STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CALVIN MARKUS GERWATOWSKI, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

HARVEY GIDDENS,

Respondent-Appellant.

UNPUBLISHED
December 2, 2008

No. 283283
Luce Circuit Court
Family Division
LC No. 06-004630-NA

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

WHITBECK, J. (*dissenting*).

The majority concludes that the trial court erred in terminating respondent Harvey Giddens' parental rights to the minor child, Calvin Gerwatowski. I respectfully disagree. I would affirm the trial court's order of termination.

To terminate parental rights a trial court must find that the petitioner has proven at least one of the statutory grounds for termination by clear and convincing evidence.[1] This Court thereafter reviews for clear error the trial court's decision terminating parental rights.[2] 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.[3] This Court must give deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.[4]

[1] MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

[2] MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Sours*, *supra* at 633.

[3] *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

[4] MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court reviewed the evidence and testimony regarding Giddens' lack of compliance with service plan recommendations, his psychological evaluations, and his prognosis for long-term improvement. The trial court then found that a statutory ground for termination had been met. Although acknowledging the highly deferential standard of review that this Court must use to evaluate a trial court's decision to terminate parental rights, the majority concludes that Calvin's best interests "would have been better served by providing [Giddens] additional services and an expanded opportunity to demonstrate his parenting ability." However, unlike the majority's implicit conclusion, I am not left with a definite and firm conviction that termination was a mistake.

The majority notes that Giddens was "initially uncooperative, but ultimately complied with the requirements of the treatment plan." The majority then goes on to conclude that Giddens "was not given reasonable or fair opportunity to demonstrate progress." However, I find it significant that at the time of the December 2007 termination hearing—10 months after Calvin's birth and approximately a year and half after Brooklyn's injury (for which Giddens never fully took responsibility)—even the witnesses who testified to Giddens' improvement remained concerned about his ability to parent children safely. Foster care worker Karen Bontrager admitted that Giddens benefited from his parenting classes, but she believed he still constituted a risk to Calvin. And Michael Powers, the psychological evaluator, stated that Giddens' prognosis to make meaningful changes in the next 6-9 months was near zero. Powers also said that, even assuming that Giddens invested himself completely in therapy, there was a only a guarded possibility that he could improve enough in 12 to 18 months to know whether or not he could safely parent children. I do not believe that the trial court clearly erred in ordering termination on the basis of Giddens' psychological assessment that indicated many serious, unresolved, deeply ingrained developmental issues that continued to exist and could not be resolved within a reasonable time. I believe that Giddens was clearly given a reasonable and fair opportunity to demonstrate progress.

The statute requires the trial court to order termination upon a finding that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that the conditions will be rectified within a reasonable time considering Calvin's age.[5] Here, the evidence established that there was at best only a guarded possibility, not a reasonable likelihood, that Giddens would rectify the conditions of adjudication in over a year, which is not a reasonable time given Calvin's young age. "A child should not be required to wait for parents to acquire parenting skills that may never develop."[6] I would conclude that termination of Giddens' parental rights under MCL 712A.19b(3)(c)(*i*) was proper.

The majority reasons that termination was questionable when there is no evidence that Giddens harmed his two older children. However, the evidence substantiated the abuse of one child. And there is no statutory requirement that termination only be ordered after multiple

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[5] MCL 712A.19b(3)(c)(*i*).

[6] *In re Roe*, ___ Mich App ___; ___ NW2d ___ (2008), Docket No. 283642, slip op p 10 (internal quotation and citation omitted).

instances of abuse. "How a parent treats *one* child is . . . probative of how that parent may treat other children."[7]

The majority concludes "termination of [Giddens'] parental rights was not clearly in the best interests of the child." In fact, the trial court did not address the best interests of the child.[8] But neither statute nor court rule requires the trial court to make specific findings on the question of best interests.[9] "[A] court speaks through its written orders and . . . , in entering the order terminating parental rights, the court necessarily found that statutory grounds for termination existed and could not have found that termination of parental rights was clearly not in the best interests of the children."[10]

The statute requires that once a petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court *shall* order termination of parental rights, *unless* the trial court finds from evidence on the whole record that termination is clearly *not* in the child's best interests.[11]

The majority concludes that termination was not in Calvin's best interests because it would "serve to diminish any financial resources to the child as [Giddens'] obligation to support Calvin is also ended." In my view, the continued availability of financial support is not a proper ground on which to negate a trial court's finding that a statutory ground for termination has been met. Indeed, in my opinion it would never be in a child's best interests to remain in the custody of an abusive parent merely for continued access to financial resources. Moreover, the record indicates that Giddens is "unemployed due to his 'disability.'" Therefore, it is unclear how much Giddens contributes or is capable of contributing to Calvin's support.

The majority also concludes that the trial court was placing form over substance in ordering termination because it is likely that Giddens will nevertheless remain in contact with Calvin in light of Giddens' relationship with Calvin's mother, who retains custody of Calvin. However, if petitioner determines that this contact continues to pose a risk to Calvin, then it has the obligation to pursue necessary proceedings to alleviate that risk.

In sum, I would affirm.

/s/ William C. Whitbeck

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[7] *In re La Flure*, 48 Mich App 377, 392; 210 NW2d 482 (1973) (emphasis added).

[8] See MCL 712A.19b(5).

[9] *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005).

[10] *Id*.

[11] MCL 712A.19b(5); *Trejo*, *supra* at 350. MCL 712A.19b(5) was recently amended such that the trial court must now find that termination of parental rights is in the child's best interests. 2008 PA 199, effective July 11, 2008. However, the trial court here made its original disposition under the prior version of the statute.