STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DAKOTA LYNN McEWEN,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JEREMIAH EDWARD McEWEN,

Respondent-Appellant,

and

TASHA JO OGG, f/k/a TASHA JO McEWEN,

Respondent.

UNPUBLISHED
March 26, 2009

No. 286426
Kalkaska Circuit Court
Family Division
LC No. 06-003828-NA

In the Matter of DAKOTA LYNN McEWEN,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

TASHA JO OGG, f/k/a TASHA JO McEWEN,

Respondent-Appellant,

and

JEREMIAH EDWARD McEWEN,

Respondent.

No. 286427
Kalkaska Circuit Court
Family Division
LC No. 06-003828-NA

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right the trial court order terminating their parental rights to the minor child. Respondent father's parental rights were terminated pursuant to MCL 712A.19b(3)(g), (h), and (j). Respondent mother's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). In Docket No. 286426, we affirm the portion of the trial court's order terminating respondent father's parental rights. In Docket No. 286427, we reverse the portion of the trial court's order terminating respondent mother's parental rights.

I

With regard to respondent father, the trial court did not clearly err in finding that the statutory grounds for termination were proven by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Dakota was removed from respondents' care based in large part on respondent father's drug use, criminal history, and mental instability. Before Dakota was even adjudicated a temporary ward, respondent father was arrested and convicted of drug possession/distribution and felony-firearm. He was sentenced to a prison term of six to 20 years. It cannot be said that he planned for the child's care before he was taken to prison. It was clearly established, therefore, that respondent father was imprisoned for such a period that Dakota would have been deprived of a normal home for a period exceeding two years, and that respondent father failed to provide for her proper care and custody. Because of his incarceration, it was impossible for respondent father to participate in any meaningful services. He was unable to provide Dakota with proper care and custody while in prison. In addition, given respondent father's admitted extensive drug problems and history of criminal conduct, it was clear that respondent father's lifestyle would have placed Dakota at risk of harm if she were returned to his care.

Having found the statutory grounds for termination proven by clear and convincing evidence, the trial court was obligated to terminate respondent father's parental rights unless it appeared, on the whole record, that termination was clearly contrary to Dakota's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).[1] Because of his criminal lifestyle and drug use, respondent father had not seen Dakota for more than 18 months by the time of the termination hearing. Given the extensive amount of time that had elapsed since respondent father last saw the child, it could not be said that they shared any sort of bond. The trial court did not err in its best interests determination regarding respondent father and in terminating his parental rights to the minor child.

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[1] 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, here, we use the prior standard under which the trial court made its original disposition.

II

With regard to respondent mother, the trial court clearly erred in finding that the statutory grounds for termination of her parental rights were established by clear and convincing evidence. We acknowledge that due 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); *Miller*, *supra* at 337. Still, we are concerned with the lack of clear and convincing evidence in the record substantiating a statutory ground for termination, and instead, what appears to be a best interests analysis. We also note that the guardian ad litem did not believe that a statutory basis for termination of respondent mother's parental rights existed.

As indicated, respondent mother's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j), which provide:

> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There is a reasonable likelihood, 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.

We first turn to whether subsection 19b(3)(c)(*i*) or 19b(3)(c)(*ii*) was established by clear and convincing evidence. Protective services worker Mindy Czinder testified that she received a referral in July 2006 alleging improper supervision and physical neglect. Czinder visited the apartment that respondents were sharing with other people and found the apartment to be too small for the number of people. One of the reasons the initial petition seeking temporary custody

of Dakota was filed was because respondent mother had been repeatedly warned that respondent father should not be near Dakota because of his instability. Additionally, protective services workers wanted respondent mother to keep Dakota away from respondent father until he could be assessed, but she failed to do so. Workers were concerned about respondent mother's emotional stability.

Foster care worker Nadine Baker testified that respondent mother's parent-agency agreement (PAA) focused on housing, substance abuse, resource management, parenting classes, emotional stability, and domestic relations. All of the PAA's requirements were successfully completed, though in a tardy manner. Substance abuse was not an issue for respondent mother. As for housing, respondent mother was living with her fiancé, Thomas Schweniger, in a two-bedroom townhouse in Harbor Beach, Michigan at the time of the termination trial. The home was childproofed and the second bedroom was equipped with a crib, toys, and a walk-in closet full of clothes for Dakota. By all accounts, Schweniger was a stable and supportive individual and active in respondent mother's endeavors to reunite with Dakota. Housing, therefore, was no longer an issue. Respondent mother also successfully completed parenting classes and numerous other job training and resource management classes. Respondent mother's emotional stability was what needed the most attention. Baker admitted that respondent mother had substantially complied with the PAA and that respondent mother appeared to have benefited from parenting classes and was more emotionally stable. A parent's compliance with the PAA is evidence of her ability to provide proper care and custody for her child. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

Respondent mother's therapist, Clifford Stevens, offered a glowing appraisal of respondent mother's progress in individual therapy. Though not a licensed psychologist, Stevens had a master's degree in guidance and counsel. He was a licensed master social worker in clinical and macro social work and had been a counselor for 33 years. Stevens noted that respondent mother had made vast improvements; she wanted to be a good mother, so she was "goal oriented." She was more responsible, mature, and stable. Stevens believed that respondent mother was "a better prepared parent at 20 years old than the majority of other first-time parents her age." Stevens acknowledged that respondent mother's participation in therapy was "sporadic" from January 2007 through June 2007. Thereafter, respondent mother became more goal-oriented and they met three or four times a month. Respondent mother likewise admitted that she "veered off" from therapy from February 2007 until June 2007, at which time the trial court made it clear that she needed to commit to therapy. Respondent mother did not think she needed psychological services at first. Once she began to comply with the psychological aspect of the PAA and took her medication, she realized how important it was to remain compliant.

Thus, it seems that although respondent mother did not act in a timely fashion with regard to her PAA, she ultimately completed and benefited from all of the services asked of her. The conditions leading to adjudication no longer existed at the time of the termination hearing. Respondent mother secured housing and was emotionally stable. She availed herself of numerous classes. Thus, the trial court erred in concluding by clear and convincing evidence that the conditions leading to adjudication continued to exist. In addition, although the trial court cited subsection 19b(3)(c)(*ii*) as a ground for termination, it did not indicate what "new conditions" arose that respondent mother failed to address.

The next issue is whether respondent mother had the means to provide Dakota with proper care or custody. MCL 712A.19b(3)(g). Respondent mother had suitable housing. By her own admission, she did not have a history of successful employment. Respondent mother had trouble with her legs and was being tested for multiple sclerosis, so she could not work. She sold Pampered Chef cooking items out of her home. Respondent mother completed problem-solving classes, classes that were meant to improve her interviewing skills, professionalism, and etiquette, and classes for effective job searching. She was amenable to services. The workers admitted that respondent mother benefited from parenting classes. It could not be said that respondent mother could not provide Dakota with proper care and custody.

The only remaining statutory ground for termination is subsection 19b(3)(j), which provides that "*based on the conduct or capacity of the child's parent*," the child would likely be harmed if returned to respondent mother's care. MCL 712A.19b(3)(j) (emphasis added). There was simply no evidence that respondent mother posed a physical threat to Dakota. The only evidence offered was that reunification would pose an emotional threat to Dakota. However, even this evidence is questionable. While it is true that the task of assessing credibility and the weight to be given testimony is left for the fact finder, we are left with a definite and firm belief that the trial court erred by relying so heavily upon the testimony of Dr. Wayne Simmons, whose opinions were significantly influenced by the foster mother's statements, and by engaging in what appears to be an undue comparison between Dakota's close bond with her foster mother, with whom she continuously resided, and her bond with respondent mother.

Dr. Simmons had a Ph.D. in psychology and was a licensed clinical psychologist who performed two bonding assessments on respondent mother and Dakota. In performing such assessments, Dr. Simmons gathers as much background information on the child as possible and then simply observes the parent with the child. The first assessment in this case was performed on July 19, 2007, when Dakota was 15 months old. Dr. Simmons reported that respondent mother seemed concerned with structure and organization and tried very hard to engage Dakota, who was somewhat tolerant. However, Dakota did not respond to respondent mother's attempts at physical contact "as you would expect a child to do if there was a prominent attachment that was present." Dr. Simmons was impressed with the level of knowledge the foster care mother had about Dakota. The foster mother told Dr. Simmons that both Dakota and her mother seemed prepared to end their visits, and it did not seem to pain either one of them to be done. After the initial assessment, Dr. Simmons concluded that "there was not a close and dependable attachment to her mother whatsoever and that certainly she represented herself as familiar to her mother and reasonably comfortable, but not attached in any dependable way." While Dr. Simmons noted that Dakota demonstrated a connectedness with the foster parents in terms of running to them and being affectionate, there was no similar demonstration with respondent mother.

