

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
February 24, 2011

In the Matter of T. MOORE, Minor.

No. 299306  
Wayne Circuit Court  
Family Division  
LC No. 08-480722

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Before: TALBOT, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

The minor child appeals as of right from a circuit court order denying the petitions of the Department of Human Services (DHS) and the child's guardian ad litem to terminate respondent N. Moore's parental rights under MCL 712A.19b(3)(g) and (j). Because the trial court did not clearly err in its findings, we affirm.

This Court reviews a trial court's factual findings as well as its ultimate determination that a statutory ground for the termination of parental rights has been proven by clear and convincing evidence for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if—although there is evidence to support it—this Court is nevertheless definitely and firmly convinced that the trial court made a mistake. *Id.* This Court also reviews for clear error a trial court's finding that it would be in the child's best interest to terminate the parent's parental rights. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

Here, the trial court determined that petitioner failed to establish by clear and convincing evidence that, without regard to intent, respondent failed to provide proper care or custody for the child and that "there is no reasonable expectation that [he] will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g). The record evidence showed that respondent has a steady job and a home in which he lives with his father. He attended parenting classes, which he purportedly completed, visited the child every week, and attended nearly all, if not all, court hearings. He brought things for his child on his visits, changed her diaper, talked to her, and played with her. He also inquired of the foster parent whether she needed anything for the child. Respondent's most recent criminal conviction occurred in 2002, eight years before trial, and he was discharged from parole in 2009. Moreover, there exists a bond between respondent and the child. Given this record, we cannot conclude that the trial court clearly erred when it determined that this ground for termination had not been proved by clear and convincing evidence.

The trial court also determined that petitioner had not established grounds for termination under MCL 712A.19b(3)(j). Under that statute, the trial court may terminate a parent's parental rights if it finds by clear and convincing evidence that 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." *Id.* For this ground, the primary evidence that there was a possibility that the child would be harmed if returned to respondent's care involved respondent's response to the sexual abuse of a different child while that child was under the care of her mother, A. Ocasio, who is also the mother of the minor child involved here, and the potential that he might permit Ocasio to see the child.

In that case, the nine-year-old victim described the sexual abuse that she suffered.<sup>1</sup> She contracted genital herpes and maintained that her father, who also had genital herpes, gave her the disease. Respondent was aware that the victim's father had been convicted of several counts of criminal sexual conduct as a result. Nevertheless, respondent claimed that he did not know whether Ocasio or the victim was telling the truth and that someone may have told the victim what to say because she was interviewed without her parents present. Although respondent maintained that he did not know who was telling the truth, he testified that Ocasio's parental rights should not have been terminated because she was not charged with a criminal offense relating to the sexual abuse. He characterized Ocasio as "the perfect mother" and claimed that "everybody makes mistakes." There was also evidence that suggested that respondent might permit Ocasio's continued involvement with the child despite the potential for harm.

Respondent's statements regarding the sexual abuse display a serious lack of judgment and suggest that he might not fully appreciate the danger posed by others to his child. As such, this testimony could support a finding that the child would be at some level of risk of harm if returned to respondent's care. However, in the absence of further evidence concerning respondent's conduct or capacity and the resultant potential for harm to the child, we cannot conclude that the trial court clearly erred when it determined that this ground had not been established by clear and convincing evidence. In order to terminate respondent's rights under § 19b(3)(j), the trial court had to find that there was a "reasonable likelihood" given the respondent's "conduct or capacity" that the child "*will* be harmed" if she is returned to respondent's home. MCL 712A.19b(3)(j) (emphasis added). Although we are troubled by respondent's apparent inability to acknowledge the horrendous acts that occurred to the other child, this lack of insight into the danger posed by Ocasio's actions does not by itself leave us with the definite and firm conviction that there is a reasonable probability that the child *will* be harmed if returned to respondent's home. Respondent testified that he would not permit Ocasio to be involved in the child's life despite the evidence that he had for a time continued to see Ocasio. The trial court had the opportunity to view respondent and was in the best position to

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<sup>1</sup> Although the victim did not testify in this case, she testified in the case against Ocasio and the trial court took judicial notice of the file. This Court affirmed the termination of Ocasio's parental rights in *In re TM1, KO1, KO2, & TM2*, unpublished opinion per curiam of the Court of Appeals, issued May 27, 2010 (Docket No. 293763).

evaluate his credibility and determine the weight to be accorded his testimony. And this Court will defer to the trial court's superior ability to judge the persons who appear before it. See *In re Miller*, 433 Mich 331, 337-338; 445 NW2d 161 (1989) (noting that the trial court had the opportunity to view the parent over time at a variety of proceedings and stating that appellate courts must defer to the trial court's superior ability to determine credibility and accord weight to the witness' testimony). Accordingly, on this record, we cannot conclude that the trial court clearly erred when it determined that this ground had not been properly established.

Finally, even if we were to conclude that the trial court clearly erred when it determined that this ground had not been established, the trial court also found that it was not in the child's best interest to terminate respondent's parental rights. A trial court cannot terminate a parent's parental rights without first finding that it was in the child's best interest. See MCL 712A.19b(5). Here the record evidence showed that respondent completed the services that were offered to him and had a strong bond with the child. Given this evidence and deferring to the trial court's superior ability to judge the witnesses before it, we cannot conclude that the trial court clearly erred when it found that the evidence did not establish that it would in the child's best interests to terminate respondent's parental rights and instead determined that the child should remain a temporary ward of the court. Thus, even if a statutory ground for termination had been proven by clear and convincing evidence, it would nevertheless not warrant termination. MCL 712A.19b(5).

Affirmed.

/s/ David H. Sawyer  
/s/ Michael J. Kelly