

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of BURTON, Minors.

UNPUBLISHED  
January 2, 2014

No. 313448  
Ingham Circuit Court  
Family Division  
LC No. 12-001053-NA

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Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

RONAYNE KRAUSE, J. (*dissenting*)

I dissent because the majority misreads the record. I would reverse and remand.

The spark that caused this case was an incident of domestic violence committed by respondent's husband against her. This matter formally commenced on June 2, 2011, when the trial court held a hearing and signed an ex-parte order of apprehension to take the children into custody.<sup>1</sup> That order stated that the basis was:

[Respondent's husband] pushed, choked, and spit in the face of [respondent], who was nine months pregnant with his child at the time. This occurred in front of their two year old child. He also pulled a gun on [respondent]. He has a felony record and he is not allowed to possess a gun. [Respondent's husband] also had a handgun in the home when his step-daughter, [redacted] was shot and killed.

However, at the preliminary hearing the next day before a referee, it was determined that in fact no gun had been involved in the domestic violence incident. It was also established that respondent's husband had not been charged with any crime arising out of the shooting incident, during which respondent's husband returned gunfire at an armed home invader almost a year previously and fatally shot his and respondent's oldest daughter. It appears undisputed that the shooting, although tragic and horrible, was entirely accidental and resulted in no criminal charges nor any parental termination case being brought against either respondent or her husband. The referee acknowledged that the representations that respondent's husband had been criminally charged "keep[] adding this really, really negative flavor to this family, I get that."

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<sup>1</sup> Although reflected in the lower court register of actions, no transcript of that hearing was provided to us.

At that preliminary hearing, the author of the petition<sup>2</sup> testified that “the concern is domestic violence by [respondent’s husband] against [respondent] using a gun.” Again, it was determined that no gun had been involved. The referee opined that the trial court had clearly signed the apprehension order on the basis of misinformation and may not have done so had accurate information been provided, but that he was reluctant to interfere with the trial court’s decision. Consequently, although the referee found that there had been a domestic violence incident, it did “not rise to the aggravated standard by use of a gun.” The referee authorized the petition but nevertheless released the children to respondent’s custody, subject to two conditions: respondent was not to permit any contact between her husband and the children, and respondent was not to permit her husband into her home.

Although the petition cited the domestic violence incident and the shooting incident as bases for removing the children, at no point did the referee suggest that the shooting incident was a basis for authorizing the petition. The record filed by the referee expressed “serious concerns regarding the judgment of the mother” and found “little doubt that a DV [domestic violence] did occur based on the physical marks left on the mother,” however, it reiterated that the shooting had been accidental. An order was entered stating that respondent was not to allow the children any contact with her husband and was not to allow her husband into the home.

At the next hearing on June 23, 2011, the trial court observed that the initial petition contained inaccuracies and set the matter for a later date to obtain an amended petition. The trial court continued the order that there must be no contact between the children and respondent’s husband. The trial court opined that respondent had been uncooperative with law enforcement officers, apparently on the sole basis that respondent had failed to appear as a witness against her husband. However, the testimony from respondent at a later hearing was that she was not subpoenaed for the first trial and at the second trial, the prosecutor decided not to pursue the charges.<sup>3</sup> The trial court then ordered the children removed from her custody, contrary to the recommendations of the guardian ad litem at the June 23, 2011 hearing, “because the court doesn’t place children with people they don’t trust.” The trial court entered an order finding removal warranted because “mother is denying domestic violence and is failing to protect the children from [her husband].”

By this time, no order had been entered by the trial court or a referee stating that either respondent or her husband could not have contact with each other. On June 28, 2011, however, the trial court signed an order stating that “The Father, [respondent’s husband], is to have no

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<sup>2</sup> One of the children was born in 2012 and the subject of another petition that was, according to its author, simply copied from the first petition with little personal knowledge as to at least some of the contents. I do not believe the second petition changes any of this appeal’s analysis.

<sup>3</sup> See Permanent Wardship Bench Trial transcript from October 10, 2012 at pages 26-27. The prosecutor could have held the trial without the victim, as is routinely done in domestic violence cases. Furthermore, the trial court at the dispositional review hearing on January 11, 2012 indicated that this termination has nothing to do the respondent not appearing in court against her husband.

contact with the Mother and the Children.” Notably, nowhere in the record is a reciprocal order applying to respondent ordering her to have no contact with her husband. At the July 13, 2011 placement review, it was noted that a “PA 53” no-contact order had been issued by the district court against respondent’s husband, arising out of the then-pending domestic violence case against him.<sup>4</sup> At that time, respondent’s husband’s mailing address remained at respondent’s house, but nobody had any idea or evidence where respondent’s husband was actually staying.

At the plea hearing on August 15, 2011, respondent entered a plea admitting that her daughter was shot during the 2010 home invasion, that police had responded to the domestic violence report, and that she failed to appear for her husband’s subsequent trial for the domestic violence incident because she had not received a subpoena. The guardian ad litem stated that the basis for jurisdiction was domestic violence and failure to protect the children. The trial court accepted the plea but opined that the petition was “weak to seek termination.” However, the trial court admonished that respondent and her husband were “not going to get their children back unless they address this domestic violence issue” and “if she was strangled, then there’s some serious domestic violence issues here.” Nevertheless, it was established that the PA 53 order no longer existed, and the trial court explicitly permitted respondent and her husband to have contact with each other.<sup>5</sup> There is no indication in the record that respondent was ever under *any* court order to avoid contact with her husband, and certainly she was under no such order after the August 15, 2011, hearing.

Furthermore, it is unambiguous from the record that the shooting incident was a factual backdrop to this case, but it was not in any way a *basis* for this case. The trial court admonished the attorneys as such repeatedly at the January 11, 2012 dispositional review hearing.<sup>6</sup>

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<sup>4</sup> In the event a no-contact order is issued against only one party, *only* that party is obligated to avoid the other. The other party, unless a separate order is entered against them, is under no extraordinary legal obligations whatsoever.

<sup>5</sup> The corresponding order was not filed until September 12, 2011. Inexplicably, however, it stated, *inter alia*, that “[t]he no-contact order dated June 28, [sic] 2011 is lifted.” The lower court register of actions has no entry on that date.

<sup>6</sup> The trial court initially explained that it was doing so because “there have been a lot of changes of attorneys and caseworkers” at page 4. In response to an attorney’s apparent lack of familiarity with the file, the trial court pointed out “that the plea in this case is that there was a [police report] that the mother was observed to have redness around her neck and scratches to her upper chest and chin. And then that was the basis for this court taking jurisdiction and [ . . . ] treating it for domestic violence. This isn’t – doesn’t have anything to do with the fact that the mother doesn’t show up for the criminal charges . . . And this Court is not concerned with that” on pages 43-44. The trial court admonished the attorneys repeatedly that there “isn’t any point in arguing” about the shooting incident because “that isn’t why the children are under the jurisdiction of the Court. The children are under the jurisdiction of the Court because there was an incident of domestic violence between the parties in June” on pages 72-73. The trial court reiterated that “this came under the jurisdiction of the Court because [respondent’s husband]

Consequently, as an initial matter, termination pursuant to MCL 712A.19b(3)(c)(i) was, under the circumstances of this case, improper per se. The conditions that led to the adjudication were that respondent was a victim of domestic violence, no more and no less.<sup>7</sup> A parent's parental rights may not "be terminated solely because he or she was a victim of domestic violence." *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011). To the extent the trial court terminated respondent's parental rights on the basis of her victimization at the hands of her husband, that termination was improper and impermissible. The trial court was not permitted to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(c)(i) under the circumstances of this case.

However, because establishment of only one statutory ground is necessary, erroneous termination on one ground is harmless if another ground was also properly established. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). Under MCL 712A.19b(3)(g), the court could terminate parental rights if "the parent, without regard to intent, fails to provide proper care or custody for the [children] 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." Under MCL 712A.19b(3)(j), the court could terminate parental rights if "[t]here is a reasonable likelihood, based on the conduct or capacity of the parent, that the [children] will be harmed if he or she is returned to the home of the parent." This Court reviews a trial court's findings whether grounds for termination have been established for clear error, and we will not reverse unless we are definitely and firmly convinced the trial court made a mistake. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009); *In re Jenks*, 281 Mich App 514, 517; 760 NW2d 297 (2008).

Harm to the children is obviously a valid basis for termination under either subsections (g) or (j), and the trial court properly cited that as an overriding concern. The majority also cites harm to the children as a proper concern and accurately observes that there was some evidence in the record tending to suggest that the children were in danger. In particular, respondent's husband's drug dealing out of the house and a concerning, although unsubstantiated, reference to a past incident of physical abuse respondent's husband had committed against the deceased child. However, those are dangers posed by respondent's husband, not by respondent herself.<sup>8</sup> strangled [respondent]," and further opined that respondent was failing to comply with orders of the court, causing the court not to trust her on pages 79-80.

<sup>7</sup> The majority notes other issues that were of concern; indeed they were, but they were not the actual bases for taking jurisdiction. Consequently, they are irrelevant under MCL 712A.19b(3)(c)(i), in terms of termination under that section.

<sup>8</sup> The majority relies significantly on respondent's husband's criminality and appears to conclude that respondent was personally responsible for actually harming the children because she allegedly continued to associate with her husband. Criminality alone, *even by a custodial parent*, is not relevant to a parent's fitness in the absence of actual evidence that it has made the child's environment unsafe or unfit. See *In re Curry*, 113 Mich App 821, 827-830; 318 NW2d 567 (1982). As I discuss, whether respondent even *was* continuing to associate with her husband, let alone expose her children to her husband, turns on a credibility determination that would violate this Court's core function as an error-correcting court of record for any of us to make. There is no actual evidence that respondent violated any of the court's orders to keep her children isolated

Termination may be proper where a respondent is directly responsible for exposing children to a danger. See *Plump*, 294 Mich App at 273. However, unlike respondent here, the respondent in *Plump* was herself using drugs and maintaining physically unsuitable housing in addition to associating with someone who had not only abused her but had directly abused her children. *Id.* at 272. Here, the only concern with respondent, at least the only concern upon which termination was based, was her husband's infliction of violence upon *respondent*.

Critically, the trial court based the overwhelming majority of its findings under subsection (g) and (j) on concluding that respondent was not credible, and a significant factor leading to that conclusion was the erroneous view that respondent had associated with her husband contrary to a no-contact order. If respondent in fact had violated a court order, I would not so readily find grave uncertainty with the trial court's findings. To the contrary, the significance to a court of a violation of its orders can hardly be overstated. See, e.g., *In re Debs*, 158 US 564, 594-595; 15 S Ct 900; 39 L Ed 1092 (1895);<sup>9</sup> *In re Reiswitz*, 236 Mich App 158, 172; 600 NW2d 135 (1999). I would not in any way fault the court for viewing a party's reliability and credibility exceedingly poorly for flouting its orders. However, *no such order ever existed* in this case.<sup>10</sup>

The majority correctly states that this court defers to the trial court's superior ability to evaluate witnesses' credibility. See *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). However, that is a general rule; our deference to the trial court is seldom absolute. The majority fails to make *any* inquiry into why the trial court reached its particular credibility determination. Here, it is unambiguous that the trial court's credibility determination was largely based on an objectively incorrect understanding of the facts. As an equally general rule, this Court is not obligated to sustain a trial court's discretionary rulings where they are based on unsound foundations.

I would not hold that there is no possible basis in the record for the trial court to find termination appropriate. Rather, I am so concerned with the trial court's reliance on respondent's credibility as assessed by the court's belief, unsubstantiated by any evidence, that

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from her husband. There is no substantiated evidence that respondent's husband's criminality truly was being exposed to the children, considering the lack of any criminal or civil proceedings in the wake of the shooting incident, and the trial court's credibility assessment turned on an erroneous assumption that the majority seemingly intends to perpetuate. Using inflammatory language does not change the facts or the law in this, or any other, case.

<sup>9</sup> I recognize that *Debs* has been significantly abrogated regarding what was at the time considered to be essentially unfettered authority by the courts to impose contempt without review or interference by any other court. See *Bloom v State of Illinois*, 391 US 194; 88 S Ct 1477; 20 L Ed 2d 522 (1968). However, the overwhelming importance of courts being able to enforce their orders has not.

<sup>10</sup> As noted, it appears that respondent's husband was under at least one no-contact order, and respondent was for at least some time under an order to prevent contact between her husband and her children. She was, however, at no time under any order herself to avoid contact with her husband. It is axiomatic that it is impossible to violate an order that does not exist and never did.

respondent violated a court order that I am definitely and firmly convinced the court made a mistake. As stated, the trial court was not permitted to terminate respondent's parental rights because she is a victim of domestic violence, and I find the trial court's factual findings regarding MCL 712A.19b(3)(g) and (j) definitely and firmly mistaken and in need of reconsideration. I would therefore reverse the trial court's order of termination and remand for reconsideration on the basis of a corrected view of the evidence.

/s/ Amy Ronayne Krause