

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of AYDEN ROOD, Minor.

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DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

DARROLL DONALD ROOD,

Respondent-Appellant.

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UNPUBLISHED

June 12, 2008

No. 280597

Mason Circuit Court

Family Division

LC No. 06-000019-NA

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Respondent appeals by right the family court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that he might do so within a reasonable time given the child's age] and (j) [a reasonable likelihood exists, based on the parent's conduct or capacity, that the child will suffer harm if returned to the parent's home]. We reverse and remand.

I

We review for clear error a family court's decision to terminate parental rights. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). The clear error standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

II

Natural parents have a fundamental liberty interest in the care, custody, and management of their children, and the state must therefore meet a high burden before terminating an individual's parental rights. *Santosky v Kramer*, 455 US 745, 753-754; 102 S Ct 1388; 71 L Ed 2d 599 (1982). To terminate parental rights, the family court must find that at least one of the

statutory grounds for termination in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Fried*, 266 Mich App 535, 540-541; 702 NW2d 192 (2005). The petitioner has the burden of proving the statutory ground. *In re Trejo*, *supra* at 350. “Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child’s best interests.” *Id.* at 354; see also MCL 712A.19b(5).

### III

Respondent argues that the family court clearly erred by concluding that petitioner had sufficiently proven the statutory grounds for termination by clear and convincing evidence. More specifically, respondent complains that petitioner failed to make reasonable efforts to contact him and to provide him with services. Before the family court may enter a dispositional order, the petitioner generally must make reasonable efforts to rectify the problems that caused the child’s removal by adopting a service plan. MCL 712A.18f(1), (2), (4); *In re Fried*, *supra* at 542. A respondent’s arguments concerning the adequacy and reasonableness of proffered services ultimately relate to the sufficiency of the evidence proving a statutory ground for termination in a given case. *Id.* at 541, citing *In re Newman*, 189 Mich App 61, 65-67; 472 NW2d 38 (1991).

At the time of the child’s removal from his mother’s care in March 2006, respondent, the child’s noncustodial parent, was incarcerated. His last visit with the child had occurred on Christmas 2005. Within a few days of the child’s placement into foster care, on learning from the mother about the child’s foster care placement, respondent phoned a protective services worker and advised her of his address and cell phone number, which the protective services worker passed along to the assigned foster care worker. Respondent did not subsequently follow through on the advice to promptly contact the foster care worker. Nor did he pursue visitation, explaining at the termination hearing that because the child presumably would be reunited with the mother, he did not want to become part of the child’s life, only to later have the mother push him back out.<sup>1</sup> In June 2006, the family court accepted the mother’s plea of no contest to the allegations contained in the original and amended petitions. Although no adjudication occurred with respect to respondent, he appeared at the June 2006 hearing, during which he supplied his contact information to the court.

The foster care worker’s efforts during the first several months of the dispositional phase of this case consisted of one phone call to respondent, which failed to connect because the number was no longer in service. It appears from the record, however, that the worker called an outdated telephone number listed in petitioner’s service plans, and it remains unclear why she did not call the other telephone number that respondent had provided at the June 2006 hearing.

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<sup>1</sup> The record supports respondent’s claim that the mother did not want respondent involved in the parental rights contingent on petitioner pursuing termination of respondent’s parental rights.

It is also unclear why the worker did not attempt to contact respondent through the mail, especially given that she was fully aware of respondent's address. When the worker's first inquiry to the child's mother in July 2006 concerning respondent's whereabouts yielded no results, she waited more than five months before making an effort to contact respondent by mail in December 2006. After this mailing was returned as undeliverable, the foster care worker made only one more inquiry concerning respondent's whereabouts before the supplemental petition seeking termination of his parental rights was filed.

Respondent ultimately made contact with the foster care worker again in May 2007, approximately 14 months after his initial contact with petitioner. During these months, respondent neither contacted the child nor provided the child any financial support.

The evidence in this case portrays respondent as having been a less-than-ideal parent during his child's brief lifetime. However, the evidence also plainly establishes that the breakdown of communication in this case was predominantly attributable to petitioner. Because of petitioner's inadequate attention to this case, respondent received no communication or information about the proceedings for more than one year. Respondent certainly shares responsibility for this lack of communication, as he allowed 14 months to elapse before finally contacting the foster care worker a second time. But the facts also establish that respondent made the initial effort to contact petitioner shortly after the child arrived in foster care, that respondent had attended the hearings for which he received notice, and that respondent had provided his contact information to petitioner and the family court.<sup>2</sup>

In light of the record before us, we must conclude that the family court clearly erred by finding that petitioner had proven § 19b(3)(g) by clear and convincing evidence. MCR 3.977(J). Although respondent's absence from the child's life and lack of financial support constituted a serious failures to provide his child proper care in the past, these failures in large part owed to petitioner's lapses. Respondent had demonstrated a willingness to act on what little information he received—indeed, he contacted petitioner following the child's removal from the mother's home and he attended both hearings for which he received adequate notice. Given these undisputed facts of record, it was reasonable to expect that respondent would become involved in the child's life, provided that he received proper notice of the protective proceedings.

Furthermore, § 19b(3)(g) does not merely require a finding that the parent has failed to provide proper care or custody for the child in the past; it also requires the petitioner to prove that "there is no reasonable expectation that the parent will be able to provide proper care and

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<sup>2</sup> The family court file documents that proofs of service for dispositional review hearings on June 29, 2006, September 14, 2006, and a March 1, 2007 permanency planning hearing were mailed to an incorrect address for respondent, 231 10<sup>th</sup> Street, Manistee. A proof of service advising of a December 2006 dispositional review hearing does not document any service to respondent. We acknowledge that the foster care worker was not personally responsible for the fact that these hearing notices to respondent were mailed to an incorrect address, or for the fact that mail service to respondent's address was apparently erratic. Nonetheless, both of these problems exacerbated the communication problems that plagued this case.

custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g). The proofs adduced below showed that respondent was the primary caregiver for another minor child, and that he possessed at least minimally sufficient parenting skills with respect to that child. The proofs also established that irrespective of respondent's past failures, he now appeared willing and able to provide for the minor child at issue in this case. Because a family court's finding that there is no reasonable expectation that the parent will be able to provide proper care and custody for a child in the future must rest on more than mere conjecture, the family court in this case clearly erred by determining that petitioner had proven § 19b(3)(g) by clear and convincing evidence. *In re Sours, supra* at 636.

The family court also clearly erred by finding that, pursuant to § 19b(3)(j), the child would likely suffer harm if reunited with respondent. MCR 3.977(J). As we have observed, respondent likely would have become involved in the child's life had petitioner contacted him in a timely manner and properly informed him of these proceedings. As also noted previously, some evidence showed that respondent was a responsible caregiver for another young child, and that respondent had expressed a willingness to care and provide for the minor child at issue in this case, which evidence reduces the likelihood that the child was at risk of future harm caused by respondent's noninvolvement.

We recognize that respondent has a criminal record, consisting mostly of minor property offenses and domestic violence convictions. However, respondent's offenses were confined to a relatively short span of time. More importantly, respondent's past criminal offenses in no way related to child abuse or endangerment, or to the victimization of children. "The 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 . . ." *Santosky, supra* at 753. The possibility that respondent would continue to engage in domestic violence in the future was certainly not supported by *clear and convincing evidence*; respondent's current girlfriend testified that he never had engaged in violent behavior with her. In summary, we conclude that the family court's determination that a reasonable likelihood existed that the child would endure harm if reunited with respondent amounted to "essentially conjecture." *In re Boursaw*, 239 Mich App 161, 177; 607 NW2d 408 (1999), overruled in part on other grounds *In re Trejo, supra* at 353-354. Consequently, the family court clearly erred by finding that § 19b(3)(j) had been proven by clear and convincing evidence.

We vacate the order terminating respondent's parental rights and remand this matter for reconsideration after respondent has received an opportunity to demonstrate his ability and willingness to parent the minor child. *In re Newman, supra* at 70. Of course, if respondent does not timely demonstrate his ability to provide the child proper care and custody, petitioner once

again may seek to terminate his parental rights.<sup>3</sup> However, before respondent's fundamental liberty interest may be forever severed, he first must be given a fair opportunity to participate.<sup>4</sup>

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

/s/ Brian K. Zahra

/s/ Elizabeth L. Gleicher

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<sup>3</sup> “Unlike criminal defendants, natural parents have no ‘double jeopardy’ defense against repeated state termination efforts. If the State initially fails to win termination, . . . it always can

<sup>4</sup> In light of our resolution of this matter, we need not address the remaining arguments raised on appeal.