

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KEION LASHAWN LEE
MERRITT, RICHELLE RA'VON MERRITT, and
ANGEL VASQUEZ, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

UNPUBLISHED
November 25, 2003

v

No. 242051
Wayne Circuit Court
Family Division
LC No. 91-292717

ANGELA LOUISE WELCH,

Respondent-Appellant,

and

LEE DON MERRITT, a/k/a LE DEON MERRIT,

Respondent.

Before: Murphy, P.J., and Cooper and C. L. Levin^{*}, JJ.

LEVIN, J. (*dissenting*).

I respectfully dissent.

The Michigan Court Rules provide that an order terminating parental rights must be based on “clear and convincing legally admissible evidence introduced at the trial.”¹

^{*} Former Supreme Court justice, sitting on the Court of Appeals by assignment.

¹MCR 5.972(D) provides:

(D) Termination of Parental Rights at the Initial Disposition. The court shall order termination of the parental rights of a respondent at the initial dispositional

(continued...)

The trial court's findings on the issues of "proper care or custody"² are not based on "clear and convincing legally admissible evidence introduced at the trial," and are clearly erroneous.

(...continued)

hearing held pursuant to MCR 5.973(A), and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1) the original, or amended, petition contains a request for termination;

(2) the trier of fact found by a preponderance of the evidence that the child comes under the jurisdiction of the court on the basis of MCL 712A.2(b); MSA 27.3178(598.2)(b);

(3) the court finds on the basis of clear and convincing legally admissible evidence introduced at the trial, or at plea proceedings, on the issue of assumption of court jurisdiction, that one or more facts alleged in the petition:

(a) are true,

(b) justify terminating parental rights at the initial dispositional hearing, and

(c) fall under MCL 712A.19b(3); MSA 27.3178(598.19b)(3);

unless the court finds, in accordance with the rules of evidence as provided in subrule (F)(w), that termination of parental rights is clearly not in the best interest of the child. MCR 5.974(D)(3).

²The parental rights of the mother were terminated by the circuit court on the recommendation of the referee on the authority of subdivisions (g) and (j) of MCL 712A.19b(3), which provides:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(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.

* * *

(continued...)

(a)

The inadmissible, nonexpert, hearsay testimony, set forth in the settled statement of facts, of the FIA caseworker that the “hospital” had instructed the mother to keep the youngest child, when he was a newborn, on his back, apnea monitored, does not support, with “clear and convincing legally admissible evidence introduced at the trial” a finding that the mother failed to provide “proper care or custody” for the youngest child, and hence does not provide a basis for an inference or finding that there is “no reasonable expectation” of ability to do so in the future, or “that the child will be harmed” if he is returned to the mother’s home.

Because there was no medical or other expert witness testimony whatsoever, either concerning the health and medical condition of any of the three children, including the infant, or that proper care or custody of the infant required that he be kept on his back at all times, while awake as well as when sleeping, or during certain hours, apnea monitored, and for how many months after he was born, a finding of improper care or custody of the particular newborn in the instant case, based on the alleged failure of the mother in this regard, is not supported or justified.

(b)

There is no evidence that the mother had a chronic “long term” substance abuse history or a “long term” history of “failure to benefit from treatment,” as asserted by the majority.

The evidence of use of substances was the use of “alcohol and barbiturates” in 1991, followed eight years later by use of crack cocaine just before the birth of the infant on June 28, 1999. There is neither an allegation in the petition seeking termination of parental rights, or elsewhere, nor evidence at the adjudication or another hearing of any use of alcohol or drugs in the over 14 months between the birth of the youngest child on June 28, 1999, and September 5, 2000, when the circuit court entered an order terminating the mother’s parental rights.

There was no evidence that either before 1991, or at any time thereafter, the mother was ever asked to participate in a substance abuse treatment program, and failed to do so, or participated and failed to benefit from treatment.

(c)

There is no allegation in the petition seeking termination of parental rights, or elsewhere, or evidence at any hearing, that the mother’s use of substances in 1991 or 1999 actually resulted in any failure of proper care or custody of the two older children. There is no allegation in the petition seeking termination, or elsewhere, or testimony, legally admissible or legally inadmissible, that the youngest child actually suffered physical harm because of the mother’s use

(...continued)

(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.

of crack cocaine in 1999; there was no medical or other testimony that he had actually been harmed thereby.

The FIA returned custody of the two older children to the mother in 1995, although it was aware of the 1991 use of substances. The FIA did not intervene to prevent the mother from taking the infant home from the hospital in July 1999, although it was aware of the use of crack cocaine just before he was born. The FIA intervened over three months later, in October, 1999, ostensibly because of the failure to keep the infant on his back, apnea monitored at all times, day and night, not because of substance abuse.

(d)

The terms of any parent agency agreement entered into in 1999 or 2000 do not appear in the record. The nonspecific generalization in the testimony of the FIA case worker, reflected in the settled statement, that the mother failed to comply with the parent agency agreement, does not identify any term or provision of the multitudinous provisions of a typical parent agency agreement that the mother failed to comply with. Absent specific identification of wherein the mother failed to comply, it is not possible to determine the significance of the asserted noncompliance, and whether it actually resulted in any failure to provide proper care or custody, and thus might justify a prediction of future inability to provide proper care or custody. Accordingly, neither a finding of failure to provide proper care or custody, nor of expectation of inability to do so in the future, can be affirmed on the basis of the asserted non-specific noncompliance with the parent agency agreement.

(e)

There is no allegation in the petition, or elsewhere, or evidence at the adjudication or another hearing that the mother should have pursued a particular course of action respecting the psychological disorders of the two older children, and failed to do so. Accordingly, a finding of failure to provide proper care or custody, and of expected inability to do so in the future cannot be sustained on the basis of the asserted psychological needs of the two older children.

I

The Michigan Court Rules clearly provide that the rules of evidence apply and must be observed at an adjudicative hearing where it is sought to terminate parental rights.³

³See fn 1, *supra*, and accompanying text. The Michigan Court Rules also require that the rules of evidence be observed at a trial, the jurisdictional phase, of a petition claiming negligence or abuse of a child:

MCR 5.972(C)(1) provides:

Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance

(continued...)

In *In re Gillian*, 241 Mich App 133 (2000), this Court considered a case where, as here, the FIA had sought termination of parental rights because of a change of circumstances, alleged in an amended petition, as is provided for in MCR 5.972(E).⁴ In the instant case, the FIA filed two petitions, one in October 1999, and an amended petition seeking termination of parental rights in November 1999. There was no hearing on the allegations in the first petition except insofar as they were incorporated in the amended petition.

The trial court's initial assumption of jurisdiction in *Gillian* was based on smoke inhalation suffered by children in a fire, and the amended petition, on which the termination of parental rights was sought, alleged new circumstances.

This Court found that the trial court had erred in admitting hearsay testimony to establish the father's substance abuse and anger management problems, and reversed an order terminating parental rights, and remanded for proceedings consistent with its opinion.

The concurring Court of Appeals judge would have gone further. Because a liberty interest is involved, he would have found that there must be full procedural protections in all cases where the "drastic sanction" of termination of parental rights is involved.

II

The settled statement of facts of the March 13, 2000, adjudication hearing is one-sided, and wholly inadequate for meaningful appellate review.

(...continued)

of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights. MRE 5.972(C)(1).

⁴MCR 5.972(E) provides in relevant part:

(E) Termination of Parental Rights on the basis of Changed Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction. The new or different circumstances must fall within MCL 712A.19b(3); MSA 27.3178(598.19b)(3), and must be sufficient to warrant termination of parental rights. (Emphasis added.)

(1) Fact Finding Step. Legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights. Except as provided in MCR 5.980, the proofs must be clear and convincing. MCR 5.974(E).

A

The majority states that another panel of this Court, after learning that the transcript of the March 13, 2000, hearing was missing, and the mother's trial lawyer was deceased, ordered the case remanded for settlement of the record by the hearing referee, pursuant to MCR 7.210(B)(2). The majority continues that the remand order was "carried out by the hearing referee,⁵ and this Court accepted the settled statement of facts; therefore, we find that it would improperly contravene this Court's prior order if we were to revisit the issue whether a settled statement of facts is appropriate under the circumstances presented."

Notwithstanding this history, there has been no judicial determination that this settled statement is sufficient. To be sure, the Clerk's office did not reject the settled statement proffered by the referee. In this sense, this Court did accept the settled statement so proffered. That is not, however, a judicial determination by this Court of the accuracy, adequacy or completeness of the settled statement.

The majority's statement that there does not appear "to be any substantive factual dispute with respect to [the FIA caseworker's] testimony as reconstructed and as it related to events surrounding this case," and its conclusion that "therefore, we accept the settled statement of facts," ignores that the mother's trial lawyer was deceased, and that the referee's notes of the March 13 hearing were, she conceded, incomplete, and that the mother was not truly in a position to assist her appellate lawyer regarding any legally significant errors or omission in the settled statement. The majority essentially begs the question whether the settled statement is or is not accurate, adequate or sufficiently complete for meaningful appellate review.

B

In the criminal context, this Court has held that a defendant's right to an appeal can be impaired if the lower court record is missing or incomplete, and the omitted material precludes this Court from effectively evaluating the defendant's claims on appeal.⁶ Michigan law provides for a new trial to protect the defendant's right to an appeal.⁷

Because of the importance of due process considerations in proceedings to terminate parental rights,⁸ the mother's right to appeal the decision terminating her parental rights should

⁵It appears that the referee adopted the settled statement of facts presented by the Assistant Attorney General.

⁶*People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983).

⁷*Id.*, see also *People v Frechette*, 380 Mich 64, 73; 155 NW2d 830 (1968).

⁸See *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), and *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993).

be provided the same regard as a criminal defendant's right of appeal. Law governing missing trial court records in criminal cases is, thus, an appropriate analogy.⁹

The mother argues that the trial court erred in finding clear and convincing legally admissible evidence of the statutory grounds to terminate her parental rights pursuant to MCL 712A.19b(3)(g) and (j). Review of this issue requires a determination whether the trial court made clearly erroneous findings of fact with respect to the statutory grounds for termination.¹⁰ Here, the settled statement is not adequate to allow for meaningful review of this issue, because crucial findings of the trial court cannot be verified on review of either the settled statement or any other portion of the record.

C

It appears from the settled statement that only one witness, an FIA caseworker, testified at the March 13, 2000 adjudication hearing, and that she was cross-examined. But there is not a word in the settled statement respecting the questions asked on cross-examination or the answers given. Nor does the settled statement say anything regarding any objections to the hearsay non-expert testimony of the witness, or any objections to any other evidence that may have been offered, or any ruling by the referee.

The trial court's findings, which are predicated on legally inadmissible evidence, cannot properly be affirmed on the supposition that because the settled statement does not record that any objection was voiced to the legally inadmissible evidence, there was no timely or proper objection, and there was a waiver or forfeiture.

⁹See *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988) applying by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context to termination of parental rights proceedings.

A defendant in a criminal case is not entitled to a new trial merely because there is a gap in the lower court record. *Audison, supra*, 834-835. This Court "must determine whether the unavailability of those portions of the transcript so impedes the enjoyment of the" (*Id.*, 834-835) right to an appeal that a new trial must be ordered. The pertinent question is whether this gap impeded this Court's ability to fairly evaluate the mother's arguments on appeal. *People v Federico*, 146 Mich App 776, 799; 381 NW2d 819 (1985). "The sufficiency of the record depends on the questions that must be asked of it." *Id.*, 800.

¹⁰MCR 5.974(I); *In re Trejo Minors*, 462 Mich 341; 356-357; 612 NW2d 407 (2000); *In re Miller*, 433 Mich 331, 357; 445 NW2d 161 (1989).

The settled statement was prepared by the assistant attorney general and approved by the referee, whose findings are now being reviewed,¹¹ without any possibility of the mother's appellate lawyer establishing whether objections were made.

At the January 31, 2000, hearing, the mother's subsequently deceased trial lawyer said, "this case is going to be vigorously defended as a permanent custody petition."

The settled statement acknowledges that the FIA caseworker was cross-examined, but, if its accuracy is to be believed, there was no objection by the mother's lawyer, or the father's lawyer to the hearsay testimony and other incompetent testimony of the FIA caseworker. That is not credible.

Nor is it credible that the FIA witness was not required to elucidate the date, or any of the terms of the parent-agency agreement, or spell out with legally admissible evidence wherein the mother allegedly failed to comply therewith.

At the hearing on April 12, 2000 the mother's lawyer objected, on the third question put by the assistant attorney general, to the testimony of a foster care worker. Two pages later in the transcript, the assistant attorney general withdrew the witness, and her testimony, and rested.

At the June 9, 2000, hearing, the mother's lawyer argued, "there's been absolutely no medical testimony whatsoever" in support of the assistant attorney general's "medical arguments." "There's been no testimony that the apnea monitor was even needed or on its proper use." And, "there's been no competent testimony offered at this trial regarding any medical treatments that were or were not given to this child."

The only fair inference from the foregoing, is that the mother's deceased lawyer was a lawyer who understood the difference between "legally admissible" and legally inadmissible evidence, and that he would not have hesitated to, and no doubt did, object to the hearsay and other incompetent evidence offered by the FIA caseworker, that he later referred to as incompetent during argument.

If the mother's lawyer failed to object to the legally inadmissible evidence regarding the medical needs of, and failure to care for, the youngest child when he was an infant, that, under

¹¹ The referee's findings adopted by the trial court, began with the statement that they are based on the "sworn testimony and the evidence before it." That recital is partially untrue as appears on a comparison of the findings and the record.

The statement of the findings is replete with numerous findings that repeat allegations in the amended petition for which no evidence was offered at the adjudicatory hearing, and others relate to matters for which no source can be found either in the amended petition or elsewhere in the record.

the majority's analysis, appears to be outcome determinative, then it would seem that there was ineffective assistance of counsel entitling the mother to a new trial.¹²

III

The FIA caseworker provided in the settled statement inadmissible (because it was hearsay) testimony that the "hospital" had instructed that the baby was to be kept on his back and apnea monitored, and also testified (her admissible testimony) that the mother had failed consistently to do so. There was, however, no medical testimony that this new born, more so than any other infant, needed to be kept on his back, even when awake, or that an apnea monitor was even medically recommended, let alone medically required.

Nor is the hearsay report of the caseworker in the settled statement of the SIDS death of siblings, and her non-expert opinion that sleeping on the stomach was improper for an infant with a high risk of SIDS, probative, at least absent medical or other expert testimony that the deaths of the siblings were in fact SIDS deaths, and that a SIDS death of a sibling indicates medically a certain course of appropriate care of the infant, and what that course of treatment would be.

It appears that SIDS is not hereditary. It is a sudden, inexplicable death of an infant under one year of age, the cause of which remains unexplained after a thorough medical investigation. If it is SIDS, the parents are blameless.

One author states that little information is available "on which infants should be monitored, and how useful monitoring is." Another states that a SIDS or crib death usually occurs when the baby is two or three months of age. And still another author states that it rarely occurs after six months of age.¹³

¹²See *In re Simon*, n 16, *supra*.

¹³Sudden Infant Death Syndrome (SIDS) -- or more commonly, crib death -- is defined as a sudden, unpredictable, and inexplicable death of an infant under the age of one year. The cause of death remains unexplained even after a thorough medical investigation, autopsy, examination of the scene of death, and a complete review of the clinical history. Markel and Oski, The Practical Pediatrician, p. 263.

The exact cause of sudden infant death syndrome -- in which an apparently healthy baby dies while asleep -- is not known. Usually, no cause of death is discovered. The risk of crib death is higher in winter and may be related to immaturity of the part of the brain that controls breathing. The problem does not seem to be hereditary. Crib death is more common in male infants and usually occurs when the baby is 2 to 3 months of age. Sudden infant death syndrome occurs at a rate of 1 per 5,000 live births. The American Medical Association Family Medical Guide, Third Edition, p. 699.

(continued...)

At the time of the adjudication hearing, March 13, 2000, at which no medical testimony was offered, the infant (child) was eight and one-half months old, and largely out of danger of SIDS,¹⁴ which by definition is such an unexplained death of an infant under the age of one year. When the trial court entered the order of termination, the infant was more than a year old.

When the March 13, missing transcript hearing was held, eight and one-half months after the infant was born, the infant (child) probably was rolling over from stomach to back and back to stomach. And there is nothing to indicate, certainly no medical testimony, that the use of an apnea monitor, if ever medically indicated or required, continued to be medically advisable or was even practicable.

IV

While the majority relies on the failure to keep the youngest child on his back at all times, and apnea monitored, it appears that the majority concludes that it is the mother's "substance abuse history [that] supports termination" of parental rights to all three children (i) for failure to provide proper care and support, and (ii) there is no reasonable expectation of ability to provide proper care and custody in the future, and (iii) there is a reasonable likelihood that the children will be harmed if returned to the mother's home.¹⁵

(...continued)

Sudden infant death syndrome (SIDS), or crib death, happens to some babies in their sleep without apparent cause. SIDS strikes about 1 out of 5,000 babies in the first year, affects more boys than girls, and occurs more frequently in colder months. Placing the baby on his back or side to sleep is believed to reduce the risk of SIDS. The Medical Advisor, The Complete Guide to Alternative & Conventional Treatments, p. 33.

SIDS rarely occurs before 2 weeks or after 6 months of age, and the peak incidence is between the second and third months of life. The incidence in the United States is about 1 in 500 live births. Males are more likely to die of SIDS than females, and the syndrome strikes more often during cold weather. * * * In an effort to prevent SIDS, monitoring might be recommended for infants who are at especially high risk. Little information is available, however, on which infants should be monitored and how useful monitoring is. Parents who opt for monitoring require special training in cardiopulmonary resuscitation and proper use of the monitoring equipment. Mayo Clinic Family Health Book, pp. 21-22.

¹⁴See n 13, *supra*.

¹⁵The majority states:

"The settled statement supports the trial court's finding that respondent violated medical instructions with regard to supervising and caring for her child and using the apnea monitor. This establishes support for the court's finding that respondent failed to provide proper care and custody for Angel, as required by MCL 712A.19b(3)(g). Additionally, the fact that there were four occasions on which Angel was discovered lying on his stomach and/or without the monitor

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connected, along with respondent's history as reflected by documents concerning the prior wardship, provided sufficient evidence to support a finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time, and that Angel would likely be harmed if returned to respondent's care. MCL 712A.19b(3)(9g) and (j).

