STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RICHARD HUDSON, DENNIS MORGAN and MICHAEL MORGAN, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MELANIE MORGAN,

Respondent-Appellant,

and

ANDREW TANNER,

Respondent.

UNPUBLISHED
August 26, 2008

No. 282765
Clinton Circuit Court
Family Division
LC No. 05-018269-NA

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Respondent-mother appeals as of right from a circuit court order terminating her parental rights under MCL 712A.19b(3)(c)(i) [the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the children's ages], (c)(ii) [the parent received recommendations to rectify other conditions and had a reasonable opportunity to do so, but failed to rectify the other conditions], (g) [irrespective of intent, the parent failed to provide proper care and custody and no reasonable likelihood exists that she might do so within a reasonable time given the children's ages], and (j) [given the parent's conduct or capacity, the children likely would suffer harm if returned to the parent's custody].[1] We reverse and remand.

[1] The circuit court also terminated the parental rights of the fathers of the children, but they are (continued…)

I. Basic Facts & Underlying Procedure

The circuit court exercised jurisdiction over the three involved minor children in September 2005, on the basis of admissions to a petition filed by the Department of Human Services (DHS). Specifically, respondent admitted that (1) she and Michael Morgan, her husband and the father of DM and MM, had been adjudicated for neglect in 1999 "and participated in services at that time," and received services again between November 2004 and May 2005; (2) on September 12, 2005, the family home "was found to be in deplorable conditions"; (3) Morgan's alcoholic older brother was sharing the home; (4) respondent and Morgan twice failed to pick up one of the children from school during his first week in attendance; (5) "there have been allegations of drug use in the home," and Morgan tested positive for marijuana on November 29, 2004, but thereafter tested negative; (6) several other people lived in the home, including one who had an outstanding arrest warrant; (7) the oldest child, RH,[2] has anger and aggression issues, and allegedly "acted out sexually with the other children in the home"; and (8) Morgan pleaded guilty of attempted larceny in 1988, using marijuana in 1998, operating under the influence in 2002, and in 2005 was "the passenger in a vehicle in which a bag of Marijuana was found on the back seat," although all charges against him ultimately were dismissed.

The circuit court ordered that respondent and Morgan participate in services, comply with drug screens, evict Morgan's brother from their home and prohibit other adults from living there, submit to psychological evaluations, cooperate in arranging psychological and sexual abuse evaluations of the children, and permit no alcohol or drug use in the home. The court conducted a drug screen of respondent and Morgan that day. Respondent's urine tested positive for opiates.

At a dispositional hearing conducted on October 14, 2005, Tonya Bentley, a DHS worker, testified that the family overall "has been doing very well," was participating in services, and was "making substantial progress." Bentley reported that a Families First worker felt "very encouraged by their motivation and their ability to work together as a family," and recommended that the DHS remain involved for at least another three months. Bentley noted that respondent had missed one drug screen, and emphasized "that it's important that [Morgan] in particular does participate in the drug screens and the substance abuse assessment." The circuit court continued its prior orders.

On November 22, 2005, petitioner filed a motion to show cause, alleging that respondent tested positive for opiates, and "[t]hat although this Court ordered that no other adults live in the home, it appears that there are still a number of individuals frequenting the home, including Claude Hubbard, who had his parental rights terminated." The circuit court conducted a show cause hearing on November 28, 2005.[3] According to the circuit court's handwritten order entered that day, respondent had tested positive for opiates on three occasions. The court

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(…continued)

not parties to this appeal. The term "respondent" thus refers only to respondent-mother.

[2] Morgan did not father RH, who was 14-years-old when these proceedings commenced.

[3] The parties did not order a transcript of this proceeding.

ordered that respondent and Morgan ban Hubbard from their home, submit to drug screens and comply with drug rehabilitation services as recommended by the DHS, and that respondent "provide copies of all prescriptions to DHS and . . . sign all necessary releases for her medical records." A protective services worker's note dated December 7, 2005, states that respondent

> admitted to having a number of positive opiate screens. She stated that she hurt her back in 2003 and was never able to finish physical therapy. She stated that she has been given Vicodin a number of times. She explained that the court told her she had to turn in the medical records to support that these medication [sic] were prescribed. [Respondent] reported that she experiences chronic pain due to her back problems and her dental issues. She explained that her teeth do not have enamel on them and that she continues to have problems with abscessing.

The circuit court conducted a dispositional review hearing on January 12, 2006.[4] The circuit court ordered the children removed from respondent and Morgan's home, finding,

> Home is appropriate though cluttered. No risk to children as to condition. Respondent mother—therapy but struggles with level of functioning. Sleeps during the day. Cooperative but dirty drops for both parents since show cause. Extra family members in home. . . . Respondent mother referred for evaluation. . . . Children doing well but minimal progress. If children remain in home, need intensive therapy. RH has anger and very bonded to mother. . . . Caseworker believes children at risk, emotionally. . . .

The circuit court ordered frequent, supervised parenting time.

On April 13, 2006, the circuit court held another review hearing.[5] The court continued the children in foster care, explaining as follows in its handwritten order:

> Children doing pretty well in foster placement. Initially, structure difficult for them, but behaviors have improved. RH had very difficult time, angry. He's made a lot of progress, particular[ly] trust issues. Therapy going well. Improving in school work. . . . Respondent father not at hearing. Per respondent mother—"took off this morning." *Refused* participation with services. Wanted to release his parental rights. No interest in explaining to boys. . . . He blames respondent mother. Parents intend to pursue divorce. Respondent mother disappointed by respondent father. Respondent mother—said she's been attending AA. Continues in PATS. No documentation of either. Weekly counseling. Unemployed. Evicted. For while moved back in with respondent father. But now her mother has purchased a trailer. Dropped dirty last week. Failed to follow through with dental exam. [Emphasis in original].

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[4] The parties did not order a transcript of this proceeding.

[5] The parties did not order a transcript of this proceeding.

The circuit court continued its prior orders.

On July 13, 2006, the circuit court conducted a review hearing.[6] The court continued the children in foster care, finding that substantial progress was not made. According to the court's handwritten order, "Respondent mother participating but minimal progress. Tested positive for drugs in May and June. Denies use. Caseworker has concerns about reunification in mother's current home."

On September 7, 2006, the circuit court conducted a permanency planning hearing. Scott Campau, a DHS worker, testified that respondent had obtained full time employment and "made progress" since the last court hearing. Campau described that respondent had opened a savings account and was using it to pay her bills, including a $400 fee necessary to restore her driver's license. He explained that "[s]he's continuing to attend AA and NA meetings once to twice per week," and that no problems had occurred with respect to visitation. Campau reported that according to respondent's therapist, Joanne Giordano, respondent "is doing really really well" in her sessions, "really addressing the issues and kind of delving deep into those right now," and regaining control over her life and increasing her self-esteem. On the negative side, Campau reported a dirty drop that week for cocaine and opiates, and advised the court that respondent denied any drug use. Respondent lived with her grandmother in a two-bedroom trailer that Campau believed would provide insufficient space for all three children. The circuit court observed with regard to respondent,

> I was really happy to hear about the progress you had been making. I have never had a parent come in and set up a savings account while they have been going through the programming so that they could have a plan and make regular payments to get their drivers [sic] license back. I mean, the fact that you have a full time job, you're enjoying your job, you have made such great strides and I don't know if this test is positive or not, I am going to have you do a screen today . . . .

Respondent told the court that she had taken only Robaxin and Ultram, both prescribed by a physician. The court continued its prior orders.[7]

At a December 7, 2006 dispositional review hearing, Campau testified that respondent "has made some pretty good progress," specifically that she completed a substance abuse program called PATS, attended weekly AA or NA meetings, had no positive drug screens, and regularly attended and progressed in individual therapy. Campau continued,

> And one of the things that she has really done a good job with I think over this report period is managing money and budgeting and that sort of thing, which

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[6] The parties did not order a transcript of this proceeding.

[7] The record does not contain reports documenting the allegedly positive drug screen or the screen conducted on September 7, 2006.

> have been a big problem in the past. She was able to pay off a $350 bill to the State of Michigan to have her driver's license reinstated and that was something that she had set up in the previous quarter. . . .

Campau reported that apart from respondent's substance abuse history, his only concern involved her "maintaining a relationship with [Morgan] while he wasn't participating in services and she wasn't honest about that to this Court or our Agency." Nevertheless, Campau recommended that respondent begin having unsupervised visitation with all three children in her residence. He also related that the foster parent of the younger children had admitted to spanking children in her care; Campau opined that problems with the foster parent had "impacted some . . . this reunification process," and continued,

> I don't want [respondent's] reunification efforts to be hampered by the other things going on in the case. I don't think that's fair to her and I don't think that's fair to the kids. And, no, she hasn't been perfect and she has done some things that are certainly concerning, but I also think she deserves a valid chance at reunification with the kids and I think that's in their best interest at this point.

The circuit court continued its prior orders, and provided the DHS with discretion to permit unsupervised parenting time.

At a review hearing on March 8, 2007, Campau testified that respondent "has had really the same kind of quarter that she has had the last couple of quarters. She has had some things that have been positive and a couple of negative things." A positive screen for Vicodin in December 2006 resulted in the suspension of her unsupervised visitation, after only a couple visits with RH. According to Campau, respondent continued to make progress in therapy, paid off additional debts, and maintained employment, but had not enrolled in health insurance, despite her eligibility. Campau opined, "And that's really been the issue with [respondent] for the duration that I have worked on this case, is that it never seems like . . . enough progress where I feel like . . . we're at a point where we can really move towards a return home." The circuit court summarized its findings as follows:

> I'm so torn, [respondent], I have to tell you because I really give you credit for a lot of things that have occurred. You know, we—we did have some setbacks and you have been strong enough to break away from [Morgan]. You have made some progress, you have maintained your employment, you're paying down your bills. You're heading in some very positive directions at a time I don't think it's easy, your children were removed from your care and you really had to climb out of a difficult position you were in and you have been doing that.
>
> And—but because of some of the substance abuse concerns and . . . other areas where we haven't had follow through, we're not at a place to return the children and it is getting tough and—and it is getting to a point where we are going to have to make a decision. I don't want to terminate your parental rights, I think these boys are very bonded to you and—and I think you have been working. You have shown them that you're working hard to get them back but there comes a point where the lack of permanency no matter how hard you're trying hurts them. And particularly if something should occur, your rights are terminated and

> I can't keep the younger boys in their placement, if that's—if that's what's going to happen, that's another concern to me if that can't be an adoptive placement for them.
>
> So I guess I'm just saying this to you, I don't want you to be discouraged because you have done some very—you have been very strong and done some very positive things. And you have shown your boys that you are willing to make them a priority but you need to think about those areas where there is still problems [sic] and make—and try and draw down for some strength to make progress in those areas because we are getting to a point where we are going to have to get off the fence here. . . .

Respondent advised the circuit court that due to her work schedule, she found it difficult to attend court sessions that began before 3:30 p.m., and inquired when she could recommence visiting RH. The court again afforded the DHS discretion regarding the terms and conditions of respondent's parenting time.

On June 7, 2007, the court conducted another review hearing. Campau informed the court that the foster care license of the parent caring for respondent's two youngest children "will be closing," necessitating their move to a new foster home. Respondent lost her job but shortly thereafter located another one, although it paid significantly less and lacked the benefits of her previous employment. She continued to live with her grandmother, and had one positive drug screen. Campau related that respondent reported having had eight teeth pulled, and that she received a prescription for Vicodin. Campau elaborated,

> The only real issue I had with that is that we have had conversations about the fact that she is an addict and if she has some need for a pain killer that a doctor is prescribing that she needs to be very clear about that and let the doctor know that she has an addictive personality, she has had problems with these things in the past and she needs to be prescribed a non-narcotic pain killer. I'm a little bit concerned that didn't happen, I'm not sure why it didn't. And—and as a result—I guess I just don't know how much longer we can continue on the case and—and how much older we let the boys go to. And I don't—other than that I don't have any other recommendations for the Court and I would ask that all prior orders are affirmed.

When questioned by the court, Campau admitted that visitation continued to go well and that respondent "requires a minimal level of supervision." He additionally conceded that termination "would be hard" on the younger boys because "[t]hey have a definitive bond with mom. They enjoy seeing mom during the visits and they certainly look forward to those visits each week." Campau also admitted that respondent "had been doing a pretty good job of paying the bills off," and that her last positive drug screen had occurred in October 2006. Patrick Snyder, the DHS caseworker for RH, testified that respondent's parenting time went well, and continued,

> My recommendations in light of the new evidence with regard to the dirty drop I—I had written—[Campau] and I had spoken a couple of weeks ago that maybe the goal considering how things were going, would be towards an independent living placement with [RH] at his grandmother sometime, you know,

> later this summer, kind of transition, that would provide [RH] with some money with some independence and at the same time would allow him to be with his family. At this point I'm not sure what my recommendation is. This is very new and I was hoping to gather some more information here to make a better decision. So at this point I guess just to reaffirm prior orders and maintain placement in the current foster home for [RH].

Snyder advised the court that respondent had enjoyed unsupervised visitation with RH "[j]ust about every weekend" since January 2007, and conceded, "I don't think that termination is appropriate for a 16 year old at this point, I think that the bond that he has—that RH has with his mother is strong and I don't think that she is any danger to him."

At the June 2007 hearing, respondent summarize her position as follows:

> I thought that getting my teeth done was a good thing. I had tried the Ultram, for the pain for my teeth when I had the bottom ones pulled and it did not help and my doctor does know I had a problem and she didn't seem to think that it would be a problem. . . . I really didn't want them but I didn't have any other choice. I mean, if I would have had a couple done I probably could have lived with it but I had eight teeth done and I was pretty much out of it for a couple of days just trying to lay down and relax. . . . And—and then I'm still going to NA, I'm chairing my first meeting at the end of this month, you know, for—for a clean time ceremony. I took the boys, my other boys, to my annual NA picnic, you know—because it's something I want to share with them and we had so much fun. But I just—I don't know—I'm trying my best. I haven't had to be on my own for, excuse me, for a long time. And my grandma has repeatedly said if need be she would go back up north so I would have the extra room, that way the boys would each have, you know, [DM and MM] would have one room, RH would have his own room, I would sleep out in the living room I don't absolutely have to have a room. But I just—I don't know what else to do.

The circuit court authorized petitioner to file a permanent custody petition.

The circuit court held a permanency planning hearing on September 6, 2007. Respondent did not attend the hearing. The court file reflects that notice of the hearing was mailed to respondent in June, but to an incorrect address.[8] The post office, on June 11, 2007, had returned to the court as undeliverable some documents mailed to respondent at her initial address, but the court made no effort to reserve notice on respondent at her correct address. Campau recommended, in relevant part, as follows:

[8] It appears that the court never changed respondent's address in its records. The address on file June 2007 was the same one used at the commencement of the proceedings. The address was changed in the court file after the September 2007 permanency planning hearing.

Campau: . . . [T]his is a case where we have been—where I have really been on the bubble with termination. We have had up and down quarters and [respondent] it's—it's a shame quite frankly because her therapist tells me she is capable of doing this, does not support termination, thinks that if this was—she went so far as to say that if this case were on the front end without having removal, if services were in place. That she thinks that removal wouldn't even take place, so she finds it very difficult to support a termination.

The Court: Who is the therapist?

Campau: Joanne Giordano. I talked to Dr. Hutchins, who is the boys' therapist and she is a little bit more ambivalent about it but states that clearly the boys have a bond with mom and termination would be harmful; however, points out that they would certainly have an opportunity to be successful long term in an adoptive placement. I think—I have had an ongoing dialog with [respondent] over this report period that we don't want to terminate because she can't economically—she can't financially provide a stable placement for her children, if there is something we can do to help out in that regard that we would certainly want to do that. She knows that she's really on last legs here. . . . And I guess the only thing that I can say is not—her not showing up here to Court today speaks volumes about I guess where we need to go with this case. And I think it's tragic, I think it's sad because she clearly loves these kids. . . .

* * *

The Court: Let me ask you a couple of questions before we get to [RH]. At the last hearing she had lost her job but then she did get other employment even at a lesser pay, has she maintained that job?

Campau: She did and then she quit because it was through John Good Construction, which I was able to verify, he was not paying her. Had given her a—didn't pay her for a length of time, she apparently hounded him about getting payments, he paid her a little bit of money and then didn't pay her anymore. Because she has actually moved out of her grandmother's residence in an effort—well, it's two fold. Number one, to hopefully accommodate [RH]'s future placement with grandma as a potential and also so that she—she thought okay, well if that's one of my barriers this is what I'm going to try to do, I want to do that. And [respondent] really put—after the last—after our last hearing when she realized that termination may be imminent, she really did put a lot of effort in and really did get out and was really trying to work. She is not working right now, she is—my understanding is she may be hired at the Admiral Station in Lansing as early as this week. . . .

Campau added that respondent's drugs screens had continued to return negative, and that respondent had provided him with a prescription for the opiates that caused the positive test in June 2007. He told the court that respondent continued to attend NA meetings, although she had missed some appointments. He continued, "And when I talked to Joanne Giordano she indicated to me that she feels the substance abuse issue is really—she has come a long, long way with

that." Regarding RH, Campau opined "I think at this point RH has really earned at least a chance at placement with his grandmother." The circuit court observed,

> This is the second reporting period where progress was not made for the mother and in some ways it's a hard case because I think she started out trying so hard and really she did start out making progress but we have—it seems to be back sliding the last two reporting periods. And while I respect her therapist, I do agree with the guardian ad litem's statement that this is about the children, . . . they are the ones over whom I have jurisdiction, it is their safety and well-being that I have to look out for. Their lack of permanency is a concern, although it's only—not only been a year but it's been a year that they have been out of home . . . .

The court again authorized petitioner to file a termination petition, and ordered that RH's placement remain unchanged pending the termination hearing.[9]

On November 7, 2007, petitioner filed a petition seeking termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). On November 14, 2007, the circuit court appointed counsel for respondent, who had been without counsel throughout the proceedings.

Four witnesses testified at the termination hearing. Bentley, the initial caseworker, explained that she became involved with respondent's family in September 2005 "after receiving a referral with concerns about substance abuse in the home, dirty home conditions, and overall physical neglect of the children, including improper supervision." Bentley additionally described concerns regarding "the number of people living in the home," and the use of alcohol by those people. She admitted that respondent cooperated and cleaned the home, but noted that the family "continued to struggle financially," respondent's drug screens were occasionally positive for opiates, and respondent "had struggled with depression and was in counseling." Bentley discontinued working with respondent and her family in January 2006.

Snyder, a foster care case manager, recounted that he had worked with respondent and RH. Snyder described respondent's relationship with RH as "very good . . . and, in light of everything that I have seen, I cannot imagine that she poses any harm or risk to RH's mental health or well-being." Snyder related that respondent had not missed a single weekly visit. In response to questioning by the court, Snyder opined that RH's foster family felt committed to caring for RH for a long period, and would "absolutely" cooperate if the court ordered visitation with respondent.

Campau, who became involved in the case in June 2006, expressed concern regarding respondent's lack of current employment, her "dependent personality," her lack of housing and

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[9] The record reflects that respondent was served with the court's order following the permanency planning hearing on the day of the hearing, at the courthouse. This raises the question whether respondent did attend part of the hearing.

her failure to divorce Morgan, with whom Campau believed respondent was "maintaining some sort of a relationship." In his view, respondent could not meet the emotional needs of her children "on a consistent basis," and could not meet their "physical needs." Campau further opined that termination of respondent's rights "would be in [RH]'s emotional best interests," because RH "harbors a tremendous amount of guilt for where he is, where his brothers are, for what his mother's station in life is, and has made it clear that he feels some level of obligation to help support his mother and his grandmother." Regarding the younger children, Campau believed that termination would better serve the emotional interests of DM than MM, because DM "is likely to have some of the same difficulties that [RH] has seen over the past few years."

Richard Hudson, respondent's father, testified that he had purchased a two-bedroom home in Lansing for respondent and her children. He explained that he and his mother currently lived in the home with respondent, but that he and his mother would move out within a couple of weeks if respondent regained custody of her children. Hudson advised that he and his mother owned vehicles that respondent could use, and that RH had continued to visit them.

The circuit court reasoned as follows that it would terminate respondent's parental rights:

> Thank you. In Michigan, a court shall terminate parental rights if it finds by clear and convincing evidence that one of the statutory criteria has been met and it is not contrary to the children's best interests to terminate parental rights.
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> This case began in September of 2005, over two years ago. Our first dispositional hearing was October 14, 2005. The kids initially remained in the home until January of 2006, when even after having jurisdiction, there were problems that required the removal from the home.
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> * * *
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> With regard to [respondent], there is no doubt that she loves her children. I—I understand that. And, there were times during the course of these proceedings where I thought that there might be a glimmer of hope that she could turn a corner; however, based on the evidence, I—I do think under [712A.19b(3)(c), (g), and (j)] that those three criteria have been met satisfied by clear and convincing evidence.
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> The reasons this came to adjudication were dirty, deplorable home conditions, substance and alcohol abuse in the home, lack of supervision of the children, financial problems, strains for—for the family, prior to CPS involvement, Mom's mental health issues and physical health issues, actually to the point where it impacted the proper care and custody of the children. Services were provided in the form of screens, psychological evaluation, Outreach therapy, psychological—I'm sorry—and a case worker managing the case. However, today, we still have those conditions. And further other conditions that came within the Court's jurisdiction were housing problems, that she lost her original housing, employment, and this discovery of some of the children's physical and mental health needs.

Today, Respondent Mother is not employed. I understand when she initially lost a job that was not her doing and she did seek immediately to try and find employment because she had been trying to pay down some debt; however, at one point—I was reviewing my orders prior to the hearing today because these are one continuous proceedings—there was a time and place where she quit a job that she actually had. She has no housing. The only housing available to her is being provided by her father and grandmother. She still has, I believe, mental health needs. Her counselor indicated as of this week that she—that the counselor had concerns about her ability to make decisions and consistent decisions and decisions for the children. There—it's unclear if she's dealt at all with her dependency issues, not only with regard to possible continued substance abuse but with regard to her relationship with Mr. Morgan.

As the GAL indicated, there is no financial barrier to filing for divorce. Waivers are signed all the time to waive the fees for that. She had clearly been recommended, and she had been counseled, to do that because of his inability to want to stay substance free, and so he was a barrier to the children coming home.

It's concerning to me—her father's testimony was concerning that she's never lived on her own, she's never supported herself and the children, and that he even agrees that she can't support herself right now. And, there is no likelihood within a reasonable period of time that, considering the children's ages, that she'll be able to care for them.

With regard to whether it's contrary to the children's best interests to terminate parental rights, Michael and Dennis initially, for me, I—I do believe it's not contrary to their best interests. They have physical needs that were neglected. And, the mother at this point, the testimony was that she's unable to meet their continued physical and emotional needs. They do—particularly Dennis, as the GAL indicated, he does need to figure out where he belongs and what and where he can settle in, and that we're here two plus years and he's been unable to do that. He needs that. And, it will—and even though the case worker said six months, he said minimally six more months, and Dennis cannot wait six more months. It's already been over 24 months.

With regard to Ryan, I—I wasn't sure about this but, actually, the testimony and—and what came out today and yesterday it is clear that's not contrary to his interests. He also had emotional and physical needs that were neglected and not tended to during the time he was with his mother. The fact that he still, over two years no—he's made a lot of progress in this case, and with so much of it for the better, but he is being held back by a sort of continued role reversal about his worrying about whether he needs to take care of his mother. I mean, she still can't take care of herself. Her dad's taking care of her. He doesn't need to take care of her, too. He needs the ability to be able to move on. I don't think he wants to hurt her. I don't think he feels that he can say it, and his case worker yesterday indicated that he needs someone to help him have the opportunity to move forward without carrying that burden with him. And, the testimony was that it would be contrary to his best interest. So, I have no

> evidence it would—it would—I'm sorry. The . . . evidence is that it's not contrary to his best interest to terminate parental rights.
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> I have no evidence suggesting it would be contrary to any of the children's best interest to terminate, and so I am terminating Respondent Mother's parental rights[.]

II. Analysis of Procedural Due Process Issues

Respondent raises two procedural due process issues on appeal. She first argues that the circuit court violated her due process rights when it failed to advise her that her plea of admission regarding the allegations in the original petition could result in termination of her parental rights. Respondent did not raise this issue below. This Court reviews unpreserved constitutional challenges for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

When taking a plea to the allegations in an original petition, the circuit court must follow MCR 3.971(B) and (C). Under MCR 3.971(B)(4), the court must advise the respondent, among other things,

> of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

According to MCR 3.971(C), the court cannot accept a plea of admission or no contest without taking steps to satisfy itself that "the plea is knowingly, understandingly, and voluntarily made," and that "one or more of the statutory grounds alleged in the petition are true."

In this case, the circuit court accepted a plea of admission by respondent and Morgan to most of the allegations in the original petition. Respondent actively participated in the plea-taking process, answered questions posed by the court, and volunteered information.

The record establishes that the circuit court properly advised respondent regarding the consequences of her plea. Moreover, the court carefully questioned respondent and Morgan regarding the veracity and voluntariness of the admissions they made. The court did not advise respondent that a plea could be used as evidence in a proceeding to terminate her parental rights. However, at the termination hearing petitioner did not rely on the admissions of respondent or Morgan, but presented Bentley's testimony to establish the factual bases for adjudication. Therefore, we cannot find that plain error affecting respondent's substantial rights occurred when the circuit court advised respondent of her rights and accepted her plea.

Respondent next argues that her due process rights were violated because the circuit court failed to provide her with a court-appointed attorney after petitioner filed the original petition. The underpinnings of a respondent's right to appointed counsel in parental rights termination proceedings are statutory and constitutional. Our Legislature mandated the appointment of counsel for indigent parents in MCL 712A.17c(5):

> If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an

> attorney, the court *shall* appoint an attorney to represent the respondent. [Emphasis supplied.]

In MCR 3.915(B)(1)(b), our Supreme Court reiterated the statutory right to appointed counsel. The court rule requires a circuit court to appoint counsel in child protective proceedings if "the respondent requests appointment of an attorney," and the court determines that "the respondent is financially unable to retain an attorney." MCR 3.915(B)(1)(b)(i) and (ii). Here, the record reflects that respondent made no request for an attorney at any time during the more than 24 months that elapsed between the adjudication and the termination hearing. Because respondent never articulated a desire or request for counsel, we find no violation of her statutory or court rule-based rights to counsel.

This Court has explicitly recognized that the United States Constitution provides a right to counsel in parental rights termination cases. In *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000), this Court observed, "The constitutional concepts of due process and equal protection also grant respondents in termination proceedings the right to counsel."

The circuit court appointed counsel for respondent on November 14, 2007, approximately two weeks before the termination trial commenced. We believe that earlier appointment of counsel would have better served respondent's need for representation, and more fully protected her constitutional right. We decline to reverse on this ground, as we find that the process afforded minimally satisfied the United States Constitution.

We remain troubled, however, by the circuit court's decision to appoint respondent's termination hearing counsel as her appellate attorney. In our view, appellate appointment of respondent's termination hearing counsel impeded respondent's opportunity to have an independent and searching review of the record. We note, for example, that appellate counsel failed to order the transcripts of three hearings that he did not attend, including the hearing at which the children were removed from respondent's care. More importantly, respondent's appellate counsel failed to raise any challenge regarding the sufficiency of the evidence supporting termination of respondent's parental rights, or the circuit court's best interest findings. We view this as a remarkable and extremely disturbing omission, given the obvious dearth of evidence supporting any of the statutory grounds invoked by the circuit court, MCL 712A.19b(3)(c)(i), (c)(ii), (g), or (j), as discussed in more detail, *infra*.

Only rarely will this Court consider and decide an issue not raised by the parties. Here, however, we are confronted with a circuit court order permanently severing respondent's fundamental rights to the care and custody of her children, and a record that clearly does not support that decision. Because we cannot ignore a result that would cause substantial injustice, we turn to a detailed consideration of the sufficiency of the evidence. *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004).

IV. Statutory Bases for Termination

A. Standard of Review

We review for clear error a circuit court's decision to terminate parental rights. MCR 3.977(J). The clear error standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the

court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes us as more than just maybe or probably wrong. *In re Trejo, supra* at 356.

The proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The clear and convincing evidence standard is "the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (internal quotation omitted, alteration in original).]

B. MCL 712A.19b(3)(c)(i)

First, we endeavor to apply the clear and convincing standard to the statutory language in subsection (c)(i), which permits a court to terminate parental rights only if "[t]he conditions that led to the adjudication continue to exist" without reasonable likelihood of rectification. Our careful review of the entire record in this case leads us to conclude that the circuit court clearly erred in finding clear and convincing evidence that the conditions leading to the September 2005 adjudication continued to exist at the time of the November 2007 termination hearing.

The following conditions led to the children's adjudication: (1) respondent and Morgan previously were adjudicated for neglect in 1999 and participated in services at that time, as well as from November 2004 through May 2005; (2) on September 12, 2005, the family home "was found to be in deplorable conditions"; (3) Morgan's alcoholic older brother was living in the home; (4) respondent and Morgan failed to pick up one of the children from school on two occasions; (5) "there have been allegations of drug use in the home"; (6) multiple people lived in the home, including one with an outstanding arrest warrant; and (7) the oldest child, RH, is "angry," "can be aggressive," and allegedly acted out sexually with the other children in the home.

By the time of the termination hearing, no one involved in the proceedings contested that respondent had the capacity to maintain a clean and appropriate home and had markedly improved her parenting skills. The testimony agreed that respondent attended nearly all available visits with her three children, that she interacted appropriately with them and required minimal guidance or supervision, that the children looked forward to seeing respondent, and that respondent shared a strong bond with all three children. The adjudication-related concerns about residence suitability no longer existed because respondent spent most of the duration of the proceedings living with her grandmother, and no evidence suggests that anyone else potentially harmful to the children resided there. At the time of the termination hearing, respondent had relocated from the trailer to a two-bedroom house her father owned.

Concerning respondent's use of controlled substances at the time of the adjudication, petitioner's concerns unquestionably focused primarily on Morgan. At the first dispositional hearing, Bentley emphasized that Morgan "in particular" needed drug screens and treatment. Respondent completed a substance abuse treatment program, regularly attended AA and NA meetings, and also submitted to virtually all required drug screens. On a few occasions during the pendency of the case, respondent tested positive for opiates, which she maintained resulted from prescription drugs, including Vicodin, that a doctor prescribed her for chronic back and neck problems and dental-related pain. At the termination hearing, Campau acknowledged that in June 2007, respondent had tested positive for opiates after taking Vicodin to alleviate pain arising from the removal of eight teeth, and that respondent had supplied him with the relevant prescription information. Respondent's last positive test, again resulting from opiates or Vicodin, apparently occurred in November or December 2006, approximately a year before the termination hearing.

Given respondent's participation in treatment, attendance at AA and NA meetings, and lack of any unexplained positive drug screens in 2007, the record does not clearly and convincingly demonstrate that respondent had an ongoing substance abuse problem. Furthermore, the record simply does not support that *any* of the other conditions warranting adjudication remained a concern at the time of the termination hearing.

C. MCL 712A.19b(3)(c)(ii)

Regarding the circuit court's reliance on subsection (c)(ii), our review of the record reveals that during the proceedings respondent received several additional recommendations to address potential child abuse or neglect issues. Specifically, the circuit court ordered that respondent attend individual counseling, and respondent regularly did so, actively participating in therapy. At the September 2007 permanency planning hearing, Campau reported that respondent's therapist "tells me she is capable of doings this" and "does not support termination."[10] At the termination hearing two months later, Campau testified that the therapist, who did not appear at the hearing, felt that "while . . . [respondent] did make progress and at

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[10] Campau's September 5, 2007 updated service report summarized his conversation with respondent's therapist as follows:

> Joanne [Giordano] indicated that [respondent] had made a lot of progress over the time that she had worked with her. She indicated that [respondent] appears to have stabilized emotionally and is capable of caring for her children. The main concern that Ms. Giordano noted was that if [respondent] were to begin hanging around friends who use drugs, that she would begin again. Joanne Giordano would begin to meet with [respondent] again in the future, if her services were needed.

In light of Giordano's comments, and the lack of any evidence substantiating that respondent currently labors under a debilitating mental deficiency, we find perplexing and unsupported the circuit court's bench opinion reference that respondent "still has, I believe, mental health needs."

times a tremendous amount of progress in their therapy sessions, she had serious reservations about what would happen if the children were home and that [respondent] would simply revert back to . . . old behaviors and . . . have difficulty in terms of making consistent, appropriate choices with the children." But in light of the facts that respondent consistently interacted appropriately with the children during her regular supervised visits, that respondent undisputedly made significant progress during her therapy sessions, and that respondent was afforded no opportunity to demonstrate her ability to parent the children on an extended basis in an unsupervised setting, we view Campau's report of this potential parenting concern as primarily speculative, and not constituting clear and convincing evidence of parental unfitness.

The circuit court also raised the related issue of "some of the children's physical and mental health needs" as another "condition that came within the Court's jurisdiction," presumably in reference to subsection (c)(ii). The oldest two children, RH, currently age 17, and DM, currently age 9, undisputedly had mental health issues. RH was diagnosed with "oppositional defiant and antisocial personality features," which became manifest in RH's "stealing, insubordination, and defiance" after his placement in foster care. RH took medication "to help manage organic symptoms of anxiety and depression," attended weekly counseling, and had achieved some measurable progress. According to Campau's updated service report dated early September 2007, DM, whom the psychological evaluation "diagnosed as exhibiting an anxiety disorder, perhaps ADD, and low self-esteem," had some difficulties with anger, for which he also attended therapy, but did not require medication. Notwithstanding these documented mental health issues, the evidence of record agreed that both RH and DM felt bonded to respondent, and vice versa, and that during the many visits respondent attended, neither RH's nor DM's mental difficulties created any problems whatsoever. In mid- to late-2007, at the time of the termination hearing, the children had no ongoing physical health concerns. Once again, in light of respondent's treatment plan participation and progress, consistently positive interactions with the children, and the loving relationship respondent shared with all the children, we view as speculative the circuit court's concern that any special needs of the children would render respondent unable to provide them proper care and custody, especially given the absence of any opportunity for respondent to have even attempted caring for the children on an extended basis.[11]

Respondent also received instructions to secure suitable housing. Between mid-2006 and at least July 2007, respondent resided with her grandmother in a two-bedroom trailer. Although Campau noted that the trailer would not sufficiently accommodate respondent's three children, respondent apprised the circuit court that her grandmother repeatedly had offered to vacate the trailer in the event respondent received custody of her children. By September 2007, respondent had moved out of the trailer and into a two-bedroom Lansing home that her father had purchased as "a place for her and the children to live." No evidence suggested that the home somehow

[11] We wholeheartedly agree in the observation of Campau, in his September 2007 report, that "[i]n order to get a better assessment of [respondent's] parenting abilities at this point in time, it w[ould have] be[en] advantageous to have [respondent] visit with her children in a more natural environment such as her own home."

qualified as inappropriate for the children. Given the testimony of respondent's father, the circuit court's bench opinion finding that respondent "has no housing" lacks any support in the record.

Respondent was directed to obtain employment, and she worked full-time at the same job for approximately 10 months before the employer terminated her. While employed, respondent demonstrated her ability to manage money to pay debts. The circuit court specifically recognized that respondent had undertaken financial responsibility for her debts in an extraordinarily positive manner. Respondent briefly worked at other lower wage jobs and otherwise, in Campau's estimation, diligently searched for employment. At the termination hearing, at which respondent did not testify, her father recounted that he and respondent had recently sought assistance in locating employment through the Michigan Works program. Although respondent lacked employment at the time of the termination hearing, no evidence suggests that she was to blame for her unemployed status. The employment-related evidence does not clearly and convincingly substantiate that respondent could not locate employment, or other economic assistance, within a reasonable time. Respondent's temporary lack of employment did not render her unfit.

During a review hearing in December 2006, Campau mentioned the additional concern that respondent might be "maintaining a relationship" with Morgan, who had refused to participate in services. Respondent then received advice cautioning her against falling back into a relationship with Morgan, a documented substance abuser with a criminal history, and urging her to divorce him. At the termination hearing, Campau reiterated his concern in this regard: "I was never made aware that [Morgan] was interested in reunification; however, there were times when I was made aware that he and [respondent] were maintaining some sort of relationship." Campau conceded, however, that he had no knowledge what type of relationship respondent maintained with Morgan, and "[h]ow close [they were], I don't know." Given the nebulous nature of Campau's testimony, the evidence of record does not rise to the level of clear and convincing that respondent maintained an inappropriate relationship with Morgan at the time of the termination hearing that would have posed a risk of abuse or neglect to the children if they resided in respondent's custody.

In summary, the circuit court clearly erred in finding clear and convincing evidence of any conditions warranting termination under subsection (c)(ii).

D. MCL 712A.19b(3)(g) and (j)

The circuit court referred to subsections (g) and (j) at the outset of its bench opinion as two more statutory bases warranting termination, but did not subsequently identify facts of record specifically supporting these grounds. We conclude that the circuit court clearly erred to the extent it invoked subsections (g) and (j) as bases for termination for two reasons. First, the evidence discussed above documents: (1) respondent's diligent and substantial efforts and progress toward maintaining sobriety and mental health, (2) her current possession of apparently stable housing, (3) her strong bond and consistently positive interactions with the children, (4) her willingness to work and her active and ongoing search for employment, and (5) that neither respondent nor any of the children currently suffers from any mental deficiency that likely would preclude her from caring for the children. And second, Campau's vague concerns about

respondent's potential relationship of some kind with Morgan do not establish clear and convincing evidence of a potential risk of harm to the children.

E. MCL 712A.19b(5)

In light of our conclusion that none of the statutory grounds cited by the circuit court in ordering termination found clear and convincing evidentiary support in the record, we need not specifically consider the propriety of the circuit court's best interest findings. We nonetheless observe that the circuit court clearly erred in finding that termination would not contravene the children's best interests,[12] primarily because abundant evidence of record establishes respondent's dedication to her treatment plan, the undisputedly loving and positive parenting time interactions between respondent and the children, and the absence of any current mental or physical impediments that likely would preclude respondent from caring for the children. We conclude that absent a clearly and convincingly established statutory ground of parental unfitness, the duration of the children's foster care placements, standing alone, does not warrant termination.

We reverse the circuit court's order terminating respondent's parental rights, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

[12] On July 11, 2008, the Legislature amended MCL 712A.19b(5), which currently reads as follows:

> 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.