

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of MARK MCKEE, BRANDON  
MCKEE, TRAVIS MCKEE, CHELSEY MCKEE,  
and CODY MCKEE, Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

VERA WALKER,

Respondent-Appellant,

and

MARK MCKEE,

Respondent.

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In the Matter of MARK MCKEE, BRANDON  
MCKEE, TRAVIS MCKEE, CHELSEY MCKEE,  
and CODY MCKEE, Minors.

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FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

MARK MCKEE,

Respondent-Appellant,

and

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UNPUBLISHED  
November 16, 2004

No. 254576  
Genesee Circuit Court  
Family Division  
LC No. 98-109919-NA

No. 254796  
Genesee Circuit Court  
Family Division  
LC No. 98-109919-NA

VERA WALKER,

Respondent.

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Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor children under MCL 712A.19b(3)(a)(ii), (c)(i), (c)(ii), (g), and (j). We affirm in part but remand for a determination of whether respondent mother or her husband have rebutted the presumption of legitimacy.

It is undisputed that, when respondent mother became involved with respondent father, her husband was incarcerated and she did not seek a divorce from him.<sup>1</sup> During her husband's incarceration, respondent mother bore the five children at issue in the instant proceeding. Respondent father is the alleged biological father of the children, and he signed affidavits of paternity regarding all five children.

The trial court did not err in determining that the statutory grounds for termination of respondent mother's parental rights were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The family was involved in a protective services proceeding in 1998. The current proceeding commenced in March 2002 when the children failed to attend school regularly, and referrals were made alleging drug use, domestic violence, and lack of medical attention.

The evidence showed that during the twenty-two month course of this proceeding, respondent mother had engaged in some counseling but required additional counseling and required substantial assistance from outside sources to provide the children with basic necessities, such as housing and utilities. She had a plethora of physical ailments for which she took numerous medications. The condition of adjudication to which respondent mother admitted was educational neglect, and the reason offered for the children's poor school attendance record was her physical illness. The evidence showed that her physical condition had not improved, and that her inability to ensure the children's school attendance had not been rectified.

Other conditions causing the children to come within the trial court's jurisdiction, and the elements to which respondent father pleaded no contest at the adjudication, were respondents' psychological neuroses, lack of housing, domestic violence, drug use, medical neglect of the children, and lack of employment. The evidence showed that both respondents stopped attending counseling in July 2003, although their May 2003 psychological evaluations stated that they both needed long-term counseling. Respondent mother did not have stable housing or financial means to provide for the children independently. She denied that the children had special needs,

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<sup>1</sup> The husband of respondent mother was not a party to these proceedings. All references to "respondent father" are references to the alleged biological father.

although the evidence showed otherwise. Although many of respondent mother's difficulties may have related to her association with respondent father, she did not separate herself from him until two months prior to the termination hearing.<sup>2</sup> Respondents did not show improvement during the course of the proceedings, although they complied with some aspects of their parent agency agreements. The children could not be safely returned home after nearly two years as court wards.

Further, the evidence did not show that termination of respondent mother's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). There was some bonding between respondent mother and the children, with the exception of the youngest child. Although the children had been separated and moved among various foster homes, and the likelihood of one family adopting all five of them was remote, the evidence showed that they were likely to suffer harm and continued instability if returned to either respondent. There was no clear evidence that termination would be contrary to their best interests.

Respondent mother also asserts that the trial court abused its discretion in admitting her drug screens into evidence because they were hearsay. The drug screens showed that she took opiates, barbiturates, and benzodiazepines. It was not clearly established that she took drugs that were not prescribed or were illegal, and the trial court did not rely on drug use as a ground for terminating her parental rights. Respondent mother admitted to and listed all of the medications she took. An admission by a party is by definition not hearsay. MRE 801(D)(2)(a). Questioning of the caseworker following admission of the drug screens centered on respondent mother's compliance with screens, and not the legality of the drugs for which she tested positive. Because the drug screens were not hearsay, and were not relied upon in terminating her parental rights, the trial court did not abuse its discretion in admitting them.

Respondent father argues that the trial court clearly erred in determining that there was a statutory ground for termination of his parental rights, and that termination of his parental rights was contrary to the best interests of the children. A presumption of legitimacy attaches to children born or conceived during an intact marriage. *In re KH*, 469 Mich 621, 624-625; 677 NW2d 800 (2004). The mother or her husband must rebut the presumption of legitimacy, and the trial court must make a finding that such a presumption has been rebutted. *Id.* at 635, 637. Where a legal father exists, an alleged biological father cannot properly be considered a putative father. *Id.* at 624. One cannot terminate respondent father's parental rights if he never had any.

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<sup>2</sup> Respondent father was ordered out of the home in the 1998 proceeding.

We remand to the trial court for a determination whether respondent mother or her husband have rebutted the presumption of legitimacy by clear and convincing evidence.<sup>3</sup>

Affirmed in part; remanded in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Hilda R. Gage

/s/ Brian K. Zahra

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<sup>3</sup> In the petition for termination of parental rights, reference is made to case number 96-048767-DS, which the petition states “[d]etermines that [the husband of respondent mother], although legally married to [respondent mother,] is not the biological father” of the minor children. Because we were not provided with any court documents to substantiate this claim, we remand for determination whether respondent mother or her husband have rebutted the presumption of legitimacy by clear and convincing evidence.