STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of REEDER, Minors.

UNPUBLISHED
October 22, 2013

No. 315382
Berrien Circuit Court
Family Division
LC No. 2011-000088-NA

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court order terminating her parental rights to her two minor children under MCL 712A.19b(3)(c)(*i*), (g), and (j). Because the reasons for adjudication—both specifically and more generally—did not exist at the time of termination, and despite the deferential standard of review applicable in this appeal, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND FACTS

The petition at issue alleged one specific ground for jurisdiction: that respondent left the two children, CR and BR,[1] with an inappropriate caregiver after being told in a prior proceeding not to associate with that individual. According to the petition, in a previous case, CR was placed in foster care from June 21, 2010 until July 11, 2011. That case (which only involved CR even though BR was born during those proceedings) was closed on October 10, 2011, and reunification occurred.

With respect to the particular incident giving rise to the petition, it was alleged that on October 17, 2011, Child Protective Services (CPS) received a complaint that respondent's whereabouts were unknown and that the children were heard crying from the house. According to Benton Township Police Officer Eugene Anderson and Sergeant Timothy Sutherland, upon arrival at respondent's home they heard a baby crying and saw CR through the kitchen window. The officers knocked on the door for about 20 minutes until Andrew Whisenant answered the door. Officer Anderson discovered that Whisenant, who had been drinking but did not appear drunk or intoxicated, was on parole and was prohibited from drinking alcohol. A preliminary

[1] At the time the petition was filed, CR was just about 3 years old, while BR was just shy of his first birthday.

breathalyzer test established that Whisenant had a .055 blood alcohol level, and he was arrested for a parole violation. Respondent arrived home and stated that she had been at work and had no one to watch the children other than Whisenant.[2] According to testimony from Amy Bush, of the Berrien County Department of Human Services (DHS), respondent indicated that typically her grandparents would watch the children while she was at work, but they were unavailable that day because they had to pack for a vacation. She was aware that Whisenant had a drink before she left the children with him.

Adjudication occurred on December 5, 2011. The attorney referee had also handled the previous neglect case, took judicial notice of the prior file, and recalled that in the previous case, respondent was told to make appropriate decisions regarding Whisenant.[3] The trial court found that there was a preponderance of the evidence that jurisdiction should be taken over the children because there was substantial risk of harm to the children, there was a lack of proper custody or guardianship, and there was an unfit home environment. All of these findings were premised upon respondent having Whisenant babysit that one evening. The children were ultimately removed from the home not because of any unsafe conditions, but because the DHS believed that respondent had violated her parole and, as a result, would be incarcerated, leaving the children without a parent. However, respondent was never incarcerated.

At a dispositional hearing on January 3, 2012, foster care specialist Holly Force testified that if respondent mother engaged in services and made improvements, the children could be returned within three to six months. Substance abuse and employment were *not* problems, nor was housing or income. Child care was an issue, and as a result, respondent was required to find two available daycares, which she did.[4] But, as Force recognized, finding those two daycares was of no value to respondent until the children were returned.

Dispositional review and the termination hearing were combined and held over two days in February 2013. Respondent's counselor, Peter Drabbant, testified that he had been seeing respondent for individual therapy since October 2009 and that she had also been attending

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[2] According to the petition, during the previous foster care case respondent was warned by Holly Force, a foster care specialist, to have no contact with Whisenant because he was on parole, he had a child in foster care, and respondent was on felony probation. Before the previous case closed, respondent informed Force that she was no longer dating Whisenant.

[3] In November 2011, respondent indicated that she would marry Whisenant and there was nothing anyone could do. However, in January 2012, respondent indicated that she no longer had any involvement with Whisenant.

[4] Originally, respondent was told that once she found appropriate daycare, the children would be returned to her care. However, she was later told that she also had to engage in counseling and parenting classes. As a result, according to a case worker, respondent initially had "a chip on her shoulder," but she became more cooperative later in the proceedings. However, respondent continued to not understand why the children were in care.