Dr. Simmons performed a second bonding assessment on October 19, 2007. Dr. Simmons noted that respondent mother was "more capable in her efforts" at engaging Dakota. However, he believed that there was "absolute terror in Dakota's eyes" when respondent mother was trying to comfort her. Dakota was placated with fruit snacks but intermittently attempted to leave during the visit. He noted that, despite an injured back, respondent mother made an effort to get on the floor and play with Dakota and was "quite tender and playful." Still, Dr. Simmons did not think that respondent mother's presence was appealing or compelling to Dakota, although

Dakota did voluntarily hug her mother on one occasion during the visit. Dr. Simmons testified that respondent mother was "substantially livelier and more engaging . . . and I felt she was more knowledgeable, but that Dakota still continued to have a very weak attachment to her mother." Dr. Simmons was also concerned about reports of Dakota acting out after her visits with respondent mother. Dakota's attachment to respondent mother seemed based almost exclusively on what respondent mother could provide in terms of food and toys. Dakota "associates her mother now with a distressed state." With regard to the possibility of reunification, Dr. Simmons opined that, "as clearly and inevitably as anything we know in psychology that it would be catastrophic for this child and for her psychological welfare." However, during cross-examination, Dr. Simmons admitted that most of the information he received regarding the "toxic" reaction and tantrums Dakota suffered after seeing her mother were based on the foster mother's statements. Other than the look of terror that Dakota had when Baker left the room at the second assessment, Dr. Simmons could point to no other instances in which Dakota had a negative reaction to respondent mother. Instead, his analysis was based almost entirely on the foster mother's allegations.

Jennifer Seese, Dakota's foster mother, testified that, the older Dakota became, the worse she would react after visiting with respondent mother. After visits Dakota would cry all the way home and then have difficulty sleeping. She would not let Seese out of her sight and would not eat. Sometimes it would take days to get Dakota back to her normal routine. There were times when Dakota would tell Seese, "no Tasha." One time she was so upset on the way to a visit that she threw up. When the visits were stopped in November 2007, none of those behaviors were apparent in Dakota.

A third bonding assessment was performed by Dr. Robert Plummer on December 1, 2007. Baker had sent Dr. Plummer a letter indicating the reason Dakota was removed along with all the parenting times and notes that Baker took. He was also provided the foster parents' journal. Dr. Plummer testified that he had a Ph.D. in psychology and specialized in clinical psychology and clinical neuropsychology. He met with Dakota and respondent mother for approximately a half hour. During the assessment, Dr. Plummer noted that respondent mother was attentive, interactive, and caring. Respondent mother interceded at times to make sure that Dakota would not get hurt. Dakota did not appear to fear respondent mother, and she did not try to get away from respondent mother. Dr. Plummer noted, "I did not observe any evidence of any lack of attachment." Dr. Plummer opined that a year of separation would not necessarily destroy a bond between mother and child. He noted that Dakota was very young and personable. She even went to him. Dr. Plummer believed that Dakota had the ability to bond with whoever raised her. He did not believe that respondent mother suffered from any cognitive impairment or mental illness that would impair her ability to parent. Dr. Plummer interviewed respondent mother's fiancé and concluded that he would be of support to respondent mother. Dr. Plummer did not disagree with Dr. Simmons' assessment: "I just think that what he saw at the time that he saw her was valid. But I think that the only explanation is it probably could have changed from then." Dr. Plummer spoke with the foster mother at the assessment. She told him that Dakota was scared of her mother. Dr. Plummer testified that he reserved judgment until he could make the observation for himself.

In its opinion and order, the trial court concluded:

> The testimony of Dr. Wayne V. Simmons will carry more weight than the testimony of Dr. Robert David Plummer. Dr. Simmons completed two (2) bonding assessments, the first one in July 2007, and the second one in November 2007, as opposed to Dr. Plummer who only met with respondent mother and child on one occasion. In addition, it appears that there was more data and information that was made available to Dr. Simmons, who based his opinion on his own observations as well as the information provided by the foster care mother.

