# STATE OF MICHIGAN

# COURT OF APPEALS

---

In the Matter of TYLER ROBERT PARKER, Minor.

---

VALERI MILLER and GORDON MILLER,

Petitioners-Appellees,

v

JULIE A. MCGINZIE,

Respondent-Appellant,

and

KEVIN CARL PARKER,

Respondent.

UNPUBLISHED
January 28, 2000

No. 214960
Lapeer Circuit Court
Family Division
LC No. 00-002532

---

In the Matter of BRADY CARL PARKER, Minor.

---

VALERI MILLER and GORDON MILLER,

Petitioners-Appellees,

v

JULIE A. MCGINZIE,

Respondent-Appellant,

and

KEVIN CARL PARKER,

No. 215355
Lapeer Circuit Court
Family Division
LC No. 00-002533

Respondent.

---

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

In these consolidated cases, respondent-appellant (hereinafter "respondent") appeals as of right from the family court's orders terminating her parental rights to her two children, Tyler and Brady. We affirm.

First, respondent contends that the family court erred in denying her motion for a directed verdict made at the close of petitioners' proofs. Initially, we note that respondent's designation of her motion as a motion for a directed verdict was a misnomer. *Sands Appliance Services v Wilson*, 231 Mich App 405, 409; 587 NW2d 814 (1998). A motion for a directed verdict in a nonjury case is more properly termed a motion for involuntary dismissal under MCR 2.504(B)(2). *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). In ruling on such a motion, the trial court does not view the evidence in a light most favorable to the nonmoving party, as it would when addressing a motion for a directed verdict. *Warren v June's Mobile Home Village & Sales, Inc*, 66 Mich App 386, 389; 239 NW2d 380 (1976). Instead, it acts as a trier of fact, judges credibility, weighs the evidence, and decides the case on the merits. *Id.* The trial court's ruling will not be reversed unless it is clearly erroneous. *Id.*

Petitioners argued that respondent's parental rights should be terminated pursuant to MCL 712A.19b(3)(f), (g), and (j); MSA 27.3178(598.19b)(3)(f), (g), and (j). Respondent moved for involuntary dismissal with respect to each of the three grounds for termination. The trial court granted respondent's motion with respect to § 19b(3)(j), but denied the motion with respect to § 19b(3)(f) and (g). Respondent argues that the trial court clearly erred in denying her motion with respect to § 19b(3)(f) and (g).

According to MCL 712A.19b(3)(f); MSA 27.3178(598.19b)(3)(f), the court may terminate a parent's parental rights if it finds by clear and convincing evidence that:

> The child has a guardian under the revised probate code, 1978 PA 642, MCL 700.1 to 700.993, and both of the following have occurred:
>
> (*i*) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(*ii*) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

Respondent first argues that petitioners failed to meet their burden of proof regarding MCL 712A.19b(3)(f)(i); MSA 27.3178(598.19b)(3)(f)(i) because she had not been ordered to pay support, petitioners only discussed the support issue with her once, and petitioners, as the guardians, had assumed responsibility for the children's support. However, parents are obligated to support their children, MCL 722.3(1); MSA 25.244(3)(1), and a guardian is not legally obligated to provide for a ward from the guardian's own funds, MCL 700.431(1); MSA 27.5431(1). Therefore, petitioners' status as the children's guardians did not absolve respondent of the duty to support her children. Furthermore, because § 19b(3)(f)(i) refers to the parent's obligation to provide support even if the court has not ordered the parent to pay support, the absence of a support order did not entitle respondent to judgment in her favor. Moreover, because §19b(3)(f)(i) refers to a parent's obligation to provide support without specifying that the parties must have agreed to it, the number of times that the issue was discussed amongst the parties is irrelevant. Therefore, the court properly denied respondent's motion regarding § 19b(3)(f)(i) on the grounds asserted in respondent's motion.

However, the court erred in concluding that petitioners met their burden of proof with respect to § 19b(3)(f)(ii). While the court properly concluded that respondent had an obligation to maintain contact with her sons despite the absence of a court order, the court neglected to address the other bases of respondent's motion, i.e., her ability to visit and the fact that she did visit. The evidence showed that respondent did have an ability to maintain contact with the children as demonstrated by the fact that she did visit and call them. She visited the children twelve times in 1995, nine times in 1996, and eight or nine times in 1997. While respondent may not have visited the children as much as could be hoped, it cannot be said that she regularly and substantially failed to maintain contact with the boys for the two years preceding the filing of the petitions. Because petitioners failed to present clear and convincing evidence on this point and termination is not authorized unless the requirements of both subsection (3)(f)(i) and (3)(f)(ii) are met, the court erred in denying respondent's motion with respect to § 19b(3)(f).

Respondent next argues that the family court erred in denying her motion with respect to § 19b(3)(g). To terminate respondent's parental rights under §19b(3)(g), petitioners must show by clear and convincing evidence that respondent, "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." MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g). Petitioners clearly presented evidence that respondent failed to provide proper care or custody for the children in the past. The children began living with petitioners in October, 1994, and lived there continuously through the time of the hearing in June, 1998, with respondent's consent.[1] While respondent did visit the children, petitioners testified that the visits were sporadic and that, during one period, respondent did not visit the children for four to five months. Valeri Miller testified that when the children became ill when visiting respondent's home, respondent would return them to Valeri for care. Respondent did not financially support her children while they lived with

petitioners, contributing only $13 and occasional gifts. On the basis of the evidence presented by petitioners, we cannot conclude that the trial court clearly erred in finding that respondent failed to provide proper care and custody for the children.

Furthermore, we cannot conclude that the trial court clearly erred in finding, on the basis of the evidence presented by petitioners, that there was no reasonable expectation that respondent would provide proper care or custody within a reasonable time, considering the ages of the children. Petitioners presented evidence that respondent had taken no steps toward creating a stable home for her children. Respondent did not finish high school. Petitioners presented evidence that they have encouraged respondent to continue her education or to obtain a GED, but that she refused to do so. At one point, petitioners rented a house for respondent and agreed to provide babysitting and transportation services so that she could continue her education. However, according to petitioners, respondent abandoned the house after less than two months to move in with a boyfriend, and had taken no steps to continue her education, obtain her GED, or seek employment at the time of the hearing. Petitioners also presented evidence that respondent was not self-supporting, but relied on her boyfriend, Joe Resendez, for shelter and transportation. Since October, 1994, respondent contributed only $13 and occasional gifts to the support of her children. In addition, petitioners presented evidence that Resendez has been both physically and verbally abusive toward respondent, but that she remained in a relationship with him.

The evidence presented by petitioners indicated that respondent failed to provide proper care and custody for the children in the past and that there was no reasonable expectation that respondent would provide proper care and custody within a reasonable time considering the ages of the children. Although respondent argues that the trial court erred in relying on respondent's past conduct to determine whether there was a reasonable expectation that respondent would provide proper care and custody in the future, because the trial court cannot predict the future, it must rely on evidence of actions taken by respondent to provide a stable home for her children within a reasonable time. After having reviewed the evidence presented by the petitioners, we cannot conclude that the family court clearly erred in denying respondent's motion.

Respondent next argues that the trial court erred in terminating respondent's parental rights. We disagree. This Court reviews the family court's decision to terminate parental rights under the clearly erroneous standard. MCR 5.974(I); *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong . . . ." *In re Sours Minors, supra*. Furthermore, we acknowledge the special opportunity of the family court to judge the credibility of the witnesses. MCR 2.613(C); *In re Miller, supra*.

The trial court made the following findings regarding § 19b(3)(g):

> The Court finds by clear and convincing evidence Julie A. McGinzie has failed to provide or care for said minor children since October, 1994. Her testimony indicates

> that she is able and wants the children; however, she depends upon her boyfriend to provide a home for herself and said minor children, working only one day a week, at his request, making her very dependent upon the boyfriend by not having a home or transportation of her own;
>
> Said minor children have had a stable home for over three (3) years and during that time Julie A. McGinzie, mother, has done nothing to establish the means to care for the children, and it does not appear that she will be able to in the near future, considering the said minor children are six (6) and five (5) at the present time.

The evidence admitted at trial supports the trial court's findings. At the time of the hearing, respondent did not have her own home or transportation. Respondent did obtain training to become a nursing assistant. However, by choice, she worked only one day a week, choosing to rely on her boyfriend, who testified that he was not employed at the time of the hearing, for financial support. Despite the fact that respondent claims to be financially stable, she had contributed only $13 to support the children since October, 1994, in addition to occasional gifts. Although respondent testified that she planned to marry Resendez and have her children move in with her and Resendez,[2] we do not believe the trial court erred in failing to consider the possible marriage as a stabilizing factor in respondent's life in light of the evidence that Resendez had been physically and verbally abusive toward respondent.

Section 19b(3)(g) directs that the court consider whether there exists a reasonable expectation that respondent will be able to provide proper care and custody "*within a reasonable time considering the child's age.*" Furthermore, we are mindful that, to be clearly erroneous, "a decision must strike us as more than just maybe or probably wrong," *In re Sours Minors, supra* at 633, and must leave us with a "definite and firm conviction that a mistake has been made," *In re Miller, supra* at 337. Considering the fact that the children were five and six years old at the time of the hearing, that the children had lived in a stable home with petitioners for nearly four of those years at the time of the hearing, and that, at the time of the hearing, respondent had taken no significant steps to provide a stable home for her children, we are not convinced that the trial court clearly erred in finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time. Furthermore, respondent failed to come forward with evidence that termination was not in the children's best interest. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Hall-Smith*, 222 Mich App 470, 473-474; 564 NW2d 156 (1997). We therefore affirm the trial court's order terminating respondent's parental rights pursuant to MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

[1] Petitioners became legal guardians of the children in November, 1994.

[2] We note that, while Resendez testified that he supported respondent's desire to have her children, Resendez's testimony indicated that he was less than enthusiastic about accepting the children into his home and that he "[didn't] want to disrupt our home life."