Dialectical Behavioral Therapy (DBT) since the end of July 2012.[5] Each week, respondent had an individual therapy session for 45 minutes and a two hour group DBT session. Drabbant testified that respondent missed some appointments, but for the most part, she had complied with therapy. According to Drabbant, DBT would assist respondent with emotion regulation to help her handle stressful situations and was focused on relations, emotions, and balance. Drabbant believed respondent could be an effective parent and that respondent had made moderate progress from July to the time of the hearing. He noted that rehabilitation for a personality disorder takes time, and that respondent should complete parenting classes and the children could come in for some of the DBT joint sessions.

Although Drabbant testified that respondent had issues with interpersonal relationships and had a personality disorder for which she did not take medication,[6] Drabbant nevertheless opposed termination of respondent's parental rights. In a letter dated February 4, 2013, and submitted to the trial court, Drabbant wrote:

> At this time, I don't consider [respondent's] mental/emotional state is *enough* to warrant termination since she demonstrates some capacity to direct behaviors in her children using time out skills we instilled during earlier therapy sessions. This clinician would recommend completion of the DBT Program June [sic] 2013 prior to any judgment of termination of her two children. . . .

The updated service plan (USP), signed by Force on January 30, 2013, reported that Dr. Kitchen's psychological evaluation was completed on March 6, 2012, and recommended ongoing, long-term individual counseling; development of interpersonal skills; and parenting skills training. The evaluation found that respondent was "suspicious, hostile, bitter, and unforgiving" and she had "difficulty forming and maintaining relationships." Because of the chronic nature of her issues, counseling would have to be long-term for any success to occur. She lacked "any significant parenting skills or insight." The psychological evaluation also concluded that respondent's personality issues made it difficult for her to form bonds with the children. She was overwhelmed by the responsibilities of parenting.

Force testified, consistent with the facts contained in the petition, that the children were removed because respondent mother left them with an inappropriate caregiver and there was an

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[5] According to Dr. Kitchen and Drabbant, DBT therapy is one of the few potentially effective therapies for people with borderline personality disorder or similar issues.

[6] Drabbant testified that he had been informed that Dr. Kitchen diagnosed respondent with borderline personality disorder, but Drabbant had not seen a report on that diagnosis and had not himself diagnosed her with that disorder. Drabbant testified that someone with borderline personality disorder would likely have instability in relationships, would crave different kinds of relationships, and the relationships would be sporadic and fleeting. Drabbant agreed that respondent exhibited these characteristics and had a personality disorder, but not to the degree that warranted a borderline diagnosis.

initial concern that respondent was to be incarcerated. Services offered were parenting classes, individual therapy, services to maintain employment and housing, and services for communication and social relations. According to Force, there were some concerns about respondent's actions during parenting time, but during most visits there were no concerns. During one visit, respondent put BR in the bathtub and then left him while she vacuumed the living room. This was similar to the concerns with CR in the first case, and it appeared respondent was not learning or changing her behavior. However, Force testified that for the most part, respondent did well at parenting time. And, respondent had not missed any parenting sessions. All the evidence also showed that the children were progressing normally and had no special needs or emotional or behavioral issues that required special treatment or care.

A major concern for Force and the trial court was that throughout the case respondent had several relationships. Some people moved into the house, and then moved out. Since October 2011, respondent had six or seven different people individually residing at her house at different times. This concern had not been resolved, and in fact Force testified that an ongoing concern was respondent's always changing support group. Although Force testified that respondent could have romantic relationships (though not all who stayed with her were linked romantically to respondent), the concern was that her relationships were unstable and changing throughout the case. When people come and go from the home, it may not be safe for the children.[7] Force testified that the conditions that existed at the time of removal continued to exist.

Force testified that it was in CR's best interests to terminate respondent's rights. Based on CR's therapist's report and Force's own observations, CR was bonded with the foster family. She had been in care for one year and four months. After the previous case, CR was in the care of respondent for about ten days before she was again removed and had been in care about half of her life.

For many of the same reasons that termination was in CR's best interests, Force also testified termination was in BR's best interests. BR was born during the previous case, and Force was uncertain why a case for him was never opened. He had been in care for one year and four months, or more than half of his life.

The trial court provided an oral opinion and terminated respondent's rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j). Regarding MCL 712A.19b(3)(c)(*i*) (conditions continue to exist), the trial court first recounted the reasons for taking jurisdiction—respondent leaving the children at home with Whisenant—and then found that respondent "has been cooperating with services for the most part." The court also acknowledged that it took some time (through no fault of respondent's) to start DBT, that it finally started in July 2012, and that it would take a year to complete.

After making these findings and observations, the trial court focused on the two reasons for its ultimate finding that MCL 712A.19b(3)(c)(*i*) was met: (1) respondent's inability to make

[7] There was also a concern about the type of person coming into the home. However, at least two of the individuals—Sandy Jones and Tristan Hanson—had no criminal history whatsoever.

good decisions for the children and (2) the length of time the children had been in foster care. Specifically, in addressing the first reason, the court found that approximately seven different people had moved in and out of respondent's home since the beginning of the case, which did not reflect well on respondent and would negatively impact the children if it occurred when the children were returned to her care:

> But the problem is the being able to make good decisions that won't put the children in harm's way. And I think that that's what this case centers around is being able to make those decisions to allow the children to not be harmed and to provide that proper care and custody for the children.
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> Ms. Ward has worked. She has maintained housing. The problem is that there's been different people that have moved in and out. They move in, they're there for 30 days, something happens, they leave, and then they're never heard from again. I believe that there was seven different relationships since the beginning of this case, whether it was a female friend companion that moved in or a relationship with a guy that may have just been a friend that moved in, but it was still the moving in and out. And that is problematic in this situation.

With respect to the second reason, the trial court noted that although Drabbant testified that respondent was making progress, it would not be until July 2013, upon completion of the DBT, when it would be known if there was sufficient progress for reunification. The trial court acknowledged that Drabbant opposed termination and understood his position that respondent should be allowed to complete the DBT program before a decision was made, but the court concluded that the children had been in care for too long. The trial court found that although respondent made some progress, it was not sufficient to allow additional time to complete DBT. Additionally, the trial court found that even if respondent completed DBT in July 2013, she still had to demonstrate the ability to make appropriate decisions before she could even have unsupervised parenting time. As a result, the trial court found that the condition that led to adjudication continued to exist and there was no reasonable likelihood that it would be rectified within a reasonable time considering the age of the children.

Regarding MCL 712A.19b(3)(g) (proper care and custody), the trial court noted its findings regarding (c)(*i*) were also applicable to this provision. Even though she had employment and housing, the court believed that there were questions whether respondent could financially maintain the housing. The trial court could not find respondent mother would be able to provide proper care and custody for the children within a reasonable time considering the ages of the children.

As to MCL 712A.19b(3)(j) (likelihood of harm), the trial court found the lack of progress in making decisions regarding interpersonal relationships established that returning the children to respondent would cause harm to the children because of other people moving in and out of the home. The court concluded:

> In this situation just because of not [sic] the significant progress made in making decisions with regar[d] to the interpersonal relationships, that returning the children would cause harm to the children because of this in and out of other people. It doesn't necessarily mean that the children can't adapt to that, but it also

> means that when you are providing people such as Mr. Whisenant that does have a criminal history, Mr. Ward who does have the CSC conviction and is a registered sex offender, that they're appropriate people for the children to be around. And allowing the children to see people coming in and out of a parent's life on a regular basis, not something that is long term but a constant turn around, and the quick moving somebody in after meeting somebody, moving them into the home is a real problem. And so I am finding that the children will be harmed if they are returned to the home of the parent.

The trial court then found that termination was in the best interests of each child.

II. ANALYSIS

In re Moss, 301 Mich App 76, 80; 836 NW2d 182 (2013), recently set forth the familiar standards of review applicable to orders terminating parental rights:

> To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* at 296-297.

In deciding these cases it is also imperative to keep in the forefront the limited circumstances in which the state can interfere with Michigan families. This point was well-made in *In re AP*, 283 Mich App 574, 591; 770 NW2d 403 (2009):

> Generally, the state has no interest in the care, custody, and control of the child and has no business interfering in the parent-child relationship. See *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). As a practical matter, the state is not equipped to supply a child with the necessary care and direction that a parent is equipped to provide. Neither is it its place to do so, as due process precludes a government from interfering with parents' fundamental liberty interest in making decisions regarding the care, custody, and control of their children absent a compelling state interest. *Troxel v Granville*, 530 US 57, 65-66; 120 S Ct 2054; 147 L Ed 2d 49 (2000); *DeRose v DeRose*, 469 Mich 320, 328-329; 666 NW2d 636 (2003); *Herbstman v Shiftan*, 363 Mich 64, 67-68; 108 NW2d 869 (1961); *Ryan*, 260 Mich App at 333-334. Rather, it is the parent's duty, and fundamental right, to do what the state cannot—direct a child's upbringing and education and prepare that child for future obligations. *Troxel*, 530 US at 65-66. Similarly, a child also has a due process liberty interest in his or her family life, *In re Clausen*, 442 Mich 648, 686; 502 NW2d 649 (1993), which includes having a fit parent, *In re Anjoski*, 283 Mich App 41, 60-61; 770 NW2d 1 (2009); *Herbstman*, 363 Mich at 67-68. In other words, a child has a "'right to proper and necessary support; education as required by law; medical, surgical, and other care necessary for his

> health, morals, or well-being. . . .'" *Ryan*, 260 Mich App at 333-334, quoting *Herbstman*, 363 Mich at 67. Thus, when a parent is fit and a child's needs are met, there is no reason for the state to interfere in a child's life.

This Court has also stressed that:

> "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ." The goal of reunification of the family must not be lost in the laudable attempt to make sure that children are not languishing in foster care while termination proceedings drag on and on." [*In re Boursaw*, 239 Mich App 161, 176; 607 NW2d 408 (2000) (citation omitted), overruled in part on other grounds by *In re Trejo Minors*, 462 Mich at 353-354.]

Moreover, "[a]t the statutory-grounds stage in a termination proceeding, the child and the parent 'share a vital interest in preventing erroneous termination of their natural relationship' until the petitioner proves parental unfitness." *In re Moss*, 301 Mich App at 87 (citation omitted).

The trial court clearly erred in finding that the statutory grounds were established by clear and convincing evidence. *In re Trejo Minors*, 462 Mich at 356-357. Specifically, we have a definite and firm conviction that a mistake was made when the trial court found clear and convincing evidence that the issue of improper supervision, which led to adjudication, continued to exist and that there was no reasonable likelihood that it would be rectified within a reasonable time considering the ages of the children. MCL 712A.19b(3)(c)(*i*); *In re BZ*, 264 Mich App 296-297; *In re Trejo Minors*, 462 Mich at 356-357.

In order to terminate parental rights under MCL 712A.19b(3)(c)(*i*)[8], the court must find by clear and convincing evidence that:

> (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:
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> (*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.

Here, there was no evidence proving that if the children were returned to respondent that she would leave them in the temporary care of Whisenant or any other "inappropriate" individual, which was the sole reason why the petition was filed. As to Whisenant, respondent testified—and nothing refuted her testimony (nor was it found to lack credibility)—that she had discontinued associating with Whisenant several months after these proceedings were instituted.

[8] In its brief on appeal, petitioner only argues that termination was proper under MCL 712A.19b(3)(j), and makes no explicit argument regarding termination under subsections (c)(*i*) or (g).

Additionally, it must be remembered that even while in the care of Whisenant that one evening,[9] nothing negative, dangerous, or damaging happened to the children. While Whisenant clearly left them unattended while he slept on the couch, the facts nevertheless establish that no abuse or neglect occurred while under his temporary watch. Furthermore, using Whisenant was only a temporary measure because respondent's grandparents were unavailable that evening.

This is clearly *not* the type of case we unfortunately frequently come across where a mother leaves her children with a known abuser, and continues to do so despite knowing that the abuse has occurred. See, e.g., *In re Archer*, 277 Mich App 71; 744 NW2d 1 (2007). Instead, at most we have a mother who left her two children—so she could go to work—with an individual she asserts was "good with her children" but whom DHS felt respondent and the children should not be around. DHS made this judgment not because he had a prior criminal conviction involving children, but because he had a prior record and his child was in foster care. However, because the only evidence is that respondent no longer associates with Whisenant, that specific condition no longer existed at the time of trial.[10]

