STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MILO EMMANUEL PANTALEON, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARIE LOURDES PANTALEON,

Respondent-Appellant,

and

EMILO PANTALEON,

Respondent.

UNPUBLISHED
September 19, 2000

No. 218420
Wayne Circuit Court
Family Division
LC No. 95-325957

Before: Smolenski, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Respondent Marie Pantaleon appeals as of right from an order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (g) and (j); MSA 27.3178(598.19b)(3)(c)(i), (g) and (j).[1] We affirm.

I

On appeal, respondent first argues that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. We disagree.

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[1] Previously, in *In re EP*, 234 Mich App 582; 595 NW2d 167 (1999), this Court affirmed the trial court's dispositional order removing the child from respondent's home.

To terminate parental rights, at least one of the statutory grounds of MCL 712A.19b; MSA 27.3178(598.19b) must be established by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). This Court reviews the trial court's decision 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); *In re Conley*, 216 Mich App 41, 42; 549 NW2d 353 (1996). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours*, *supra* at 633. Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, *supra* at 337.

First, the trial court did not err in finding that there was clear and convincing evidence establishing the statutory grounds for termination expressed in § 19b(3)(c)(i). The "reasonable time" requirement of this subsection properly entails an assessment of both how long it will take for the parent to improve conditions and how long the child can wait for the improvement. *In re Dahms*, 187 Mich App 644, 647-648; 468 NW2d 315 (1991). In this case, among the conditions that led to adjudication was respondent's unsuitable home environment. In August 1996, respondent's home was found to be unsuitable for the minor child. See *In re EP*, 234 Mich App 582, 586; 595 NW2d 167 (1999). The evidence clearly establishes that respondent was still without suitable housing at the time of the termination hearing. Although respondent had been living with a friend since mid-September 1998, she refused to tell the caseworker how long she planned to stay there or whether she was paying any rent. Under the circumstances, the trial court did not clearly err in finding that this condition had not been rectified.

Further, respondent continued to suffer from mental problems and failed to sufficiently comply with the requirement that she obtain mental health treatment. According to Dr. Brazzle and Dr. Wilanowski, respondent suffered from major depression with paranoid ideations, a personality disorder, and panic and phobic symptoms. In addition, respondent's mental illness prevented her from working. Although Dr. Wilanowski testified that respondent was making progress in therapy, the record reveals that respondent was not consistently taking her medication and that she continued to exhibit bizarre and sometimes violent behavior, threatening FIA personnel and other people, which behavior led to her being placed in protective custody on at least one occasion. Accordingly, the trial court did not clearly err in finding that respondent had not made sufficient progress in resolving her mental health problems. Considering that respondent had been involved with the court for about 2-1/2 years without a stable home, due largely to her continuing mental health problems, it was not reasonably likely that these conditions would be rectified within a reasonable period of time. Accordingly, the court did not clearly err in finding clear and convincing evidence establishing the statutory grounds for termination expressed in § 19b(3)(c)(i). See *In re Jackson*, 199 Mich App 22, 26-27; 501 NW2d 182 (1993).

Contrary to respondent's argument, the trial court did not err in rejecting her contention that only legally admissible evidence could be considered regarding allegations of parental unfitness other than her lack of suitable housing. We acknowledge that when termination is based on new or changed circumstances, those circumstances must be established by legally admissible evidence. MCR 5.974(E); *In re Snyder*, 223 Mich App 85, 89-90; 566 NW2d 18 (1997). In this case, the record does not

support respondent's position that a lack of proper housing served as the sole basis for the court's initial assumption of jurisdiction. On the contrary, the record reveals that the amended petition filed on March 5, 1997, included allegations that respondent was unfit because of mental health problems. Evidence regarding respondent's mental health problems was received at the hearings leading up to the court's exercise of jurisdiction on May 21, 1997, and the court's assumption of jurisdiction was based upon "all the testimony that has been provided." Furthermore, after assuming jurisdiction, the original parent/agency agreement required respondent to obtain mental health counseling. Thus, this condition did not involve a new or changed circumstance and, therefore, the court's consideration of this matter at the termination hearing was not limited by legally admissible evidence. MCR 5.974(E).