Although the trial court had an opportunity to assess the foster mother's credibility, it was clear from everyone's testimony that the foster mother had a strong bond with Dakota, who was placed with her at the young age of five months old. The foster mother denied that thoughts of adoption played a role in her testimony and statements, but it is obvious that she formed a strong attachment to Dakota. In making its decision, it appears as if the trial court performed a best interests analysis before determining whether there was a statutory ground for termination, and determined that Dakota would be better off with her foster family than with respondent mother. Such a factor could not be considered in the initial determination of whether respondent mother was neglectful. *In re Mathers*, 371 Mich 516, 530; 124 NW2d 878 (1963). As our Supreme Court has stated:

> "It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered to the [child]." [*In Re JK*, 468 Mich 202, 215 n 21; 661 NW2d 216 (2003), quoting *Fritts v Krugh*, 354 Mich 97, 115; 92 NW2d 604 (1958), overruled on other grounds, *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993).]

"There is a strong public policy favoring the preservation of the family because the family unit is deeply rooted in our nation's history and tradition." *In re B and J*, 279 Mich App 12, 18; 756 NW2d 234 (2008). Natural parents have a fundamental liberty interest in the care, custody, and management of their children, which "does not evaporate simply because they have not been model parents[.]" See *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The state must therefore meet a high burden before a parent's rights can be terminated. *In re B and J*, *supra* at 18.

The record reveals that the visits between respondent mother and Dakota were without incident. Admittedly, respondent mother was very sporadic in visiting with Dakota at the beginning of the case, and she did not see Dakota from November 2006 to January 2007. She explained that respondent father's criminal case caused her to be in lower Michigan. Her car was impounded, and she was without transportation until January 2008. Respondent mother visited once in January 2007, once in February 2007, once in March 2007, and twice in April 2007. The visits were increased in May, and respondent mother became more consistent. Baker observed most of the visits. She noted that in January and February 2007, Dakota was very amenable at the visits. Respondent mother had a difficult time picking up on Dakota's cues, but respondent mother was nevertheless involved in trying to interact with Dakota. Baker reported that, at some point in June 2007, Dakota began to act out. This was around the same time that the visits were increased in frequency and duration. Again, however, Baker's testimony was based on the foster mother's statements and not based on her own observations.

In fact, Baker observed the visits and noted that Dakota continued to be amenable. Dakota did not necessarily go to respondent mother for comfort, but she laughed, played, and had a good time. When it appeared that respondent mother needed to leave the room, Dakota would raise her arms to be taken with her. There was one occasion when Dakota fell asleep in her mother's arms. Respondent mother had enjoyed four-hour visits with Dakota during the summer and made every appointment except one when she was hospitalized. Respondent mother made the trip to attend the visits at her own expense.

Baker testified that Dakota only started acting out after "prolonged exposure to the foster parents and prolonged non-exposure to mom." Although some witnesses found Dakota's need to "wander" during visits troubling, it does not strike this Court as anything other than a curious child. Dakota never showed any stress with respondent mother, with the exception of the time Baker attempted to leave the room at the second assessment.

The trial court seems to have ignored the testimony regarding the positive nature of respondent mother's visits with Dakota, including Baker's personal observations and Dr. Plummer's assessment. Contrary to the court's statements in its opinion and order, both Dr. Plummer and Dr. Simmons were privy to the same information. Respondent mother was in substantial compliance with the PAA and clearly benefited from those services. Granted, her participation was late in coming, but respondent mother became committed to following the PAA and completed all that was asked of her. She demonstrated significant personal growth, as testified to by numerous witnesses. Respondent mother visited Dakota regularly during the months before the termination hearing. Visitation went well and respondent mother was appropriate with Dakota at all times. The trial court apparently focused on how Dakota acted *after* the visits, based entirely on the statements of the foster mother.[2]

Considering all of the evidence presented, we conclude that the trial court clearly erred in finding that a statutory ground for termination was proven by clear and convincing evidence. In finding that Dakota would likely be emotionally harmed through reunification with respondent mother based on the conduct of the mother under MCL 712A.19b(3)(j), the trial court seems to have conducted a best interests analysis and impermissibly weighed the advantages of the foster care home against the home of respondent mother. Dakota is so young that we find it difficult to accept that there is no hope for her to bond with respondent mother, and any evidence that she would suffer actual harm under respondent mother's care is less than clear and convincing. Respondent mother should be given an opportunity to care for the child and demonstrate her parenting skills.

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[2] It is not unreasonable to expect a child Dakota's age to bond with the person who renders primary care and custody for a period of time, especially one who loves and cares well for the child, as surely occurred in this instance. Comparing the bond between the natural parent and a foster parent, however, is not a proper method of establishing a statutory ground for parental termination.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly