

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ALEXANDER MITCHELL,
NATHAN MITCHELL, and NICHOLAS
MITCHELL, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

WILLIAM MITCHELL,

Respondent-Appellant.

UNPUBLISHED

March 24, 2009

No. 286895

Clinton Circuit Court

Family Division

LC No. 06-019136-NA

Before: Jansen, P.J., and Borrello and Stephens, JJ

STEPHENS, J. (*dissenting*).

I would reverse and remand this case to the trial court. While I concur with my colleagues that the constitutional arguments are without merit, I am deeply concerned that the trial court's findings were tainted by impermissible considerations.

The trial court reached its holding based on MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j) after expressing concerns about respondent's fiscal integrity and his failure to obtain independent housing. The court addressed concerns about respondent's finances throughout its oral opinion. While the court found that respondent had a legal source of income throughout the proceedings, paid his child support and met his other obligations, the court improperly focused on the fact that respondent failed to meet the mortgage obligations on his former home. That home was originally purchased with the children's mother, from whom respondent was later estranged. The decision to purchase the home was based upon the belief that both parents would make economic contributions. Therefore, when the couple separated, the home was the subject of an orderly short sale. This is woefully common in Michigan in 2009. By partially basing its decision on this consideration, the court improperly concluded that this unfortunate, though common, occurrence is an indication that an individual is an unfit parent.

Similarly, the court was also critical of respondent's choice to work at Wal-Mart rather than seek employment as a chemical engineer. While one may speculate as to whether there are employment opportunities for inexperienced chemical engineers, the sole focus of the court should be whether respondent has any legal source of income, whether that income is adequate to care for the children and whether it will likely be used for that purpose. The fact that respondent

could have potentially earned a greater income does not automatically indicate that his income was inadequate. Furthermore, there is no record of the DHS staff making any effort to find available resources to augment respondent's legal source of income with available public funds for his special needs children.

Intertwined with the court's concerns about respondent's finances was its criticism of respondent's choice to live with his sister and brother-in-law rather than obtain separate housing. Respondent's testimony that he relied upon his family, church and sobriety support groups to maintain his sobriety was unchallenged. By moving to a different location, respondent may have lost access to that important support structure. As the court noted, the extended family residence was stable and the children were welcome there. The only evidence in the record was that the home was safe, clean and had enough space for the children. The court discussed the fact that respondent and his sister had crafted a detailed plan for the children at that home that included educational and medical support systems. The court erred in insisting that the nuclear family reside independently. As noted in *Moore v East Cleveland*, 431 US 494, 505; 97 S Ct 1932; 52 L ED 2d 531 (1977):

“Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.”

The observation in *Moore* is increasingly relevant during this time of economic turmoil. In considering respondent's living arrangement when determining if the statutory conditions were met, the court failed to recognize the value of respondent's broad family support.

Finally, the court, also based its finding on an alleged occurrence of physical assault against the eldest child. However, the consideration of this allegation was improper where it was not adequately supported by the record.

Because the court's decision was intertwined with the wrongful considerations noted above, I would reverse and remand to the trial court for a determination bereft of these inappropriate considerations.

/s/ Cynthia Diane Stephens