and the need for a heightened standard of proof is not present at the best-interests stage. See *Santosky*, 455 US at 760-761.

The second *Mathews* factor requires us to explore the risk of an erroneous deprivation of the child's and the parent's interests if we were to apply a preponderance of the evidence standard, and the probable value, if any, of a clear and convincing evidence standard. See *Santosky*, 455 US at 761. Because the focus is on the parent at the statutory-grounds stage, a clear and convincing evidence standard reduces the risk of an erroneous determination that a fit parent is unfit. *Id.* at 764-765. However, as noted above, once a statutory ground for termination is established, i.e., the parent has been found unfit, the focus shifts to the child, and the issue is whether parental rights should be terminated, not whether they can be terminated. Accordingly, at the best-interests stage, the child's interest in a normal family home is paramount to any interest the parent has. See *id.* at 760. If we were to apply the clear and convincing standard of proof at the best-interests stage, the state would bear the greater share of the risk of an erroneous determination. While this would benefit the parent, it would be a detriment to the child, because an erroneous finding that the termination of parental rights is not in the best interests of the child would preserve the parent-child relationship of a parent who has been found unfit. This would keep the child in foster care and deprive the child of the opportunity for a permanent and normal family home. Thus, a clear and convincing evidence standard does not adequately safeguard the child's interest in a normal family home. However, a lesser standard of proof—preponderance of the evidence—would better safeguard the child's interest, as well as protect the interests of the parent and the state.

The final *Mathews* factor requires us to examine the governmental interests at stake, which are "a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky*, 455 US at 766. The use of a clear and convincing evidence standard at the best-interests stage could impose an increased financial burden on the state because additional evidence could be required to meet the higher standard of proof. In addition, and more importantly, the use of a clear and convincing evidence standard at the best-interests stage would impair the state's *parens patriae* interest in preserving and promoting the welfare of the child. The state's *parens patriae* interest in terminating parental rights arises after the parent has been found unfit. *Id.* at 767 n 17. Thus, once a statutory ground for termination is established, i.e., the parent has been found unfit, the state has a substantial interest in protecting the welfare of the child. The application of a heightened standard of proof—clear and convincing evidence—hinders the state's interest in protecting the welfare of the child.

Thus, based on the foregoing analysis, we hold that whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence.[2]

In this case, the record shows that respondent acted on her thoughts of harming her youngest daughter by attempting to suffocate her numerous times. The record also shows that

[2] We note that this determination is further supported by the fact that the Legislature did not include a standard for the best-interests determination when it amended the statute, as it did for the establishment of a statutory ground for termination. Had the Legislature intended for the standards to be the same, it could have included such language.

she brought the children with her while purchasing drugs, that her son had seen her using crack cocaine before, and that she did not have stable housing. Further, the record shows that based on her history, her ultimate success regarding her substance abuse and mental health treatments is uncertain at best. Accordingly, the petitioner proved by a preponderance of the evidence that termination was in the children's best interests.

Finally, respondent essentially argues that termination of her parental rights was premature because she should have been offered reunification services. We disagree. Generally, reasonable reunification efforts must be made to reunite the parent and children unless certain aggravating circumstances exist. See MCL 712A.19a(2). However, the petitioner "is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). Further, the petitioner can request termination in the initial petition. MCL 712A.19b(4), MCR 3.961(B)(6). Pursuant to MCR 3.977(E), termination is required at the initial disposition hearing and additional reunification efforts shall not be ordered if

> (1) the original, or amended, petition contains a request for termination;
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> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
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> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
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> (a) are true, and
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> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (*i*), (j), (k), (*l*), (m), or (n);
>
> (4) termination of parental rights is in the child's best interests.

In this case, the initial petition requested termination, the trial court found by preponderance of the evidence that there were grounds to assume jurisdiction, and the trial court found by clear and convincing evidence that at least one of the grounds for termination had been established. Further, the trial court found that it was in the best interests of the children for respondent's rights to be terminated. Therefore, all of the requirements of MCR 3.977(E) were met and no reunification efforts were required.

Affirmed.

/s/ Donald S. Owens
/s/ Christopher M. Murray