Additionally, the trial court's finding that respondent housed seven individuals at her home at different times during the proceedings cannot alone provide a factual basis for a statutory violation of MCL 712A.19b(3)(c)(*i*). Again, the condition that led to the adjudication was respondent temporarily leaving the children with Whisenant. But, tying that general initial condition (i.e., leaving the children with someone that DHS felt was inappropriate) to respondent currently allowing certain people to temporarily stay with her (or at best to have brief relationships with them) can only be accomplished by accepting several assumptions that have no support in the record. Specifically, the trial court could only assume that, if respondent received the children back, that she would continue to allow individuals to live with her.[11] And, if that assumption is made, then one would also have to assume that respondent would allow the individual to watch the children while she was at work (or otherwise unavailable). Then one must also assume that the children would not be properly supervised by the individual or that the individual would otherwise be an inappropriate caretaker. In other words, one must take several steps forward based on nothing more than speculation to make the argument that the condition that currently existed (allowing individuals to live in the house) had anything to do with the condition that resulted in the adjudication, i.e., temporarily leaving the children with an "inappropriate" caretaker. This is pure speculation and, in our view, cannot form the basis for termination under this subsection without any evidence that respondent had placed the children

[9] There was no evidence that Whisenant babysat for the children on prior occasions.

[10] See *In re Sours*, 459 Mich 624, 636-637; 593 NW2d 520 (1999) (concluding that where the children initially came within the court's jurisdiction due to the respondent mother's failure to protect the child from the father's abuse and where respondent mother had "taken steps to protect her children from abuse long before trial by separating herself from" the father, "the conditions that led to the adjudication no longer existed at the time of trial, and" termination was not proper pursuant to MCL 712A.19b(3)(c)(*i*)).

[11] Nothing in the record was presented to us showing that respondent had individuals living on and off with her while the children were present in the home.

in harm's way such that it can constitute abuse or neglect.[12] Consequently, the trial court clearly erred in finding that clear and convincing evidence supported termination under MCL 712A.19b(3)(c)(*i*).

Termination was also clearly erroneous pursuant to MCL 712A.19b(3)(g) and (j). These provisions state that termination may occur when:

* * *

> (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.
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> * * *
>
> (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.

For mostly the same reasons, the trial court found that respondent did not previously provide proper care and custody when she left the children in the care of an inappropriate individual, and she showed no understanding why this was inappropriate or that she would not make a similar decision in the future. Again, these findings are based upon the fact that while this case was pending, respondent allowed numerous individuals to reside in her home, only some of who she had an actual relationship with. According to the court, there was no indication that respondent understood that exposure to a series of relationships and different live-in partners could be harmful to the children. Yet, the court was not willing to allow respondent to complete the DBT, which was indisputably the only potential therapy to help someone with conditions like respondent's.

For the reasons already expressed, the trial court clearly erred in finding clear and convincing evidence that respondent did not provide proper care and custody for the children and there was no reasonable expectation that she would be able to do so within a reasonable time considering the age of the children. MCL 712A.19b(3)(g); *In re Trejo Minors*, 462 Mich at 356-357. For the same reasons, the trial court clearly erred when it found clear and convincing evidence that there was a reasonable likelihood that the children would be harmed if returned to respondent's care. MCL 712A.19b(3)(j); *In re Trejo Minors*, 462 Mich at 356-357. There was no harm ever placed upon these children, and though DHS need not await actual abuse or neglect before removing the children, nothing in this record supports a finding that any of the individuals

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[12] See *In re Boursaw*, 239 Mich App at 177, quoting *In re Sours*, 459 Mich at 636 (concluding "that petitioner has not established with the required degree of certainty that the termination of this familial bond was warranted" because "[t]he trial court's conclusion that there is a 'reasonable likelihood' that the child would be harmed if reunited with respondent strikes [the court] as being 'essentially conjecture . . . .'").

who had resided with respondent during these proceedings had ever committed abuse or neglect towards any child. Nor was there any evidence that these individuals consumed or sold drugs in the house (or were even associated with illegal drugs), or for that matter did anything illegal or inappropriate in front of these children.[13] Under these facts, and absent any other objective indicators, the trial court clearly erred in finding that there was a reasonable likelihood that the children would be harmed if returned to respondent's care.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[13] Of course, as already noted, there was no evidence that any of these individuals were ever even in the house while the children were present.