"The trial court also cited evidence that respondent has a long-term substance abuse problem and a long history of failing to benefit from treatment. The settled statement of facts, as noted above, indicated that respondent admitted to using crack cocaine throughout her pregnancy and to having a substance abuse problem. [We acknowledge the negative drug screens covering a two-month period, but find it insufficient to overcome respondent's substance abuse history.] Considering this evidence, along with the record from the prior wardship, the trial court did not clearly err with respect to the finding concerning substance abuse. We conclude with respect to all three children, respondent's substance abuse history supports termination under MCL 712A.19b(3)(g) and (j). Respondent's inability to properly care for Angel Vasquez also reflects negatively on her ability to properly care for the two older children who suffer from psychological disorders. Additionally, the settled statement of facts shows a failure to comply with the parent-agency agreement." (Emphasis added.)

Earlier in its opinion, the majority stated:

"In a written opinion, the trial court found that respondent neglected her infant son's fragile medical needs by failing to supervise him and use an apnea monitor. The trial court also found that respondent had a long history of substance abuse and failure to benefit from treatment. The court also generally alluded to the respondent's past history with petitioner."

* * *

"The settled statement of facts reveals that [the FIA caseworker] testified that respondent failed to comply with the parent-agency treatment agreement, that respondent admitted to using crack cocaine before the birth of Angel Vasquez and admitted having a substance abuse problem, that respondent was instructed that Angel was to sleep on his back and with an apnea monitor because of two prior SIDS [Sudden Infant Death Syndrome (SIDS)] deaths of children of respondent, that on four home visits Angel was sleeping on his stomach and/or without the apnea monitor attached, and that the two older children suffer from Oppositional Defiant Disorder and Attention Deficit Hyperactivity Disorder. Additionally, the record includes documentation concerning a prior temporary wardship from 1992 through 1995 in regard to the two older children. [The record of the preliminary hearing indicates that on the day the children were removed from the home in October, 1999, respondent was picked up by police on an outstanding drug trafficking warrant.]"

The predicate of the majority's analysis -- the mother's "substance abuse history" -- falls apart on critical examination of the record.

The majority refers to findings concerning the mother's "long history of substance abuse and failure to benefit from treatment,"¹⁶ her neglect of "her infant son's fragile"¹⁷ medical needs by failing to supervise him and use an apnea monitor,¹⁸ and her failure "to comply with the parent-agency treatment agreement"¹⁹ and the "documentation concerning a prior temporary wardship from 1992 through 1995 in regard to the two older children."²⁰

The majority adds "on the day the children were removed from the home in October 1999, respondent was picked up by the police on an outstanding drug trafficking warrant." There is nothing in the court file indicating when the alleged offense occurred. This is but more legally inadmissible hearsay evidence, this time from the assistant attorney general, at a preliminary hearing, without the presence of counsel for the mother, who was not appointed until later.

¹⁶Slip op, p. 2.

The trial court did not "cite evidence that respondent had a long-term substance abuse problem and a long history of failing to benefit from treatment." There was no such evidence. There was nothing to cite. The trial court so found without any evidence whatsoever to support the "failure to benefit" characterization, and a legally inadmissible report of use in 1991 and an eight year gap between 1991 and just before June 28, 1999, in the mother's use of substances to support the long term substance abuse characterization.

¹⁷The infant's health or medical condition is not adverted to in the settled statement, or in the transcript of any of the hearings.

The settled statement does not, contrary to the majority, report that the FIA caseworker testified that the instructions to keep the infant on his back apnea monitored were given "because of two prior SIDS deaths of children of the mother." Slip op, p. 3.

¹⁸Slip op, p. 2.

The trial court did not "find" that the "respondent violated medical instructions with regard to supervising and caring for her child and using the apnea monitor." (Emphasis added.) What the trial court found was that when the infant "was sent home, the mother was instructed that the baby was to remain on an apnea monitor on his back."

The settled statement says that the FIA caseworker provided testimony that the "hospital" gave such instructions, clearly inadmissible hearsay testimony

¹⁹Slip op, p. 2.

²⁰Slip op., p. 3

The arguments based on the mother's substance abuse history, failure to comply with a parent-agency agreement, the suggestion that she would be unable to care for the two older children because of their psychological disorders and the reliance on "documentation" of a prior wardship fall far short of clear and convincing evidence of anything at all.

(a)

Anecdotal material in the initial service plan, periodic review reports, and the like, in the record of the prior wardship, which terminated, without adjudication, when the two older children were returned to the mother's custody in 1995, over four years before the instant petition was filed, is not legally admissible, competent evidence in a proceeding four years later wherein the FIA seeks to terminate parental rights on new allegations of neglect or abuse or of failure to provide proper care or custody. (See Appendix with reference to the referee's announcement that she was taking judicial notice of the earlier record.)²¹

²¹See fn 1, *supra*, and accompanying text.

The settled statement does not show that the trial court took judicial notice on the record of this termination of parental rights proceeding of the earlier record of the prior wardship, although there is a statement at the conclusion of the June 6, 2000, hearing that the referee had done so. Where and when does not appear anywhere.

The record of the June 6, 2000, and earlier hearings does not indicate that the referee had so taken judicial notice of the record of the prior wardship. The settled statement does not note that the referee purported to take judicial notice of the earlier record of the prior wardship at the March 13, 2000, missing transcript hearing.

Taking judicial notice of the entire record of an earlier wardship record, that never reached the adjudication stage, even with the consent, solicited by the referee, of counsel, appears to be inconsistent with the spirit of the Michigan Court rules, which require that an order terminating parental rights must be based on legally admissible evidence.

Although the court rules [MCR 5.973(a)(4)] provide that the rules of evidence do not apply once jurisdiction has been established, at the dispositional phase, and then authorize the "receipt" of "relevant and material" written reports "even though such evidence may not be admissible at trial," the court rules go on to provide that the parties are to be given "an opportunity to examine and controvert written reports so received and may be allowed to cross-examine individuals making the reports when such individuals are reasonably available."

In the instant case, the referee did not identify on the record which written reports of the prior wardship, if any, were "received" in evidence, and failed on the record to provide the parties an opportunity to examine and controvert written reports so received, and to cross-examine individuals making such written reports if they were reasonably available.

Be that as it may, the only reference in the history of the prior wardship to use of substances is a statement that the mother used “alcohol and barbiturates” during an earlier pregnancy in 1991.

The initial service plan, dated January 21, 1992, stated that the mother had consumed alcohol and barbiturates during her pregnancy with the second oldest child in 1991. There is nothing further in that earlier wardship record indicating that the mother at any time thereafter used substances.²²

There is no indication in the record of the prior wardship that the mother was ever asked during the prior wardship to participate in a substance abuse treatment program, failed to participate in a program or did participate and failed to benefit from treatment.

Because the mother successfully completed the prior wardship, and the two older children were returned to her by the FIA, and remained in her custody without incident for over four years until October 1999, the record of the prior wardship tends in all events to show, contrary to the majority’s apparent reading of the prior wardship record, that the mother benefited from whatever treatment may have been provided during the prior wardship.

There is nothing in the record of the prior wardship or in the court file indicating that the mother ever used substances in the eight years between the 1991 pregnancy, and the mother’s pregnancy with the youngest child in 1999.

Nor is there anything in the record indicating that the mother used substances at any time after July 1, 1999, through July 7, 2000, and September 5, 2000, the dates of the referee’s and the

²²The sum and substance of the rest of the record of the earlier wardship respecting substances is as follows:

The May 1992 periodic review report says nothing about substance abuse. The August 1992 report indicates that the mother was required to “remain substance abuse free,” in addition to maintaining suitable housing and attending therapy, but offers no other information on substance abuse. Both the November 1992 and February 1993 reports are silent as to substance abuse.

The August 1993 report briefly mentions that the mother had been referred for drug screens twice, but she did not follow through. The February 1994 report indicates that the mother had complied with drug screening, and all the tests were negative.

The May 4, 1995, family reunification report states that the mother “has taken her own initiative in obtaining occasional random drug screens. Although all screens have not been mailed to Family Reunification Program therapists, we have not received any positive screens at this point.” A copy of a negative drug screen report was attached.

trial court's orders terminating parental rights, other than the mother's acknowledgment, on July 1, 1999, three days after the infant was born, that she "had a substance abuse problem," and, specifically, used crack cocaine just before the infant's birth on June 28, 1999, not, as the majority state, "throughout"²³ the pregnancy. There is nothing in the court file indicating that the mother's use of substances had anything to do with the children's removal from her custody.

Drug screens in February and March 2000 were negative.

The foregoing is the mother's entire "substance abuse history." That history cannot properly be characterized as a "long term" substance abuse history or a "long term" history of failure to benefit from treatment.

(b)

The only parent-agency treatment agreement in the court file concerns the prior wardship, and is dated February 1992, and is eight pages in length. There is nothing of that sort in the court file dated either 1999 or 2000.

Apart from the caseworker's cryptic statement in the settled statement of the March 13, 2000, adjudication hearing, that the mother had failed to comply with the parent-agency treatment agreement, there is nothing indicating that there was actually a post-1995 parent-agency agreement, or when any such post-1995 parent-agency agreement was entered into, or the provisions of any such agreement, and wherein specifically the mother had failed to comply with any such agreement.

The settled statement also states: "The Family Independence Agency and the mother agreed to the following plan in order to maintain [the infant] in the mother's home: (1) random drug screening; (2) substance abuse treatment; (3) counseling; (4) suitable housing." This plan said nothing about keeping the baby on his back with an apnea monitor.

The agreement representing this plan was presumably entered into before the baby left the hospital, or shortly thereafter; whether it was oral or in writing does not appear. There is no writing in the court file.

It is not alleged in either the original October 1999 petition or in the amended November 1999 petition seeking termination of parental rights or elsewhere in the court file that the mother failed to provide drug screens, or failed to participate in treatment, or counseling. And there was no testimony or other evidence that she failed to do so.

(c)

Evidence of a single relapse episode in the eight years, from 1955 to just before June 28, 1999, does not constitute in itself clear and convincing evidence in support of a finding that the

²³Slip op, p. 3.

mother failed to provide proper care and support for her children, or provide a sufficient basis for an inference or finding of no expectation of ability to do so in the future, without evidence, and there is none, of any failure of care or support actually resulting from substance abuse, other than an inference, without testimony or other evidence, of actual harm to the infant from the use of crack cocaine during pregnancy.

The FIA should not be heard to now seek termination of parental rights as to all three children on the basis of such a vague inference of unspecified, unarticulated harm to the youngest child when it did not intervene to remove him when he was a newborn or the two older children from the mother's care on the basis of substance abuse, and allowed the mother to retain custody of all three children although it was aware of the pre-June 28, 1999, substance abuse, without even an allegation of post June 28, 1999, substance abuse in the petition or amended petition seeking termination of parental rights.

(d)

The FIA caseworker testified that one of the two older children suffered from Oppositional Defiant Disorder (ODD), and that the other suffered from Attention Deficit Hyperactivity Disorder (ADHD), but such testimony was incompetent, non-probative and not legally admissible, simply because the caseworker was not qualified to opine in that regard.

There is nothing else in the settled statement or elsewhere in the record about the care and custody of the two older children other than, still another hearsay report from the FIA caseworker, that one of the two older children started a fire that destroyed the home. There is no claim or evidence that the mother was at fault respecting the fire. The fire apparently occurred on July 15, 1999, soon after the infant was introduced into the household, and almost three months before the children were removed from the mother's custody.

Nor is there anything to suggest that those asserted disorders of the older children were first manifested in October 1999, and that the FIA was not aware of the possibility that there were such disorders when it returned the physical custody of the two older children to the mother in 1995, or had not become aware thereof at some time between 1995 and October, 1999. Nor is there anything in the record to suggest that the mother was in any way to blame respecting such disorders.

The majority says that the failure to maintain the infant on his back with an apnea monitor reflects negatively on the mother's ability to properly care for the two older children who suffer from psychological disorders. This suggests that proper care of the two older children requires that something be done regarding their psychological disorders, but there is no expert or non-expert testimony regarding the psychological disorders or what should have been done in that regard.

Almost five months intervened between the removal of the children from the mother's home and the adjudicative hearing on March 13, 2000. During that period, the FIA may have had the children examined by a qualified person with regard to the asserted psychological disorders, and possibly developed a course of treatment therefor which the foster mother may have been administering. But then again the FIA may not have had the children examined, and there may be no treatment program. There is nothing in the record indicating that there is such a

course of treatment, or that it was being administered by the foster mother, or that the mother, from whose custody the children were removed, was less able or unable to provide such treatment.

Absent some such testimony, with legally admissible evidence, or at least some evidence, the termination of the mother's parental rights should not be affirmed on the basis of a suggestion or argument that the mother was unable to care for them because of their special needs in the form of psychological disorders.

V

The failure to keep the youngest child on his back, and apnea monitored, when he was an infant, established with essentially legally inadmissible evidence, does not justify an inference or a finding that the mother could not reasonably be expected to provide proper care and custody in the future for the two older children, who the mother had cared for, after they were returned by the FIA to her custody in 1995, for over four years, without incident or intervention by the FIA, before the FIA intervened in October 1999 in respect to the failure to keep the infant on his back and apnea monitored.²⁴

Nor did the failure to keep the youngest child on his back, and apnea monitored, when he was an infant, so established with essentially legally inadmissible evidence, justify an inference or a finding that the mother could not reasonably be expected to properly care for the youngest child in the future (as she has been able to care for the two older children for over four years after they were returned to her by the FIA) when, at the time of the referee's recommendation that the mother's parental rights be terminated, July 7, 2000 (September 5, 2000, trial court order), he was over one year of age, and, by definition, no longer at risk of SIDS, and no longer could either be kept on his back at all times while awake or sleeping, or monitored with an apnea monitor.

VI

There is no claim in the amended petition seeking termination of parental rights, or elsewhere, or evidence that the mother failed at any time to provide appropriate food or shelter or other care and support for any of her three children, or failed to provide appropriate care respecting the asserted psychological disorders of the two older children.

²⁴The petition dated October 1999, and the amended petition seeking termination of parental rights dated November 1999 did not allege substance abuse or failure to comply with a parent agency agreement.

In closing argument at the June 9, 2000, hearing, when the youngest child was within three weeks of his first birthday, the assistant attorney general argued only respecting the failure to keep the youngest child on his back and apnea monitored when he was an infant. She did not advert to alleged substance abuse, or alleged failure to comply with a parent agency agreement or the prior wardship.

Nor is there any evidence that, if the mother had a continuing substance abuse problem, and there is no such evidence, that the mother's use of substances interfered with her caring and providing for her three children, or resulted in any abuse of any of the children, except possibly an inference of abuse of the infant resulting from the use of substances during pregnancy, with no report, hearsay or otherwise, on this record of any sequelae.

The question presented is not whether the mother had a substance abuse problem, or failed to comply with a parent-agency treatment agreement. The question presented is whether the trial court correctly found, on the basis of clear and convincing legally admissible evidence -- or indeed, in this case, any evidence whatsoever -- that the mother failed to provide proper care and custody, and that she could not reasonably be expected to provide proper care and custody in the future, and whether it was reasonable to expect that the children would be harmed if returned to her home.

There is no evidence, and hence no basis for an inference, or finding, that any failure of the mother to comply with any parent-agency agreement, or use by her of a substance, had resulted in any failure of care or custody of the two older children, or harm to them, or could be expected to result in the future in harm to them or a failure to provide proper care and custody of the two older children; and the evidence of the mother's use of a substance during her last pregnancy does not, without more, and there is nothing more that is probative in the record, justify an inference that the mother could not be expected in the future to provide proper care and custody for, or would cause harm to, the infant (child) who on July 7, 2000 (Trial Court Order, September 5, 2000), when parental rights were terminated, was over one year of age (date of birth 6/28/99) and no longer, by definition, at risk of SIDS.

VII

There is no evidence that the mother failed to comply with any plan developed by the FIA in 1999 or 2000 for reunifying the family, or that there was any effort whatsoever on the part of FIA to reunify the family, the trial court's boiler plate findings to the contrary notwithstanding. What little there is in the record indicates that the FIA was unwilling, without any explanation on this record, to implement a plan for reuniting the family.²⁵

It appears that the mother may not have had the opportunity to visit with her children between October 1999 and mid-April 2000. According to the settled statement, it was not until the close of testimony on March 13, 2000, the date of the adjudication hearing, that the referee

²⁵At the January 31 hearing, the mother's lawyer stated that he would like an "opportunity to work on a plan to get these children returned and to have resolved the issues that brought this case into court in the first place. I think that would be a better way of proceeding rather than to set it for an initial permanent custody proceeding. . . . In response the court inquired of the assistant attorney general whether the FIA was prepared to go forward on the issue of permanent custody, and the assistant attorney general responded, 'yes, we are.'"

finally granted the parents' motion for visitation subject to conditions, but the assistant attorney general, at the April 12, 2000, hearing, was still resisting supervised visitation.²⁶

VIII

The FIA and the Assistant Attorney General made no effort to establish with clear and convincing legally admissible evidence introduced at the trial their claims of failure to provide proper care and custody.²⁷ And quite clearly, they did not think that they needed to do so.

I would hold that the FIA was required to prove its claims with legally admissible evidence and failed to do so, and reverse and remand for proceedings consistent with this opinion.

/s/ Charles L. Levin

²⁶The settled statement says:

Ms. Welch and Mr. Vasquez were to provide a random drug screen within twenty-four hours of March 13, 2000, adjudication hearing. If the drug screens were negative the court ordered supervised agency visits between the child and the parents. The court also told the parents to submit negative weekly random drug screens between March 13, 2000, and April 12, 2000 [the adjourned hearing date] for the supervised visits to continue.

At the conclusion of the April 12 hearing, the assistant attorney general stated that the mother had not "dropped" drug screens since March 22.

It appeared, however, that the mother was providing drug screens on Tuesdays and Thursdays weekly. The referee said, "If she's doing that and those are coming up negative, you can still be weekly, but you check and find out if they're all negative then, and I'm not going to impose further conditions on her. How many drug screens do you need to see?"

²⁷ This appear from the inadmissible non-expert hearsay evidence offered by the Assistant Attorney General at the trial on the essential elements of the claims she needed to prove.