Next, we conclude that the court did not clearly err in finding that there was clear and convincing evidence establishing the statutory grounds for termination expressed in § 19b(3)(g). As already concluded, the trial court properly found that there was clear and convincing evidence that respondent was still without a suitable home and had not made sufficient progress in treating her mental health problems, as required by the parent/agency agreement. The record clearly demonstrates that respondent's mental health problems affected her ability to care for her child and interfered with her ability to be a suitable parent. *In re Johnson*, 142 Mich App 764, 766; 371 NW2d 446 (1985). Respondent was uncooperative with caseworkers who attempted to provide her with services, sometimes threatening them and others. Further, there was clear and convincing evidence that respondent had not visited the child regularly, failing to see the child for one four month period between March and July, 1998. According to respondent, she did not visit the child during this period because she was afraid that she would assault the caseworkers. While the trial court decided not to terminate respondent's parental rights under § 19b(3)(a)(ii) (desertion), her failure to visit the child for this period of time constituted evidence of neglect which, together with the evidence of respondent's continued lack of suitable housing and ongoing mental health problems, constituted clear and convincing evidence that termination was warranted under § 19b(3)(g).

Regarding § 19b(3)(j), the trial court found that the evidence of respondent's unstable behavior demonstrated that she posed a threat to the child because "her mental condition has rendered her unable to provide the proper care and custody for her child." Respondent argues that the court's conclusion is erroneous in light of testimony provided by her treating psychiatrists. However, the evidence established that Dr. Brazzle last saw respondent in November 1997, and that Dr. Wilanowski admitted that she had never observed respondent with the child, and therefore she could not assess the risk that respondent posed if the minor child were returned to her care. We conclude that the trial court did not clearly err in finding that there was clear and convincing evidence establishing the statutory grounds for termination expressed in § 19b(3)(j).

We note that, contrary to respondent's argument, the trial court's termination of her parental rights was not based exclusively on her failure to comply with the parent/agency agreement. Rather, the trial court properly considered respondent's failure to comply with the parent/agency agreement as evidence that she was "unable to provide a fit home for a child by reason of neglect." *In re Draper*, 150 Mich App 789, 801-802; 389 NW2d 179 (1986), vacated in part 428 Mich 851; 397 NW2d 524 (1987). A record of neglect and inability to make progress toward establishing a proper home for

a minor child in the near future can support a finding that the statutory grounds for termination have been established by the requisite evidence. *In re Ovalle*, 140 Mich App 79, 83; 363 NW2d 731 (1985).

II

We also conclude that the trial court did not err in denying respondent's motion for parenting time before the commencement of the termination hearing. At the time of the termination hearing, MCL 712A.18f(3)(f); MSA 27.3178(598.18f)(3)(f) provided:

> *At the time of the initial termination hearing held to consider termination of parental rights, parenting time is automatically suspended unless the parent establishes and the court determines that the exercise of parenting time will not harm the child.* If the court adjourns or continues the termination hearing beyond the original scheduled date for any reason, the court shall suspend parenting time in the interim, unless the court determines that the exercise of parenting time will not harm the child. [Emphasis added].

In denying respondent's request for parenting time before the commencement of the termination hearings, the trial court agreed with the FIA that visitation would have been harmful to the child, in view of respondent's previous display of bizarre and threatening behavior and her failure to visit the child for four months.

III

Next, respondent argues that termination of her parental rights was contrary to the best interests of the child.

Under MCL 712A.19b(5); MSA 27.3178(598.19b)(5), once a statutory ground for termination is established, the court must terminate parental rights unless there exists evidence, on the whole record, that termination is clearly not in the child's best interests. *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407; (2000). Here, the evidence did not establish that termination of respondent's parental rights was clearly not in the child's best interests. Therefore, the court was required to terminate respondent's parental rights. Further, contrary to what respondent asserts, application of § 19b(b)(5) does not violate her constitutional right to due process. *Id*. at 356.

Nonetheless, respondent argues that reversal is required because the trial court precluded her from presenting evidence relative to the child's best interests. Specifically, respondent contends that the trial court erred by excluding photographs and a videotape of the minor child from 1997, showing the interaction and attachment between respondent and the child, and by not considering "any testimony about the condition of the child prior to May, 1997." Respondent also claims that the court erred by not allowing Dr. Wilanowski to testify about possible harm to the child if respondent's parental rights were terminated. Further, respondent claims that the trial court erroneously prevented her from introducing evidence of her "cultural and religious upbringing." Finally, respondent further claims that the trial court erred in denying her request to obtain a psychological examination of the child.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993); *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994); *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288-289; 531 NW2d 659 (1995). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990). Whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of the properly admitted evidence. *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998).

The trial court apparently excluded the pictures and videotape from evidence on the basis of relevance, finding that the proposed exhibits could not help the court "conclude that these allegations are false and that the mother ought to have the child returned." We are not persuaded that the evidence was irrelevant, inasmuch as the exhibits purported to show that there was a bond between respondent and the child. Further, we are not convinced that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence under MRE 403. However, because other evidence and testimony was presented showing that respondent was attached to the child, and because the issue of the child's attachment was not central to the court's best interest determination, respondent has failed to show either that her substantial rights were affected by the exclusion of this evidence, or that there is any reasonable likelihood that the exclusion of this evidence affected the outcome of these proceedings. Therefore, reversal is not required.

Regarding the exclusion of evidence concerning the condition of the child before May 1997, we find no error. Evidence admitted at the prior hearings is properly considered at all subsequent hearings, including exhibits not formally received into evidence at the earlier proceedings. *In re King*, 186 Mich App 458, 465; 465 NW2d 1 (1990); *In re LaFlure*, 48 Mich App 377; 391; 210 NW2d 482 (1973). Here, while the trial court made it clear at the termination hearing that it took judicial notice of the entire file, we note that respondent objected to the inclusion of "material that proceeded the adjudication." In response, the trial court excluded at the termination hearing evidence that preceded May 21, 1997, but stated it would consider all the previous exhibits and testimony received during prior hearings. In light of respondent's request at the termination hearing, she cannot argue on appeal that the trial court's action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Respondent's claim that the trial court precluded Dr. Wilanowski from testifying about any harm to the child in the event her parental rights were terminated is not factually supported by the record and we find it to be without merit.

Regarding the court's exclusion of evidence concerning respondent's cultural and religious upbringing of the child, there was no abuse of discretion because there was no indication that

respondent's culture or religion was at issue in the case. As this Court previously noted in *In re EP*, *supra* at 599, it was respondent and her counsel who attempted to inject the issue of religion into the proceedings.

Finally, we reject respondent's claim that the trial court erred by not requiring the child to undergo a psychological evaluation on the eve of the termination proceedings. The minor child had previously been subjected to evaluation, and the court determined that the child's best interests would not be served by further evaluation, which would only delay the proceedings further. Under these circumstances, the court did not abuse its discretion. Although respondent claims that the denial of a psychological evaluation violated her constitutional rights under "Const Am XIV, the 1963 Michigan Constitution, art 1, § 17 and the principles of *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982)," she fails to provide any argument in support of this claim. The failure to argue an issue constitutes abandonment of the issue on appeal. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

IV

Respondent next claims that petitioner failed to provide proper services to herself and the child. We disagree. A review of the entire record reveals that the trial court did not clearly err in finding that petitioner made reasonable efforts to prevent the child's removal from the home and reasonable efforts to attempt to rectify the conditions causing the removal.

V

Respondent also contends that petitioner impinged upon her First Amendment right to practice her religion. However, respondent's failure to argue this issue in her appellate brief constitutes an abandonment of the issue. *Froling*, *supra* at 373. In any event, we find no indication in the record that petitioner improperly considered respondent's religious beliefs before initiating the termination proceedings.

VI

Next, respondent claims that the trial court erred by refusing to allow her attorney to have the assistance of co-counsel or a clerk during the proceedings. We note that respondent raised this issue in her prior appeal, wherein this Court deemed the issue waived because respondent failed to file the requested transcript of the hearing at which the juvenile court determined that she would be allowed only a single attorney. As the minor child points out, this Court's prior decision should be deemed the law of the case on this question. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). Even if the law of the case doctrine were not applicable, we would conclude that respondent's rights to due process and equal protection were not violated when the trial court refused to allow her more than one attorney to represent her at counsel's table. Under MCR 5.915(B)(1)(a), respondent was entitled to "an attorney." While respondent claims that she should have been allowed more than one attorney to assist counsel, she cites no authority in support of this claim. Furthermore, the record indicates that respondent's counsel was assisted by another attorney, as well as student legal assistants, throughout these proceedings. Although the individuals assisting

respondent's counsel were not allowed to sit at counsel's table in court, respondent's counsel was able to confer with them during the proceedings. Under these circumstances, we cannot discern how respondent was prejudiced by the court's ruling.

VII

Respondent also claims that the trial court erred by not allowing her counsel to inspect petitioner's case file and in refusing to permit him to subpoena those records. Respondent raised this issue in her prior appeal and this Court rejected it, finding no indication that respondent was prejudiced by the discovery violation. *In re EP*, *supra* at 597. The record shows that the trial court addressed this issue before the termination hearing and expressly found that counsel had obtained the records in question and that the issue was therefore "moot." Accordingly, we find no merit to this claim.

VIII

Finally, respondent claims that the cumulative effect of the alleged errors discussed above resulted in a denial of her constitutional rights to due process and equal protection. In view of the foregoing discussion, we find no merit to this claim.

Affirmed.

/s/ Michael R Smolenski
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder