STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of N.A.K.K., Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

LORENA MARY KERR,

Respondent-Appellant,

and

JOHN HEPWORTH,

Respondent.

UNPUBLISHED
May 17, 2002

No. 232507
Monroe Circuit Court
Family Division
LC No. 99-014356-NA

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Respondent-appellant Lorena Kerr (hereinafter respondent) appeals by leave granted the trial court's order terminating her parental rights to the minor child (N.A.K.K.), pursuant to MCL 712A.19b(3)(a)(ii), (g), (j), and (k)(i). The child's father, respondent John Hepworth, is not a party to this appeal. We affirm.

Both respondent and Hepworth are citizens of Canada. Before N.A.K.K. was born, three of respondent's other children by another man were taken into custody by the Children's Aide Society on the basis of allegations of sexual abuse by Hepworth, and a fourth child, a daughter fathered by Hepworth, was taken into custody immediately after birth. Not wanting her fifth child to be taken by Canadian authorities, respondent came to Michigan, to the home of Hepworth's older sister, Beverly Catto, to give birth to N.A.K.K., who was born on December 10, 1994. The day after the birth, respondent and Catto signed an agreement, whereby the child was entrusted to the care and custody of Catto. The agreement was silent on the duration of the custody arrangement. Catto testified that it was her understanding that the arrangement was to last for only two months. Respondent testified that the parties had agreed that it would last until the Canadian court proceedings were complete. The agreement did not provide for support or visitation. After signing the agreement, respondent returned to Canada, where she was involved

in court cases regarding her older four children. Respondent's parental rights to the older four children were terminated by Canadian authorities. On January 17, 1998, respondent gave birth to twin boys, who immediately became the subjects of child protective proceedings in Canada, but were not removed from respondent's custody.[1] After a Canadian court dismissed the proceedings in February 1999, respondent and Hepworth expressed their intent to have N.A.K.K. returned to their custody by June 1999.

Through Catto, petitioner Family Independence Agency (FIA) became involved, and a neglect petition was filed. Although trial testimony showed that respondent and Hepworth had very little contact with the child during the time she lived with Catto, the trial court found that it did not have jurisdiction over N.A.K.K.. In a prior appeal, this Court reversed that decision, finding that the court had jurisdiction under MCL 712A.2(b)(1) on the basis that the child was at a substantial risk of harm to her mental well-being if respondent and Hepworth were allowed to follow through with their plan to immediately reclaim custody of her. *In re Kerr*, unpublished opinion per curiam of the Court of Appeals, decided September 26, 2000 (Docket Nos. 222784 and 223318).

After the case was remanded, the FIA filed another petition, this one requesting termination of respondent's and Hepworth's parental rights to N.A.K.K.. Following a three-day trial, in which Hepworth did not participate and respondent represented herself, the trial court terminated the parties' parental rights. This appeal followed.

Respondent first argues that the trial judge should have recused himself because of his prior knowledge and involvement with the matter. Respondent's argument is based on the fact that the trial judge, in his role as chief judge, had previously signed two orders disqualifying other judges. The reasons given for the prior disqualifications were that the child's custodian had attempted to contact the trial judge at his personal residence, that respondent and Hepworth had made threats to the court through facsimile transmissions, and that an ex parte communication was made by one of the parties.

A motion to disqualify a judge must be filed within fourteen days after the moving party discovers the ground for disqualification. MCR 2.003(C)(1). Respondent did not move below to disqualify the trial judge. She contends that she did not discover the prior disqualification orders until after the order terminating her parental rights was entered. However, copies of these orders were certainly discoverable at an earlier date. Because respondent did not move for disqualification in accordance with MCR 2.003, this issue is not preserved. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Therefore, we limit out review to plain error affecting respondent's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCR 2.003(B) provides that a judge is disqualified when the judge cannot impartially hear the case, which includes a situation in which the judge is "personally biased for or against a party or attorney" or has "personal knowledge of disputed evidentiary facts concerning the

[1] Another child, born November 8, 1999, remained in respondent's custody without involvement of the Canadian authorities.

proceeding." As a general rule, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995), aff'd 451 Mich 457; 547 NW2d 686 (1996). MCR 2.003(B)(1) requires not only a showing of actual bias or prejudice, but also that the judge is personally biased or prejudiced. *Cain, supra* at 495.

> . . . This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding. [*Id.* at 495-496.]

A favorable or unfavorable disposition, or opinions formed by a judge on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, will not serve as a basis for disqualification, "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Cain, supra* at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). A party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain, supra* at 497; *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992).

Respondent has failed to demonstrate any actual personal bias or prejudice against her. The earlier disqualification orders for the other judges did not contain any disputed evidentiary facts. The trial judge was assigned the case through a blind draw performed by the court clerk. He displayed no deep-seated favoritism or antagonism during the trial, and respondent has not overcome the heavy presumption of judicial impartiality.

Next, respondent argues that the trial court erred in considering the custody document to be a legal agreement when it was, in reality, a family arrangement pertaining to the care and custody of N.A.K.K.. Respondent maintains that this fact was recognized in the ruling denying jurisdiction made by a prior judge and, therefore, this ruling should have been given res judicata effect in all subsequent proceedings. Respondent also maintains that the agreement was properly recognized by this Court. According to respondent, the trial court should not have considered N.A.K.K. to be deserted or abandoned merely because she was allowed to stay with Catto for more than two months. She claims that it was not her fault but "judicial delay" that prevented her from coming for N.A.K.K. before 1999.

This argument has no merit. First, the trial court did not make a finding that the custody agreement was properly signed and witnessed and constituted a legal document. Respondent cites no authority for her argument regarding the legal effect of the custody agreement. Moreover, the signed document giving Beverly Catto custody of N.A.K.K. does not justify respondent's failure to contact the child for a lengthy period of time and her failure to provide any support for N.A.K.K.. Regarding her argument that the trial court's earlier ruling on jurisdiction should have had res judicata effect for purposes of the termination proceeding, we note that the earlier ruling on which respondent relies was subsequently reversed by this Court. Moreover, contrary to respondent's assertions, this Court made no finding regarding the custody agreement or desertion.

Respondent also argues that the trial court erred in finding that she deserted or abandoned N.A.K.K.. Under MCL 712A.19b(3)(a)(ii), parental rights may be terminated if the parent has deserted the child for ninety-one or more days and has not sought custody of the child during that period. Under MCL 712A.19b(3)(k)(i), parental rights may be terminated if a parent has abused the child or a sibling of the child and the abuse included abandonment of a young child.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). This Court reviews a trial court's findings of fact for clear error. MCR 5.974(I); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Under this standard, the trial court's decision must strike the reviewing court "as more than just maybe or probably wrong." *Trejo*, *supra* at 356, quoting *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, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Miller*, *supra* at 337.

The trial court found that respondent and Hepworth had abandoned N.A.K.K. for a period beginning two months after N.A.K.K.'s birth on December 10, 1994, and extending through June 1, 1996. The court stated that respondent and Hepworth

> did this by declining to take responsibility for the child after two months had passed from the time that the child was given to "Catto" and the parents failed to give "Catto" proper legal authority to care for the child by a guardianship or whatever was appropriate.
>
> A period of approximately two months turned into four and one-half years with failure to regularly visit, to regularly contact, and do the things that were necessary first for a newborn child. After age one year when the child became verbal, the parents failed to make appropriate communication with a child of that age and failed to continue to make contacts with the child who moved from the verbal one-year old to the six-year old who is now attending school.

There was clear and convincing evidence that respondent deserted N.A.K.K. for more than ninety-one days without seeking custody of her during that time. According to Catto, respondent and Hepworth communicated with her frequently at first. They visited her on March 12, 1995, bringing along some baby food and staying for one day. After that, however, there were no other gifts or communications involving N.A.K.K. in 1995. Although Catto received twenty-three faxes from respondent and Hepworth regarding the Canadian custody case, none of the faxes concerned N.A.K.K.. It was not until June 1, 1996, that respondent and Hepworth next attempted to visit N.A.K.K.. Catto acknowledged that there were other telephone calls and faxes from respondent and Hepworth during this time period, but she said these contacts only involved the proceedings in Canada. They did not ask about N.A.K.K. during these contacts unless Catto mentioned her.

This evidence was sufficient to establish that respondent had deserted N.A.K.K. for more than ninety-one days without seeking custody of her. Although the evidence of abuse through abandonment of a young child is less clear, it is not necessary to determine whether termination

was also warranted under § 19b(3)(k)(i). Any error regarding that subsection was harmless because only one statutory ground is needed to support the court's termination order. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Further, we are satisfied that the court also properly terminated respondent's parental rights under §§ 19b(3)(g) and (j). There was ample evidence that respondent failed to provide proper care and custody for N.A.K.K. MCL 712A.19b(3)(g). During the period of more than four years that Catto had custody of N.A.K.K., before respondent told Catto that she and Hepworth were ready for reunification, respondent and Hepworth provided only $900 in cash, some miscellaneous gifts, and a few necessary items toward her support. Moreover, respondent and Hepworth had not provided Catto with the appropriate legal authority to care for N.A.K.K., particularly in medical emergencies, through a formal guardianship arrangement. Nor did respondent and Hepworth communicate frequently with N.A.K.K..

There was also evidence that respondent would not be able to provide proper care and custody within a reasonable time given N.A.K.K.'s age. During the 1999 proceedings, respondent and Hepworth were asked to provide their plans for reunification with N.A.K.K.. In the document submitted to the court, they claimed that they were willing and able to care for N.A.K.K. and had been so since March 19, 1999. However, they stated that they needed no supervision from the FIA and would "never consent to this ridiculous suggestion." They further responded that there was no need for a home study and they would not consent to one, that they did not need a psychological evaluation and would "never consent to this absurd suggestion," that they did not need counseling and would "never consent to this nonsense," and that there was no need for review hearings or a visitation schedule. Hepworth had exhibited abusive behavior toward others, most notably by sending numerous insulting and threatening messages in facsimile transmissions to Catto, FIA workers, and others involved in the case. Respondent continued to live with Hepworth, but she denied knowledge of the content of his faxes. Hepworth was responsible for the household support except for the small amount of money respondent received from the Canadian authorities in what she described as a monthly child tax credit, and respondent did not know the source of the remaining household money.

This evidence established that respondent and Hepworth would not be able to provide appropriate care and custody for N.A.K.K. within a reasonable time. Foster care worker Lori Hamilton testified that it would take up to two years for reunification of N.A.K.K. into their home with their full cooperation. Without their cooperation, and there was sufficient evidence that Hepworth would not cooperate, the process could continue indefinitely. Hamilton stated that she would not return a child to a home where one parent was cooperative and the other was not. This evidence establishes that respondent would not be able to provide proper care and custody for N.A.K.K. within a reasonable time, and the trial court did not err in terminating respondent's parental rights pursuant to § 19b(3)(g).

There was also sufficient evidence to support termination of respondent's parental rights pursuant to MCL 712A.19b(3)(j), which provides that parental rights may be terminated if a "reasonable likelihood" exists, "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 making factual findings pertinent to this statutory section, the court noted in particular respondent's and Hepworth's plan for reunification, which demonstrated that they would not cooperate with anyone regarding a smooth transition into their home, the "threatening" and "inappropriate"

behavior of Hepworth and respondent's lack of interest in attempting to change that behavior or protect her children from the consequences of it, and the testimony of child welfare experts regarding the danger to N.A.K.K.'s psychological well-being if there were not proper preparation and counseling during the reunification process. Although on appeal respondent relies heavily on the opinion of psychiatric social worker Timothy Lentner, who had supervised three visits between respondent and N.A.K.K. in 1999, Lentner was positive about only the visits. He also opined that N.A.K.K. would be reasonably likely to suffer emotional harm if returned to her parents' home.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra