STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
May 26, 2011

In the Matter of A. X. W., Minor.

No. 299622
Wayne Circuit Court
Family Division
LC No. 01-403657

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Respondent, the mother of the minor child involved, appeals as of right a circuit court order terminating her parental rights. Because petitioner, the Department of Human Services (DHS), failed to produce clear and convincing evidence of respondent's unfitness and shifted to respondent the burden of proving her fitness, we reverse and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

On February 26, 2009, Children's Protective Services (CPS) got a referral that a Detroit police narcotics unit had raided the home of FW, AXW's father. After FW's arrest, CPS placed AXW in foster care. At a preliminary hearing on February 27, 2009, a CPS worker testified that respondent resided "somewhere down south" and had not received notice of the proceedings. On March 9, 2009, the DHS petitioned for temporary custody of AXW. The petition alleged that respondent and FW had divorced in 2007, and that AXW lived with FW until FW's arrest. One paragraph of the petition addressed respondent: "In May, 2004 [FW and respondent] had substantiated CPS history for physical abuse. In May, 2005 [respondent] had substantiated CPS for neglect. [Respondent's] parental rights have been terminated to her two oldest children . . . . In November, 2008 there was an unsubstantiated complaint for neglect regarding [respondent]."[1]

[1] Respondent had no history of "physical abuse," as reflected in the supplemental petition ultimately filed in this case, which omitted any reference to "substantiated … physical abuse" committed by respondent. A 2005 permanent custody petition recited the following regarding respondent:

Respondent appeared at the March 9, 2009 continued preliminary hearing and initially declined to waive probable cause for placing AXW in DHS custody. A CPS worker confirmed that FW had been charged with marijuana possession and remained in the Wayne County jail. The worker recounted that during a telephone conversation, respondent explained that she had divorced FW in 2007 and currently resided in South Carolina. Respondent told the worker that the divorce judgment awarded her custody of FW, Jr., AXW's older brother, and placed AXW in FW's custody.[2] Respondent also admitted to the worker that she "voluntarily gave custody" of her two older children to her mother because "at that time [she] was young, going to school, [and] she couldn't take care of the children."

A circuit court referee expressed concern that the DHS had not consulted the file in the previous child protective proceeding, and halted the hearing. When the referee discussed a date for continuing the preliminary hearing, respondent's counsel pointed out that respondent had a job and a nine-year-old child in South Carolina, and had to return to that state. The referee advised, "I can't accommodate that if she wants to proceed on with further testimony. The department has not reviewed the file and they don't know the grounds—they don't know the prior history." Respondent's counsel then announced, "We will go ahead and waive, your Honor." The referee authorized the petition and took further testimony from the CPS worker. The worker described that she had conducted a team decision making meeting on March 5, 2009, in which she unsuccessfully attempted to involve FW by telephone, but made no similar effort to involve respondent.

On March 17, 2009, the DHS filed a permanent custody petition seeking termination of respondent's and FW's parental rights to AXW. The petition averred with respect to respondent:

> 8. In May, 2004 [FW and respondent] had substantiated CPS history for physical abuse. In May, 2005 [respondent] had a substantiated CPS complaint for neglect. . . .
>
> 9. In 2002, [respondent's] parental rights were terminated to her oldest children . . . because the maternal grandmother . . . who had guardianship of the children requested adoption of the children. The children were adopted in April, 2002.

> [FW] stated that he recently found out that he is not the biological father to FW[, Jr.], only AXW . . . . When [FW] talked about his wife his voice became very angry and hostile calling her inappropriate names. … Referral last year 05/25/04 was about [FW] punching FW[, Jr.] in the right eye resulting in him having a black eye. These allegations were substantiated against [FW] for physical abuse and [respondent] for failure to protect.

In July 2006, the circuit court terminated jurisdiction under the 2005 petition.

[2] Petitioner never provided the circuit court with respondent's divorce judgment or any custody orders refuting repsondent's description of the court-ordered custody arrangement.

Two days later, a referee conducted a pretrial hearing. Respondent appeared at the hearing, having driven 13 hours from South Carolina, and asked for an opportunity to visit AXW that day. The CPS worker agreed to a supervised visit at the agency. A foster care worker's notes reflect that respondent's visit with AXW "appeared to go well," and that respondent expressed that "she hasn't seen [AXW] for quite some time. Mom communicates that dad did not comply with visitation."

In August 2009, the circuit court held an adjudication trial. The prosecutor moved to amend the petition to request temporary custody regarding both parents, explaining: "It's my understanding that the father is willing to make certain admissions. He was the custodial parent. He's willing to make admissions to effectuate that." FW then admitted that he pleaded guilty of possession of marijuana, spent six months in the Wayne County jail, lacked housing and employment, and had enrolled in a substance abuse program. The circuit court assumed jurisdiction over AXW on the basis of FW's admissions and proceeded directly to a dispositional hearing. Foster care worker Angela Booker testified that respondent desired to participate in reunification services, and had been in contact with AXW by telephone. Booker initiated an "interstate contract" for a South Carolina home study and mailed respondent a treatment plan consisting of parenting classes, individual counseling, psychological and psychiatric assessments, "and we discussed domestic violence as well, but [respondent] indicated that she completed those courses." The circuit court adopted the treatment plan components listed by Booker and additionally ordered respondent to maintain legal income and suitable housing, "be available for court hearings and keep in contact with the worker," and attend supervised parenting times.[3]

Respondent attended by telephone a November 2009 dispositional review hearing. Booker summarized that respondent claimed to have completed "some supportive services identified on her parent/agency . . . agreement," including parenting classes, securing employment and undergoing a home assessment, but had not visited AXW in the last three months. Respondent did not appear in person or via telephone at a January 2010 dispositional review hearing, at which Booker recounted that two warrants had issued for FW's arrest and FW had been "totally non-compliant."[4] Booker informed the court that the South Carolina home study recommended against AXW's placement with respondent, and Booker urged the court to authorize a termination petition.

The South Carolina home study reported that respondent lived in a rented, newly renovated apartment in good condition with three bedrooms. The report continued:

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[3] Booker's report filed on August 27, 2009 states, "[AXW] indicates that he misses his mother and father and would like to reside in South Carolina."

[4] FW had no contact with the DHS after November 2009, and has not appealed the termination of his parental rights.

> [Respondent] stated in family assessment provided to the Agency that she fled to South Carolina to leave [FW] her ex-husband. She reported being in a violent relationship with FW. [Respondent] wants [AXW] placed in her home and feels like she would make a good parent for [AXW]. [Respondent] indicates her family knows that she wants [AXW] in her home and they are "all for it." [Respondent] indicates she has two older sons [of] whom her mother has legal and physical custody. [Respondent] indicates she had [the older children] . . . when she was a teenager herself. [Respondent] indicates at that time she was unable to care for her sons because she was a child herself. [Respondent] indicates she felt it was in the best interest to allow her mother to adopt her two sons. [Respondent] indicates she does have a very good relationship with her sons. [Respondent] indicates FW[, Jr.] was initially with his father but due to physical abuse and neglect issues, he is now living with her. FW[, Jr.] wants his brother to live with them in the home.

The report detailed that FW, Jr. had "ADHD and a learning disability," and exhibited "behavioral issues," although an evaluation conducted through the school concluded that FW, Jr. did not need special services. According to the report, FW attended weekly counseling and medication monitoring. The report continued:

> The counselor from Pee Dee Mental Health was contacted. Mental health counselor reported that [respondent] is compliant with services but they have some concerns of the relationship between [respondent] and her paramour. The Agency was informed that it was reported to them that there have been some verbal disputes between [respondent] and paramour. It was reported that FW[, Jr.] has witnessed this and overheard [respondent] and paramour arguing and he calling his mother, a "Bitch." FW[, Jr.] will go in the room if and when his mother and paramour are arguing. The agency conducted NCIC, but no reports were found.

The home study concluded against AXW's placement with respondent in South Carolina for the following reasons:

> The Agency has some concerns of [respondent] being in a volatile relationship and currently caring for a child in need of mental health services. The Agency feels like getting another child needing mental health services would be too much for [respondent] to handle at this time.[5] The Agency is recommending [respondent] attend some individual and Pee Dee Coalition to assess her current relationship with her paramour. If this is completed, this home may be reassessed for placement.

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[5] Booker agreed at the January 2010 hearing that AXW had "some behavioral issues at school but nothing major," and had no special needs.

The referee ordered that respondent have supervised parenting times with AXW at the agency, and cautioned that the court would suspend respondent's visits if she did not see the child before the next hearing. The referee announced, "Moving back to Michigan is an order."

Respondent participated by telephone in a February 2010 permanency planning hearing. Booker presented the referee with exhibits supplied by respondent, including a report from the Pee Dee Mental Health Center authored by the clinic director, Ed Melton, MSW, LISW-CP, and certificates attesting to FW, Jr.'s perfect school attendance and receipt of a "quiz master award."[6] Booker then testified as follows:

> *Q.* Mother is out of state?
>
> *A.* Yes.
>
> *Q.* But it appears that she has given us some documents to support that she's living a responsible lifestyle in South Carolina?
>
> *A.* That's correct.
>
> *Q.* Does she maintain contact with you?
>
> *A.* She has.

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[6] The exhibits concerning FW, Jr. do not appear in the file. The Pee Dee Mental Health Center evaluation of respondent's mental status reported that respondent "did not have any Mental Health issues that would keep her from getting custody of her child," and elaborated:

> We were not in a position nor would we make a statement assessing her parenting skills.
>
> That said, she did appear a little immature for her age, and her expectations of working a full-time job and caring for two children, especially two special needs children, was naïve and possibly unrealistic. She is likely to need more support than she realizes, and which may not be available here in South Carolina now due to the economy and the ability of State Government to provide services. She tried very hard to make a good impression and to show that she had every thing [sic] under control.
>
> [Respondent] wants her child back and will do what she is told to get him back. That will be the easy part. The hard part will be the adjustments she will have to make to care for two children and work full time.

Q. And are we doing an OTI?[7]

A. We completed an OTI. That was submitted on the last court hearing. I believe it was in exhibit two.

Q. Yes. The home evaluation, it was exhibit two. What's the recommendation and how do you wish to proceed?

A. The recommendation at that time was not to place [AXW] in South Carolina due to some concerns. However, I did speak with [respondent] in regards to those concerns and that was her reason in . . . completing a Pee Dee Mental Health evaluation.

Q. Right. Because the last one says that part of the reason why they're recommending non-placement is because [FW, Jr.] has some behavioral issues and is in need of mental health support.

A. That's correct. That's correct.

* * *

Respondent's Counsel: Your Honor, my client is willing to plan for this child and I've discussed with [respondent], she's willing at this point to send every information she receives from mother back to South Carolina for them to reevaluate–

The Court: Okay. Because you understand that it's OTI that says I can't place, I can't place.

Respondent's Counsel: Yes, but the OTI was saying you couldn't place subject to some things then don't and this is what we're trying to rectify those.

By the Court:

Q. All right. So, perhaps that's where we are. Has the mother come here from the State of South Carolina to visit with her six year old?

A. Not at this time.

Q. That's in unconsciousable [sic]. When was the last time she saw this young man?

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[7] This abbreviation refers to a home study performed pursuant to the Interstate Compact on the Placement of Children, MCL 3.711, *et seq*.

A. I'm sorry, your Honor, I don't have a date off hand but I believe it was at the—maybe a few hearings ago. I [sic] few court hearings ago.

Q. Because bonding is an issue and we all must be mindful that the word biological mother is a word. Parenting is about parenting. This child doesn't know his mother and I'm not sending a six year old out of state to a stranger. That would scare this child. Scare him. So, she needs to come here. Absolutely no less than once a month visit, [respondent's counsel].

Respondent's Counsel: Okay.

The Court: My last order suggested that she moves here.

* * *

A. The DHS worker recommends that if a petition is filed, it's for mom and dad.

Q. So, DHS is recommending filing permanent custody on both parents, is that correct?

A. That's correct.

Q. Father is not doing anything at this point to work towards reunification?

A. That's correct.

Q. And as to the mother, can you summarize what efforts she has made at this point to be reunified?

A. She has completed—she has participated in South Carolina, she complete [sic] the home assessment. She currently participated in an assessment with Pee Dee Mental Health and she has submitted documentation in regards to completing parenting classes however, it reflects 2005. She has also submitted to the court a documentation in regards to [FW, Jr.], [AXW]'s sibling, that which resides in South Carolina. She . . . stays active in communicating with me at least once, twice—maybe once or twice a week.

Q. Yes—okay, I'm sorry. Go ahead.

A. And she has suitable housing.

Q. Okay. And the last time she visited was more than six months ago do you think?

A. I [sic] was more than six months ago.

Booker expressed willingness to work with respondent "for a little bit longer," and acknowledged that respondent "so far . . . has cooperated" and "has done everything" required of her. Booker conceded that she needed "clarification in regards to who the [domestic violence] allegations were against" mentioned in the South Carolina home study, because the study failed to specify whether it referred to respondent's past relationship with FW or someone else. According to Booker, respondent denied involvement in a current relationship, and supplied a certificate reflecting her completion of parenting classes in 2005. Booker felt uncertain about whether respondent needed another course of parenting classes. The referee interjected:

> *The Court*: I'll answer that right now. A mother who cannot think through the needs to visit her child and demonstrate bonding needs to return to parenting classes.
>
> [*Booker*]: Okay.
>
> *The Court*: Leaving him behind in the State of Michigan is evidence of poor parenting skills. [Respondent's counsel], I'll put it on the order.

The referee ordered that respondent "be here once a month. It's not up for conversation. She must be here once a month. … She needs to visit and demonstrate that she is going to make this work or the court will order the filing at that time."

At an April 2010 dispositional review and continued permanency planning hearing, respondent's counsel advised the referee that respondent had "just secured a new employment," and "wasn't given time to come [to Michigan] this morning." Booker testified that petitioner had altered the permanency plan to adoption, but admitted that respondent had "complied with everything except the parenting time." Booker asserted that she last spoke with respondent "yesterday," after not speaking to her since "around the last court hearing." The referee ordered that petitioner file a permanent custody petition. The supplemental petition filed on May 3, 2010 averred regarding respondent:

> 10. [Respondent] . . . is the birth mother of [AXW].
>
> 11. [Respondent] currently resides in South Carolina.
>
> 12. [Respondent] has had two previous terminations prior to this petition being submitted . . . .
>
> 13. [Respondent] last visited [AXW] on (3/19/2009) despite court orders for her to participate in at least once-a-month visitation in Detroit, Michigan.
>
> 14. [Respondent] participated with South Carolina Department of Human Services in order to complete an out-of-state home assessment. South Carolina DHS decided against placement due to several concerns in which they had in respect to [respondent's] involvement in a domestic violent relationship; in addition to, her ability to care for two children with special needs.
>
> A. Specific allegations to terminate

15. [Respondent] participated in an assessment through South Carolina Mental Health Department as recommended by South Carolina DHS. The assessment concluded that it may be difficult for [respondent] to parent [AXW] in addition to [FW, Jr.] as they are both special needs and South Carolina does not have many resources to assist [respondent].

16. Both [FW and respondent] have an extensive history (dating back to 2004) with Child[ren's] Protective Services prior to recent events that brought [AXW] into care.

Booker served as the sole witness at the termination hearing, which respondent attended. Booker testified that she had not contacted respondent for at least three months before the termination hearing, and had not spoken with FW since November 2009. Booker recommended termination of respondent's parental rights because "[AXW] needs permanency and mom hasn't been active in the parent/agency treatment agreement or making any efforts to come visit with [AXW]." She clarified her opinion as follows:

Q. Do you have any indication that the mother would be able to parent him now or any time in the near future?

A. No, I don't because mom is in South Carolina. No parenting time here, I can't say that.

Q. Are you concerned that if he were to be returned to mother today or any time in the near future that he would be at a risk of harm?

A. I'm sorry. I can't—due to her non-compliance as far as the parent/agency treatment agreement and the recommendation from the Department of Human Services in South Carolina, I would say yes.

In cross-examination, Booker conceded that the DHS did not direct respondent to complete additional parenting classes, and that her "main concern" was respondent's failure to visit AXW in Detroit. Booker acknowledged that she did not know whether respondent and AXW had telephone contact, and had made no efforts to speak with FW, Jr.

The referee found termination of respondent's parental rights to AXW warranted pursuant to MCL 712A.19b(3)(c)(*i*)[the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the child's age], (c)(*ii*) [the parent received recommendations to rectify other conditions and had a reasonable opportunity to do so, but failed to rectify the other conditions], (g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that she might do so within a reasonable time given the child's age], and (j) [a reasonable likelihood of harm exists based on the parent's conduct or capacity, that the child will suffer harm if returned to the parent's home]. The referee lastly found that termination of respondent's parental rights would serve AXW's best interests.

II. ISSUES PRESENTED

A. STANDARD OF REVIEW

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground for termination by clear and convincing evidence, the circuit court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). We review for clear error a circuit court's decision to terminate parental rights. MCR 3.977(K). 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 at 356-357. 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). Clear error signifies a decision that strikes us as more than just maybe or probably wrong. *In re Trejo*, 462 Mich at 356.

B. GUIDING PRINCIPLES

Parents possess a fundamental interest in the companionship, custody, care and management of their children, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, 483 Mich 73, 91-92 (opinion by Corrigan, J.); 763 NW2d 587 (2009). In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court reaffirmed and emphasized the constitutionally protected rights of natural parents: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." (Internal quotation and citation omitted). The Supreme Court held in *Stanley* that the Fourteenth Amendment's Due Process Clause required a parental fitness hearing before a state could constitutionally deprive a parent of parental rights. *Id*. at 657-658. Consistent with *Stanley*, our court rules mandate that petitioner bears the burden of proving a respondent's unfitness. MCR 3.977(A)(3). And our Legislature has plainly prescribed that in a child custody dispute between the parent and an agency, "the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." MCL 722.25(1).

The proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The clear and convincing evidence standard is "the most demanding standard applied in civil cases." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

> produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (internal quotation omitted, alteration in original).]

"Evidence may be uncontroverted, and yet not be 'clear and convincing.' Conversely, evidence may be 'clear and convincing' despite the fact that it has been contradicted." *Kefgen v Davidson*, 241 Mich App 611, 625; 617 NW2d 351 (2000) (internal quotation and citation omitted).

C. SUFFICIENCY OF THE EVIDENCE SUPPORTING TERMINATION

We first address the circuit court's reliance on MCL 712A.19b(3)(j) in terminating respondent's parental rights. Termination under this subsection demands clear and convincing proof that, on the basis of respondent's conduct or capacity, a reasonable likelihood exists that the child will suffer harm if returned to respondent's home. Petitioner removed AXW from FW's home because of FW's drug use and subsequent arrest. Although the petition averred that respondent had a "substantiated CPS history for physical abuse," no evidence of record tends to support this allegation, and petitioner did not incorporate a physical abuse assertion against respondent in the final permanent custody petition. No evidence supported that respondent had ever harmed AXW or another child. No evidence showed that respondent lacked the ability to safely parent FW, Jr., who remained in her care and custody throughout the proceedings. Given the absence of any evidence even remotely implying that respondent had harmed AXW or another child, the circuit court clearly erred by terminating her parental rights pursuant to subsection (j).

We next consider the circuit court's invocation of MCL 712A.19b(3)(c)(*i*) as a ground for termination. Subsection (c)(*i*) permits termination of parental rights when the conditions leading to the child's adjudication still exist at least 182 days after entry of "an initial dispositional order," without reasonable likelihood of rectification "within a reasonable time considering the child's age." The conditions that led to AXW's adjudication derived from FW's drug use, arrest, incarceration and lack of stable housing or employment. Those conditions did not involve or implicate respondent, and no evidence suggests that respondent played any role in creating them. The circuit court assumed jurisdiction solely on the basis of FW's plea admitting several of the allegations in a March 2009 petition. Because petitioner presented no evidence concerning respondent at the adjudication, the circuit court clearly erred when it terminated respondent's parental rights under subsection (c)(*i*).

Next, we turn to the trial court's citation of MCL 712A.19b(3)(c)(*ii*), which authorizes termination of parental rights when a "parent has received recommendations to rectify" conditions other than those "that cause the child to come within the court's jurisdiction," but does not rectify the other conditions. The "other conditions" identified in the supplemental petition in this case relate to the South Carolina home study and respondent's failure to visit AXW as ordered by the court. Petitioner's allegations regarding these conditions also form the basis for the circuit court finding termination warranted pursuant to MCL 712A.19b(3)(g), which allows termination when the parent "fails to provide proper care and custody" and no reasonable likelihood exists that she might do so "within a reasonable time considering the child's age."

Because the circuit court considered termination of respondent's parental rights on the basis of different circumstances than those admitted by FW, it could entertain only legally admissible evidence. MCR 3.977(F) instructs, in relevant part:

> 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.
>
> (1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if
>
> (a) the supplemental petition for termination of parental rights contains a request for termination;
>
> (b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:
>
> (i) are true; and
>
> (ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (*l*), (m), or (n); and
>
> (c) termination of parental rights is in the child's best interests. [Emphasis added.]

"If . . . termination is sought under a supplemental petition, the court considers legally admissible evidence and must state its findings of fact and conclusions of law." *Rood*, 483 Mich at 101-102 (opinion by Corrigan, J.). We evaluate the "other conditions" in turn.

A. THE SOUTH CAROLINA HOME STUDY

Because the circuit court found termination of respondent's rights appropriate in light of different circumstances than those admitted by FW at the adjudication, the court should have entertained only legally admissible evidence. MCR 3.977(F)(1)(b). Booker's testimony at the termination hearing repeatedly referenced the South Carolina home study, and the court terminated respondent's parental rights "based upon the testimony . . . presented today." However, the South Carolina home study constituted inadmissible hearsay. MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The home study does not qualify as a record of a regularly conducted activity, MRE 803(6), because no testimony satisfied the foundational requirement of establishing that the home study was prepared in the course of a regularly conducted business activity. *Price v Long Realty, Inc*, 199 Mich App 461, 468; 502

NW2d 337 (1993).[8] Nor was the home study admissible pursuant to the public record exception to the hearsay rule under MRE 803(8): no adequate foundation showed that the home study consisted of "reports, statements, or data compilations . . . of public offices or agencies, setting forth . . . the activities of the office or agency," MRE 803(8)(A); and MRE 803(8)(B) "limits [the admissibility of] public reports of matters observed by agency officials to reports of objective data observed and reported by these officials." *Bradbury v Ford Motor Co*, 419 Mich 550, 554; 358 NW2d 550 (1984). Moreover, the home study was replete with inadmissible hearsay within hearsay, MRE 805, including the report of a "volatile relationship" between respondent and a "paramour." "[H]earsay within hearsay is excluded where no foundation has been established to bring each independent hearsay statement within a hearsay exception." *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990) (lead opinion of Archer, J.).

Despite that the home study clearly embodied legally inadmissible hearsay that the court should not have considered during the termination hearing, neither respondent's trial counsel nor her appellate counsel challenged its admissibility. Appellate counsel instead argues that insufficient evidence, including the home study, justified termination of respondent's parental rights under subsections (c)(*ii*) and (g). Consequently, we now consider whether the information in the home study supplied clear and convincing evidence of respondent's unfitness.

Michigan has enacted the Interstate Compact on the Placement of Children, MCL 3.711 *et seq*., which authorizes the DHS to "obtain the most complete information on the basis of which to evaluate a projected placement before it is made." MCL 3.711, Art I(c). Article III(1) of the compact states:

> No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

This language plainly limits the compact's scope to foster care and preadoption placements.[9] Additionally, Article VIII of the compact provides in relevant part:

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[8] The Supreme Court of Indiana has held similar home visit reports inadmissible under Indiana's business record exception to the hearsay rule, Ind Evid R 803(6), which substantially tracks MRE 803(6). *In Re ET*, 808 NE2d 639, 643-645 (Ind, 2004).

[9] A section of the DHS Children's Foster Care Manual, entitled "Interstate Services Overview," recognizes this constraint:

> The Interstate Compact on the Placement of Children (ICPC) ensures protection and services to children placed across state lines for foster care (including relative and residential placements) or adoption by establishing procedures that guarantee placements are safe, suitable and able to provide proper

> This compact shall not apply to:
>
> (a) The sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's guardian and leaving the child with any such relative or nonagency guardian in the receiving state.

In *McComb v Wambaugh*, 934 F2d 474,482 (CA 3, 1991), the United States Court of Appeals for the Third Circuit carefully examined the history and language of the ICPC, and concluded that it "was intended only to govern placing children in substitute arrangements for parental care. Thus, the Compact does not apply when a child is returned by the sending state to a natural parent residing in another state." See also *In re Dependency of DF-M*, 157 Wash App 179, 188-191; 236 P3d 961 (2010).

The South Carolina home study prepared pursuant to the ICPC viewed respondent's home as suitable, but recommended against placement on the basis of information relayed to the South Carolina caseworker by an unnamed person from "Pee Dee Mental Health." The unnamed person voiced concern that respondent was involved with a paramour with whom she argued, and who called respondent a "[b]itch." In light of this information, the South Carolina caseworker expressed, "The Agency feels like getting another child needing mental health services would be too much for [respondent] to handle at this time."[10] Booker construed this as a negative home study.

The South Carolina home study undisputedly played a major role in the subsequent course of the child protective proceedings and in Booker's recommendation to terminate respondent's parental rights. Shortly after placing the home study in evidence at the January 2010 dispositional hearing, Booker asked that the court authorize a termination petition. On the basis of the home study, the referee ordered "supervised agency only visits" with AXW and expressed that respondent should relocate to Michigan. At the permanency planning hearing, the referee emphasized that "you understand that it's OTI that says I can't place, I can't place." And at the termination hearing, Booker reiterated her concerns for AXW's safety if returned to respondent "due to her non-compliance as far as the parent/agency treatment agreement and the recommendation from the Department of Human Services in South Carolina."[11]

We recognize that given the prior terminations of respondent's parental rights, the DHS harbored legitimate concerns with respect to respondent's parental fitness. "However, courts, not administrative agencies or individual social workers, are the ultimate evaluators of a parent's

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> care given the needs of the child. . . . [Children's Foster Care Manual, FOM 931, available at <http://www.mfia.state.mi.us/olmweb/ex/html/>, accessed 5/17/11.]

[10] As discussed, *infra*, the clinic director of the Pee Dee Mental Health Center subsequently opined that respondent had no "Mental Health issues that would keep her from getting custody of her child."

[11] As discussed in greater detail, *infra*, Booker had testified in April 2010 that respondent had complied "with everything except the parenting time."

ability to care for [her] child, and the ultimate decision-makers as to whether placement with a fit parent is in the child's best interests." *In re Dependency of DF-M*, 157 Wash App at 192-193. The South Carolina home study raised no concerns about respondent's ability to properly and safely care for FW, Jr. The South Carolina social worker's "feel[ing] like getting another child needing mental health services would be too much for [respondent] to handle at this time" hardly qualifies as clear and convincing evidence of parental unfitness. And although the social worker conveyed unease about respondent's relationship with a paramour, Booker acknowledged that this information fell short of the clear and convincing standard when she expressed concern that she needed "clarification in regards to who the allegations were against."

Our review of the proceedings substantiates that the circuit court and court referees inappropriately relied on the subjective judgments reached by a South Carolina social worker, which in turn were predicated on hearsay information relayed by unidentified persons. The home study incorporated no objective facts substantiating a ground for termination of respondent's parental rights. On the contrary, the home study supported that respondent lived in suitable housing, possessed a legal source of income and had complied with the Michigan court's order for a psychological evaluation.

Our Supreme Court explained in *In re Rood*, 483 Mich at 90 (opinion by Corrigan, J.), "[a]ppellate courts are obliged to defer to a trial court's factual findings at termination proceedings if those findings do not constitute clear error." "A finding is 'clearly erroneous' if 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." *Id.* at 91 (internal quotation and citation omitted). Here, the circuit court's finding that the home study cast respondent in an unfavorable light qualified as clearly erroneous, because the home study contained no information calling into question respondent's fitness to parent AXW. Instead, the home study supported that respondent was actively and successfully parenting FW, Jr. In summary, we are left with the definite and firm conviction that the circuit court mistakenly relied on the home study in terminating respondent's parental rights.

B. PARENTING TIME

Lastly, we must address whether respondent's failure to abide by the referee's parenting time order constituted clear and convincing evidence of her unfitness, justifying termination of her rights under subsection (c)(*ii*) or (g). Our Legislature has mandated that in child protective proceedings the court must permit "the juvenile's parent to have frequent parenting time," unless "parenting time, even if supervised, may be harmful" to the child. MCL 712A.13a(11). The court rules echo the liberal parental contact philosophy: "Unless the court suspends parenting time pursuant to MCL 712A.19b(4), or unless the child has a guardian or legal custodian, the court must permit each parent frequent parenting time with a child in placement unless parenting time, even if supervised, may be harmful to the child." MCR 3.965(C)(6)(a).

The Children's Foster Care Manual sets forth in relevant part the following in a section aimed at "[d]eveloping the service plan":

> Issues pertaining to a schedule of parenting time must be discussed with the parent(s) and an agreement reached as to a parenting time schedule.

> *Scheduling of parenting time must be done with primary consideration for the parents' time commitments which may include employment and mandated service requirements.* The supervising agency must institute a flexible schedule to provide a number of hours outside of the traditional workday to accommodate the schedules of the individuals involved. Barriers to parenting time are to be identified and where possible, resolved. [Children's Foster Care Manual, FOM 722-6, available at <http://www.mfia.state.mi.us/olmweb/ex/html/>, accessed 5/17/11 (emphasis added).]

We first observe that we have located no legal authority for the referee's January 2010 directive, "Moving back to Michigan is an order." Neither statutory authority nor case law supports that a circuit court may condition preservation of parental rights on a parent's relinquishment of legal residence in another state. The constitutional right to travel encompasses the right to "migrate, resettle, find a new job, and start a new life." *Shapiro v Thompson*, 394 US 618, 629; 89 S Ct 1322; 22 L Ed2d 600 (1969), overruled in part on other grounds in *Edelman v Jordan*, 415 US 651; 94 S Ct 1347; 39 L Ed 2d 662 (1974). Simply put, the circuit court improperly ordered respondent to choose between abandoning an established residence in South Carolina and preserving her parental rights. Similarly, we disagree with the referee's pronouncement that "[l]eaving [AXW] behind in the State of Michigan is evidence of poor parenting skills." Respondent testified that AXW remained with FW pursuant to a custody order. Absent any contradictory evidence, the referee lacked a basis to criticize respondent for the fact that AXW remained in FW's custody after the parents divorced.

The referee aggravated her erroneous approach to respondent's South Carolina residence by imposing a patently unworkable parenting time order. Evidence of record established that respondent traveled to Michigan by car, a journey that consumed at least 13 hours each way. And because the court permitted only supervised parenting times at the agency, respondent's visits likely would have had to occur during regular agency business hours, in other words, weekdays rather than weekends. Thus, the circuit court's parenting time order virtually guaranteed that respondent would spend most of one week each month away from her job. If respondent could not arrange overnight childcare for FW, Jr. in South Carolina, the court's parenting time order obligated that respondent remove FW, Jr. from school so that he could accompany respondent on the visits to Michigan.

Not surprisingly, respondent violated the parenting time order and failed to visit regularly while AXW remained in foster care. Although a parent's disinterest and neglect to visit a child may indeed supply grounds to terminate parental rights, the instant record leaves us with the definite and firm conviction that the circuit court made a mistake when it found termination warranted on this basis. At no point during the proceedings did petitioner produce evidence demonstrating that AXW's placement with respondent would create a "substantial risk of harm to the child's life, physical health, or mental well-being." MCL 712A.19a(5). Rather, Booker acknowledged that respondent properly cared for AXW's brother in South Carolina. Given that no evidence substantiated that AXW would suffer any substantial risk of harm if placed in respondent's care, the circuit court should have returned AXW to respondent at the permanency planning hearing, when Booker conceded that respondent had suitable housing, had done all that was required of her, and remained in regular contact.

Notwithstanding the absence of evidence of respondent's unfitness, petitioner and the circuit court demanded that respondent either move back to Michigan or regularly travel to Michigan to visit her child. "[A] state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the due process clause." *In re B & J*, 279 Mich App 12, 19; 756 NW2d 234 (2008), quoting *In re Valerie D*, 223 Conn 492, 534; 613 A2d 748 (1992). The circuit court's parenting time orders placed virtually insurmountable obstacles in respondent's path. If she complied with the orders, she likely would lose her job in South Carolina, concomitantly placing FW, Jr.'s stability at great risk. Rather than recognizing these realities and employing alternate methods of visitation, such as web cameras, letters, telephones or text messaging, the circuit court persisted in requiring respondent to prove her fitness by complying with orders that lacked a sound legal basis.

From the outset of these proceedings, petitioner and the court seemingly lost sight of the presumption incorporated into Michigan law that AXW's best interests would be served by facilitating placement with his nonoffending parent. During the year that elapsed after AXW's removal from his father's home, petitioner failed to garner any evidence of respondent's current unfitness, and instead learned that respondent lived in a suitable home and safely parented FW, Jr. By imposing utterly unrealistic parenting time orders, the circuit court thwarted reunification rather than striving to accomplish it. Because our review of the record does not reveal clear and convincing evidence of respondent's unfitness, we conclude that the circuit court clearly erred by terminating respondent's parental rights.

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

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey