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STATE OF MICHIGAN

COURT OF APPEALS

In re O'BRIEN/CUDNEY, Minors.

UNPUBLISHED
September 10, 2020

No. 350245
Oakland Circuit Court
Family Division
LC No. 19-869478-NA

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-mother, LR, appeals as of right the trial court's order terminating her parental rights to the minor children, GLO and KEC, at the initial dispositional hearing pursuant to MCL 712A.19b(3)(g) (failure to provide proper care or custody despite a financial ability to do so), (i) (parental rights to another child were terminated due to serious and chronic neglect or physical or sexual abuse), and (j) (reasonable likelihood of harm if children returned to the parent's care). We affirm.

I. BACKGROUND

Respondent has four children, of whom only GLO and KEC are at issue in this appeal. Plaintiff previously voluntarily relinquished her parental rights to the two other children. Respondent is the children's sole caregiver. In early 2018, respondent lost her employment and housing. She placed many of her personal belongings, including her identification, the children's birth certificates, and their social security cards, in a storage unit. Unfortunately, plaintiff failed to pay a rental fee, whereupon those belongings were disposed of. She sought and received assistance from two agencies, and she moved herself and the children to Oakland County in order to receive funding from those agencies. At the time, GLO was two years old and KEC was four months old. With the funds she was provided, respondent and the children moved into a Red Roof Inn, where they remained for four months.

In August of 2018, Oakland County Child Protective Services ("CPS") received a complaint that the children were being unsupervised and neglected, respondent was engaging in prostitution out of the hotel room, and respondent was abusing drugs. Respondent tested positive for marijuana and cocaine on two separate drug tests administered three days apart. Respondent

admitted that she used marijuana infrequently, but denied doing so around the children. She provided the CPS investigator with an expired medical marijuana card. Respondent also disclosed that she had been diagnosed with post-traumatic stress disorder ("PTSD"), attention deficient hyper activity disorder ("ADHD"), bipolar disorder, and borderline personality disorder. Respondent admitted that she was not currently participating in any mental health services. CPS discovered that the funding respondent was receiving would soon be exhausted and could not be renewed, and respondent had no viable long-term plans. The investigator opined that the children appeared to have an appropriate place to sleep at the Red Roof Inn, no concerning marks or bruises, and food to eat.

Shortly after CPS became involved, respondent was evicted from the Red Roof Inn for complaints of noise, people coming into and out of her hotel room, and claims of prostitution. However, the CPS investigator admitted that she did not talk to any representative of Red Roof Inn.[1] With the financial assistance of another Red Roof Inn resident, "Eddie" (later identified as Eddie Phelps), and respondent's sister, respondent spent a few nights at a Motel 6, and then she moved to a Knight's Inn with the children. Respondent suggested to the CPS investigator that she was working on a plan with Phelps. The CPS investigator opined that the children appeared to have a place to sleep at the Motel 6, but they were dirty. CPS originally intended to help respondent obtain copies of the children's birth certificates so that she could apply for housing. However, the investigator testified that after respondent tested positive for marijuana and cocaine twice,[2] petitioner filed a petition seeking termination of respondent's parental rights at the initial disposition pursuant to MCL 712A.19b(3)(g), (i), and (j).

After the preliminary hearing, the children were placed in a licensed foster home where they remained throughout the proceedings. Respondent was offered supervised parenting time at the agency twice a week. Proceedings were delayed to permit compliance with the Indian Child Welfare Act ("ICWA"), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*. Finally, following a hearing in March 2019, the trial court found, by a preponderance of the evidence, that it could exercise jurisdiction over the minor children. The court also concluded that statutory grounds for termination of respondent's parental rights had been established by clear and convincing evidence. A best-interest hearing was held over three days between June and July 2019, after which the trial court found that termination of respondent's parental rights was in the children's best interests. This appeal followed.

II. PRINCIPLES OF LAW AND STANDARDS OF REVIEW

> Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional. The adjudicative phase determines whether the

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[1] The allegation of prostitution was never ultimately supported by any non-hearsay evidence. Indeed, as our dissenting colleague observes, it was seemingly only supported by *double* hearsay. We disagree with our dissenting colleague's belief that we are relying on this allegation for anything more than background.

[2] It would later turn out that the CPS investigator was mistaken about the first test, which was only positive for marijuana.

> probate court may exercise jurisdiction over the child. If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child. [*In re Brock,* 442 Mich 101, 108; 499 NW2d 752 (1993).]

To acquire jurisdiction over the children, petitioner must establish by a preponderance of the evidence that one of the statutory grounds in MCL 712A.2(b) has been established. *Id*. at 108-109. The child's situation must be examined as of the time the petition is filed. *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004). " 'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross,* 281 Mich App 737, 740; 760 NW2d 314 (2008).

"Upon a finding of jurisdiction, the probate court has several options," including terminating the parent's parental rights if the statutory elements in MCL 712A.19b(3) are established by clear and convincing evidence. *Brock*, 442 Mich at 111-112; *In re Trejo,* 462 Mich 341, 355; 612 NW2d 407 (2000). "Once a statutory ground for termination is established by clear and convincing evidence, the trial court must terminate parental rights unless it finds from the whole record that termination clearly is not in the child's best interests." *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004). Whether termination of parental rights is in a child's best interests must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

This Court reviews the trial court's findings of fact for clear error. MCR 3.977(K); *In re BZ*, 264 Mich App at 296. This Court also reviews for clear error whether the trial court properly decided to exercise jurisdiction in light of its findings of fact. *Id*. at 295. The trial court's best interests finding is likewise reviewed for clear error. *Id*. at 301. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id*. at 296-297. In general, a trial court's conclusions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001).

III. JURISDICTION OVER THE CHILDREN

Respondent first challenges the trial court's exercise of jurisdiction over the children. We find no error warranting reversal. The trial court exercised jurisdiction under MCL 712A.2(b)(1) and (2), which provide that a court has jurisdiction over a child in the following circumstances:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship . . .
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

As discussed above, at the time the petition was filed, respondent had been living on charity for several months and those funds were about to be terminated. Although the children were apparently being clothed and fed, respondent had not used the time to devise any kind of long-term plan, obtain new employment or an alternative source of income, or find stable housing. Rather, respondent was abusing drugs, one of which might have been pursuant to an expired medical marijuana card, but the other was certainly not a substance respondent could plausibly claim she might have believed to be legal or safe.[3] Respondent was evicted from the hotel for repeated complaints of noise and possible prostitution. Although the latter was not, seemingly, confirmed in any way, respondent's eviction was at least some evidence that the hotel did not consider her conduct, whatever it was, to be benign. Importantly, there would have been no plausible way respondent could have engaged in any of the above activities outside the presence of the children.

Although respondent obviously did not have complete control over all of her circumstances, she certainly had a choice whether to engage in drug abuse or possible prostitution. We are not definitely and firmly convinced that the trial court erred by finding a preponderance of evidence that respondent was able to provide an environment for the children that was at least safe while she sought an environment that was more stable, but instead neglected to do so. MCL 712A.2(b)(1). At the time the court assumed jurisdiction of the children, there was sufficient evidence to conclude that respondent had not provided proper care and custody for the children and that there existed a likelihood of continuing harm to the children.

IV. REASONABLE EFFORTS

Respondent argues that petitioner failed to make reasonable efforts to avoid removal of the children. We disagree.

As an initial matter, there is a difference between removal and reunification. Technically, reunification is impossible if there has been no removal. As our dissenting colleague recognizes, prior to filing the petition, the CPS investigator provided respondent with a list of shelters and churches to call regarding housing. The CPS investigator also discussed food resources with respondent. CPS was clearly endeavoring to work with respondent. Respondent argues that all of her problems stemmed from her lack of proper identification, and petitioner neglected its duty to help her obtain replacement identification, with which she could have replaced her medical marijuana card, applied for employment, and sought secure housing. However, the agency providing respondent with funds had apparently already been helping her obtain replacement identification, she did have some kind of "paper" identification in August of 2018, and CPS was attempting to obtain identification for the children until respondent tested positive for marijuana *and* cocaine. Pursuant to MCR 3.965(C)(4), "the child's health and safety must be of paramount concern to the court" when determining whether reasonable efforts had been made. In light of the efforts CPS did make until respondent tested positive for drugs and was evicted from the Red Roof

[3] Again, it would later turn out that respondent only tested positive for cocaine once, but at the adjudicative hearing, the CPS investigator indicated that respondent tested positive for marijuana and cocaine on both tests. Whether the trial court properly assumed jurisdiction obviously depends on what the trial court knew at the time.

Inn, we do not find clear error in the determination that petitioner's efforts to avoid removal were reasonable.

Our dissenting colleague largely focuses on the fact that petitioner made no efforts at *reunification*. As our dissenting colleague observes, "[r]easonable efforts to reunify the child and family must be made in all cases," absent certain aggravating circumstances. MCL 712A.19a(2). However, this Court has explained that reunification services are not required where, as here, the initial petition seeks termination from the outset (and, as we will discuss, certain other conditions are met). *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013). Our Supreme Court precedent does not seem to contradict *Moss*, because the cases we can find involve subsequent termination petitions filed after proceedings, rather than initial termination petitions. See *In re Rood*, 483 Mich 73, 77-88; 763 NW2d 587 (2009); *In re Mason*, 486 Mich 142, 147-149; 782 NW2d 747 (2010); *In re Hicks/Brown*, 500 Mich 79, 83-84; 893 NW2d 637 (2017).

Moss relied on MCR 3.977(E), under which reunification efforts are *not* to be made if:

> (1) the original, or amended, petition contains a request for termination;
>
> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
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> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
>
> (a) are true, and
>
> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), or (m);
>
> (4) termination of parental rights is in the child's best interests. [See *Moss*, 301 Mich App at 91-92.]

We note that MCR 3.977(E) lacks conjunctions between the enumerated conditions, making it difficult to determine on its face whether all of the conditions or only one of the conditions must be met. However, our Supreme Court has long held that the courts must sometimes read the proper conjunction into a statute to effectuate the intent of the Legislature. See *Elliott Grocer Co v Field's Pure Food Market*, 286 Mich 112, 115-116; 281 NW 557 (1938). The *Moss* Court implicitly concluded that all of the requirements were necessary. *Moss*, 301 Mich App at 91-92. We find no reason not also to read the word "and" into the end of each enumerated condition. Nonetheless, we believe it would be helpful for our Supreme Court to provide further clarity.

As noted, the initial petition requested termination of both children, satisfying MCR 3.977(E)(1). As we discuss below, and as our dissenting colleague seemingly does not dispute, termination was in the children's best interests, satisfying MCR 3.977(E)(4). The somewhat more confusing provisions are (2) and (3), each of which contain their own timing requirement. The

reason for the confusion is simply that the initial hearing was never really concluded for seven months, due to the need to resolve ICWA concerns. We appreciate our dissenting colleague's concerns that during that time, the children were essentially in limbo and petitioner was not offering anything to respondent. However, ultimately, the trial court did find grounds for jurisdiction after a contested hearing, and it did find grounds for termination at the same hearing. Thus, MCR 3.977(E)(2) and (3) are also satisfied. Pursuant to the court rule, reunification efforts were not required.

Our dissenting colleague goes on to argue that petitioner had no right to seek initial termination. We recognize that this Court has the discretionary authority to identify and address issues not argued by the parties. *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002); *Paschke v Retool Industries (On Reh)*, 198 Mich App 702, 705; 499 NW2d 453 (1993) (emphasis in original), rev'd on other grounds 445 Mich 502; 519 NW2d 441 (1994). Nonetheless, parties are generally obligated to provide some kind of argument in order to entitle them to appellate consideration. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). We are not persuaded that the record or the briefs in this matter are sufficient to warrant straying so far afield from the parties' actual arguments. We conclude that petitioner was not obligated to provide reunification services,[4] and the trial court did not clearly err when it found that the children came within its jurisdiction and that reasonable efforts had been made to avoid removal.

V. GROUNDS FOR TERMINATION

Respondent argues that the trial court erred in finding a statutory ground for termination of her parental rights established by clear and convincing evidence. We disagree. The trial court terminated respondents' parental rights pursuant to MCL 712A.19b(3)(g), (i), and (j), which permit termination of parental rights under the following circumstances:

> (g) The parent, although, in the court's discretion, financially able to do so, 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.
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> * * *
>
> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights.
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> (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.

[4] We do recognize that, as our dissenting colleague observes, there are some inconsistencies in the trial court's orders, but no argument has been made that petitioner violated a court order.

We note as an initial matter that, insofar as we can determine from the record, respondent voluntarily relinquished her parental rights to her two older children. Furthermore, the prior petition resulting in those relinquishments was apparently based on respondent leaving the children in the care of their grandparents and using marijuana. The record is utterly devoid of any evidence that we can find from which it could be found that respondent's parental rights to any prior children were "terminated due to serious and chronic neglect or physical or sexual abuse." The trial court unambiguously erred in finding MCL 712A.19b(3)(i) established by any quantum of evidence. Furthermore, it is obvious that respondent was not, in fact, "financially able to" provide proper care or custody for the children, so the trial court equally unambiguously erred in finding MCL 712A.19b(3)(g) established. However, only one ground for termination must be established, so any error in finding any other grounds is necessarily harmless. See *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

In addition to the facts already discussed above, it was later determined that although the children had initially appeared physically fine when they were first seen in August of 2018, they were both behind on their immunizations and their well-child checkups. They were bitten by bedbugs after moving out of the Red Roof Inn. Although respondent only tested positive for cocaine once, contrary to the testimony at the adjudication hearing, and although marijuana is now legal for recreational use, the fact remains that neither are healthy to use in the presence of children. Respondent either used drugs in the presence of the children, or she left them unattended for the purpose of using drugs. Furthermore, the legality of marijuana aside, respondent clearly has a history of using it irresponsibly. In addition to using them in the children's presence, she did so despite knowing she was under CPS scrutiny. Furthermore, one of the children tested positive for marijuana at birth. Despite receiving support for several months, respondent failed to make use of the opportunity to develop a plan for caring for the children, or any indication of longer-term stability. The evidence indicated that respondent had multiple serious mental health issues for which she was not receiving treatment.

The question is a very close one, and we have some doubt that we would have arrived at the same conclusion as the trial court. However, doubt about an outcome does not, by itself, establish that it was wrong. See *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992) ("doubt about credibility is not a substitute for evidence of guilt"). Even if we were to review this matter de novo, we would still be obligated to recognize that the trial court was in the better position to assess the witnesses' credibilities. See *Matter of Loyd*, 424 Mich 514, 535; 384 NW2d 9 (1986). Our deference to the trial court is not blind, but we cannot reverse simply because we do not believe we would have reached the same conclusion. *Beason v Beason*, 435 Mich 791, 803-804; 460 NW2d 207 (1990). It follows that under the clear error standard of review, we must have more than just some misgivings to reverse on a close evidentiary question. In light of the above evidence, we are therefore constrained to conclude that the trial court properly found grounds for termination established by clear and convincing evidence under MCL 712A.19b(3)(j).

We recognize that respondent has argued that other evidence demonstrated her ability to achieve stability, a steady income, and a safe environment. Specifically, in September 2018, approximately one month after the children were removed, she moved into a home with Phelps, whom she meet at the Red Roof Inn in July 2018. She also asserts that she became gainfully employed as a caregiver for Phelps's mother. However, none of this evidence was presented during the statutory-grounds hearing. Evidence of this nature was presented for the first time at

the best-interest hearing four months later. At no time did respondent move to reopen proofs after the conclusion of the statutory-grounds phase. In any event, even if the court had been made aware of respondent's new living arrangement during the combined hearing, it is unclear that this would have altered the outcome. As explained in greater detail below, evidence that respondent began cohabitating with a man she had only known for a month is somewhat less compelling than respondent suggests. Indeed, this evidence could be considered more indicative of respondent's impulsivity than her ability to achieve lasting, long-term stability.

Respondent also reiterates that petitioner failed to assist her in replacing her lost identification documents and obtaining a state identification card. It is not clear to us that petitioner was specifically obligated to do so. Moreover, respondent takes the position that petitioner *created* the conditions leading to the removal of the children by, implicitly, intentionally refusing to help her obtain identification documents. While petitioner could have done more, and perhaps it would have been better if petitioner did do more, we do not think the evidence supports any argument that petitioner acted in bad faith. Respondent also argues that termination was premature because she was not provided with reunification services, but reunification services are not required where termination is the agency's goal. *In re Moss*, 301 Mich App at 90-91; *In re HRC*, 286 Mich App at 463. Thus, MCR 3.977(E)(1) provides that reunification efforts are not required where "the original, or amended, petition contains a request for termination." Accordingly, when petitioner exercised its discretion and filed a petition seeking termination of respondent's parental rights at the initial disposition, and reunification was clearly not the goal, petitioner was not required to provide respondent with any reunification services.

In summary, the trial court did not clearly err in finding statutory grounds for termination established under MCL 712A.19b(3)(j). The trial court was therefore obligated to terminate respondent's parental rights unless doing so was not in the children's best interests.

VI. BEST INTERESTS

Respondent argues that termination of her parental rights was not in the children's best interests. We disagree.

When determining whether termination of parental rights is in a child's best interests, the court may consider numerous factors, including the child's bond to the parent; the parent's parenting ability; the child's need for permanency, stability, and finality; and the advantages of a foster home over the parent's home. *In re Olive/Metts Minors,* 297 Mich App 35, 41-42; 823 NW2d 144 (2012). The court may also consider psychological evaluations, the child's age, and a parent's history. *In re Jones,* 286 Mich App 126, 131; 777 NW2d 728 (2009).

Respondent contends that termination of her parental rights was not in her children's best interests because a strong bond existed between her and the children. The court acknowledged this bond, but it concluded that it was overshadowed by respondent's lack of stability, her continued drug use, and her untreated mental health issues. Kathy Spatafora, the clinical psychologist who evaluated respondent, opined that in light of respondent's instability, continued drug use, and untreated mental health issues, reunification would not be in the children's best interests. Spatafora acknowledged that respondent had made some recent progress, which Spatafora weighed heavily in respondent's favor. However, Spatafora nevertheless believed that

in light of respondent's long history of instability, her prior terminations, the services previously offered, and respondent's continued difficulty exercising sound judgment, it would be highly premature to conclude that respondent could sustain her progress for long. Spatafora further opined that in light of the children's young ages, any bond between respondent and her children would be adversely affected during this period. Additionally, the evidence at the best-interests hearing showed that respondent had made some efforts to obtain mental health treatment, but she remained untreated, and instead she was continuing to use marijuana as a coping strategy. Although marijuana is now legal, we do not find it inappropriate for the trial court to be concerned that respondent was inexpertly self-medicating with a substance over which she had already demonstrated a long history of poor control.

As alluded to above, respondent claims to have achieved stability and permanency by moving in with her boyfriend, Phelps, and she was gainfully employed as a caregiver for her boyfriend's mother. To respondent's credit, the evidence seemingly indicates that Phelps has no criminal history and no drug use issues. The trial court reasonably worried that respondent's apparent stability was illusory, or at least not convincingly proven, because it was contingent upon her continued relationship with Phelps. It is somewhat concerning that respondent seemingly attached herself to Phelps after knowing him at the Red Roof Inn for a short time and just when she was being evicted. Respondent had not attained any independent stability. Furthermore, there was direct evidence that the relationship was not stable. The caseworker testified that respondent and Phelps had experienced a brief break-up that resulted in respondent moving to Hillsdale for a week. Respondent had also confided in the caseworker that Phelps was not particularly supportive of respondent during the child protective proceeding. Further, respondent was still married to her estranged husband and had yet to file divorce papers. Thus, there was ample support for the trial court's conclusion that respondent's professed stability was questionable.

The record clearly supported a finding that respondent had not attained the stability necessary to parent two very young children. By contrast, the children were thriving in their foster home. The children were placed together and the foster mother had expressed an interest in adopting both children. Although the children did not have any special needs, GLO had some medical and dental issues for which the foster mother ensured he was receiving proper treatment. When balancing the best-interest factors, a court may consider the advantages of a foster home over the parent's home and the possibility of adoption. *In re Olive/Metts*, 297 Mich App at 41-42. It is clearly apparent that GLO and KEC were both placed in a stable home and were progressing, and that this progress could continue as the foster parent had indicated a willingness to plan long term for the children.

Considering the foregoing, termination of respondent's parental rights was the best avenue by which these very young children would be afforded the greatest opportunity to achieve permanency and long-term stability. Accordingly, the trial court did not clearly err when it found that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Michael J. Riordan
/s/ Amy Ronayne Krause

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S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

In re O'BRIEN/CUDNEY, Minors.

UNPUBLISHED
September 10, 2020

No. 350245
Oakland Circuit Court
Family Division
LC No. 19-869478-NA

Before: RIORDAN, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

SHAPIRO, J. *(dissenting)*.

I would reverse the termination of respondent's parental rights and so respectfully dissent. I agree with my colleagues that the evidence presented at the statutory basis hearing did not support termination of respondent's parental rights under MCL 712A.19b(3)(g) and (i). I disagree with their view that the department made reasonable efforts to reunify this family and would reverse. I also disagree with the majority's conclusions that termination under MCL 712A.19b(3)(j) was justified by clear and convincing evidence and that termination was in the best interests of the children. Accordingly, I would reverse and remand for further proceedings.

I. REUNIFICATION EFFORTS

"Under Michigan's Probate Code, the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights. *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2).

To satisfy that requirement, "the Department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification. *Id*. at 85-86, citing MCL 712A.18f(3)(d) (stating that the service plan shall include a "[s]chedule of services to be provided to the parent . . . to facilitate the child's return to his or her home")."

When the children were removed on August 14, 2018, there was no evidence that respondent had *ever* harmed them either intentionally or as a matter of neglect. The children, ages 2 ½ years and 8 months at removal, had been in their mother's care since birth. Given that the department described both children as healthy, and developing normally and without any signs of

injury or mistreatment, it is difficult to see any justification for the department's aggressive stance in these proceedings.[1] Nevertheless, at the very first proceeding—a preliminary inquiry regarding removal—the department and the trial court withheld all reunification services despite the lack of statutory authorization for such an action.[2] As a result, respondent was never offered services during the six months between removal and the long-overdue completion of the preliminary hearing. The only reunification effort made by the department was to allow respondent to have supervised visitation when it was ordered to do so by the court.[3]

MCL 712A.19a(2) makes clear that "reasonable efforts must be made in *all* cases" except those that fall within a narrow set of circumstances involving serious abuse. (Emphasis added). Those circumstances are set forth in MCL 712A.19a(2)(a), (b), (c) and (d). The requirements of subsections (b), (c) and (d) are plainly not met here. The circumstances set forth in those provisions are:

> (b) The parent has been convicted of 1 or more of the following:
>
> (*i*) Murder of another child of the parent.
>
> (*ii*) Voluntary manslaughter of another child of the parent.
>
> (*iii*) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.
>
> (*iv*) A felony assault that results in serious bodily injury to the child or another child of the parent.
>
> (c) The parent has had rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to that termination of parental rights.
>
> (d) The parent is required by court order to register under the sex offenders registration act. [MCL 712A.19a(2)(b)–(d).]

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[1] At the August 14, 2018 removal hearing, the L-GAL described the children as "healthy [and] doing fine." The case services worker who filed the petition stated at the hearing that the children had clothing, food and a place to sleep. The referee's report of that hearing stated that the children appeared to be "reasonably well fed and have not suffered injury."

[2] Whether there was even an order allowing a denial of services is not even clear. The trial court's order of August 14, 2018 following the preliminary inquiry on that date stated: "The petition is not authorized pending resumption of the preliminary hearing."

[3] Astonishingly, the department requested that respondent be denied visitation altogether.

None of these apply here. Moreover, these factors make clear that a lack of reunification efforts is permitted only in the most egregious of circumstances: murder, manslaughter, felonious assault, sexual offender status or a prior *involuntary* termination.

The remaining exception set forth in MCL 712.19a(2)(a) provides that an immediate termination petition is to be filed if the child "has been subjected to aggravated circumstances as provided in [MCL 722.638(1) or (2)]." The department relies solely on MCL 722.638(1)(b)(*ii*), which reads:

> (b) The department determines that there is risk of harm, child abuse, or child neglect to the child and either of the following is true:
>
> * * *
>
> (*ii*) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state, the parent has failed to rectify the conditions that led to the prior termination of parental rights, and the proceeding *involved abuse* that included 1 or more of the following:
>
> (A) Abandonment of a young child.
>
> (B) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
>
> (C) Battering, torture, or other severe physical abuse.
>
> (D) Loss or serious impairment of an organ or limb.
>
> (E) Life-threatening injury.
>
> (F) Murder or attempted murder.
>
> (G) Voluntary manslaughter.
>
> (H) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter. [Emphasis added.]

The record is unclear as to which aggravated circumstance the department and court were relying on. However, since plaintiff was never accused of any of the actions set forth in (b)(*ii*)(B)–(H), the claimed basis must have been subsection (b)(*ii*)(A), which refers to abandonment of a young child. The department points out that respondent voluntarily surrendered her parental rights to two children 15 years earlier when she was 21. According to the department, respondent pleaded to having abandoned her children by leaving them with her mother for some period of time. However, MCL 722.638(1)(b)(*ii*) does not state that any voluntary termination based on abandonment is grounds to deny services in a later case. Subsection (b)(*ii*) also requires that the basis for the prior voluntary termination must have risen to the level of "abuse." MCL 722.602 defines "child abuse" as "harm or threatened harm to a child's health or welfare . . . through

nonaccidental physical or mental injury; [or] sexual abuse . . . ." There is no record evidence that the children were harmed or threatened with harm while in their grandmother's care.[4] My colleagues in the majority agree with me on this point. Their opinion states that "[t]he record is utterly devoid of any evidence that we can find from which it could be found that respondent's parental right to any prior children were 'terminated due to serious and chronic neglect or physical or sexual abuse.' "[5]

There is one other basis to accept a termination petition at the outset, although the department does not rely on it. MCL 722.638(3) authorizes the department to do so as a matter of discretion and sets forth the required procedure. If the department wishes to file a discretionary (as opposed to mandatory) request for termination and disposition, it must first "hold a conference among the appropriate agency personnel and agree upon the course of action." The statute further requires that "[t]he department shall notify the attorney representing the child of the time and place of the conferences and the attorney may attend." The record does not indicate that such a conference took place and if it did occur it is clear that notice to respondent's counsel was not provided since the ruling on the initial petition and denial of services occurred before plaintiff was even assigned counsel. Thus, MCL 722.638(3) cannot provide a basis for the department's action and the court's authorization to file for immediate termination.

In sum, any claim that an immediate termination petition was required or permitted by statute fails. The grounds simply are not present. Given that there was no basis to seek immediate

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[4] It appears that the record of those prior proceedings was never admitted into evidence or even produced for the court to review.

[5] A review of cases in which a dispositional termination and denial of services were found to be proper reveals that they involved circumstances far beyond those present here. See e.g., *In re Moss*, 301 Mich App 76, 81-82; 836 NW2d 182 (2013) (mother had a history of refractory psychosis in which she heard voices telling her to harm her children and she attempted to suffocate her daughter); *In re AMAC*, 269 Mich App 533, 534; 711 NW2d 426 (2006) (mother previously voluntarily surrendered her right to two children after attempting to strangle them to death); *In re Thompson*, 318 Mich App 375, 376; 897 NW2d 758 (2016) (termination in initial petition based on the 2006 and 2013 deaths of the children's infant siblings due to unsafe sleeping conditions); *In re Medina*, 317 Mich App 219, 222; 894 NW2d 653 (2016) (termination at disposition where father was convicted of CSC-I against a 9-year-old); *In re Powell/Hammond*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2009 (Docket No. 289139), p 2 (mother subjected children to physical abuse and her niece to "severe physical abuse"); *In re Bembry/Jackson*, unpublished per curiam opinion of the Court of Appeals, issued November 16, 2010 (Docket Nos. 296360; 296361), pp 1-2 (children were locked in a small basement room for years, not permitted to attend school, rarely fed and beaten with sticks, boards, and extension cords, causing scars and marks); *In re Wilkerson*, unpublished per curiam opinion of the Court of Appeals, issued February 14, 2013 (Docket No. 312197), p 1(children found with multiple injuries and mother pleaded guilty to child abuse); *In re Mundy*, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2006 (Docket No. 270892), p 1 (boyfriend of mother severely injured child and mother had known of his previously abuse of the child).

termination, it was plain error for the trial court to deny services and other "reasonable efforts" toward reunification. Reasonable efforts at reunification "*must* be made in *all* cases except those involving aggravated circumstances under MCL 712A.19(a)(2)," which in turn refers to the factors in MCL 722.638(1) and (2), as just discussed. *In re Rippy*, ___ Mich App ___. ___ ; ___ NW2d ___ (2019) (Docket No. 347809), slip op at 2 (emphasis added), citing *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

The majority notes that the department made "reasonable efforts," but the efforts it refers to were efforts to avoid removal. Those cannot satisfy the requirement of reasonable efforts at reunification. Indeed, the only "reasonable efforts" noted by the majority are that "[p]rior to filing the petition, the CPS investigator provided respondent with a list of shelters and churches to call regarding housing . . . [and] discussed food resources with respondent." If that constitutes reasonable efforts to reunify then the bar has been set shockingly low. And as respondent points out, and the department does not dispute, many of her housing and food issues were due to the fact that she lacked identification papers for the children and needed therefore to obtain new copies of their birth certificates, a process which since 9/11 is far from simple.[6] The majority notes that the department was assisting respondent in this process, but that they abandoned it because mother had tested positive for marijuana and cocaine in the week immediately following the initial report to the department that respondent and children were living in a motel.[7] I fail to see how failing two drug tests at the very outset of the process justifies cessation of reasonable efforts, and the majority cites no such justification. Rather than assisting respondent with obtaining these critical documents and other services that may have led to reunification, the department and the trial court short-circuited the process by seeking termination at disposition in the initial petition and discontinuing any assistance it was providing to respondent within days of the removal. As the majority points out, "the investigator testified that after respondent testified positive for marijuana and cocaine . . . , petitioner filed a petition seeking termination of rights at the initial disposition,"

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[6] Respondent consistently showed a willingness and ability to seek and benefit from services. She moved to Oakland County in order to receive assistance from Common Ground, an agency that assists survivors of human trafficking. Common Ground provided respondent with financial aid, and respondent was also receiving some food assistance and Medicaid. The plan was for Common Ground to assist respondent in finding an apartment, but her lack of proper identification impeded this process. Indeed, many of respondent's issues were related to her lack of identification for herself and the children since without the proper identification, respondent was unable to seek employment, apply for housing assistance or renew her medical marijuana card. The agency's worker agreed that without proper identification, it would be very difficult to obtain housing or employment. But, after two positive drug tests, each performed within days of removal, the agency chose to cease all services and file a petition seeking termination at the initial disposition.

[7] The investigation began on August 6, 2018 and the drug tests occurred on August 7 and August 10. Respondent conceded that she had smoked marijuana but denied knowingly using cocaine and suggested that the marijuana cigarette she smoked was laced with cocaine.

and so ended services before they had begun. Respondent *never* received any services during the entire pendency of this case other than being permitted to visit her children under supervision.[8]

The procedure followed in this case was also unusual in that the preliminary hearing was repeatedly adjourned and not completed for seven months due to concerns regarding possible tribal affiliation. It is clear therefore that the failure to provide services cannot be justified by the need to move quickly. Removal was on August 14, 2018, and the adjudication did not occur until March 18, 2019. There was more than sufficient time in which to provide services.

Lastly, it is worth noting that while the order issued as a result of the March 18, 2019 combined preliminary examination and adjudication trial found statutory grounds to exercise jurisdiction, it also provided that "reasonable efforts shall be made to preserve and reunify the family." Despite this order, no services were thereafter provided.[9]

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[8] The department did prepare a parent-agency treatment plan, however, it did not provide for any services. The plan consisted solely of directives to the mother to accomplish various tasks such as "develop[ment] of a written budget plan, including rent, bills and expenses" and many others without any assistance from the department. The plan also stated that respondent would participate in a psychological evaluation at the referring agency, but none was scheduled until after the statutory basis hearing on March 18, 2019. Respondent did attend the evaluation.

[9] The orders issued in this case and the case service plan are quite inconsistent regarding whether or not services are to be provided. The initial petition reviewed on August 14, 2018, included a request that respondent's rights be terminated and the trial court signed the form statement at the end of the petition stating that the court conducted a preliminary inquiry and "the filing of this petition is authorized." However, the referee's report to the court makes no mention of the fact that the petition sought termination at disposition. The case service plan issued one month later on October 19, 2018, states that efforts are to be made to reunify and describes adoption as a concurrent plan, not the sole plan. The plan contains a section on reasonable efforts which asked the caseworker the following: "If services were not provided, were not required, or if providing services to the family was not reasonable explain why." The response failed to answer, stating only that respondent "has been offered parenting time twice a week for one hour." And the caseworker checked "N/A" as to whether a mandatory petition is required as well as in response to the questions whether the agency is or is not recommending termination. The document states that a termination petition has not been filed and that a "mandatory petition is [not] required." The next order was signed following the hearing on October 29, 2018, when the completion of the preliminary hearing was adjourned. Paragraph 18 of the form order allows the trial court to check one of two boxes to indicate that "reasonable efforts shall be made to preserve and reunify the family" or "reasonable efforts shall not be made to preserve and reunify the family." Neither box is checked. The order issued following the January 14, 2019 hearing did not check either box on paragraph 18. An order dated January 31, 2019, relating to the January 25th hearing, contained no direction as to whether reasonable efforts should be made and the court did not check the box that would have ordered reasonable efforts toward reunification. The March 4, 2019 order, following the February 20, 2019 hearing, directs that reasonable efforts shall be made. And as noted, the

While respondent's lack of funds and a long-term plan to assure stability required intervention, the agency and the trial court decided far too quickly—at the initial removal hearing—and despite the lack of any evidence of abuse, that this mother did not deserve the opportunity to show that she could improve her circumstances and assure a stable home for the children. The department's unwillingness to continue to assist the respondent in obtaining the necessary identification papers and its request to deny all parenting time from the outset are particularly galling. Given respondent's willingness to participate in assistance and services and the lack of harm to the children, this was by no means a case in which it was proper to seek termination in the initial petition. Because respondent was entitled to reasonable efforts at reunification by the department and was not provided with any, I would reverse.

II. TERMINATION UNDER MCL 712A.19B(3)(J) & BEST INTERESTS

Even if the denial of services did not require reversal, the termination was improper. At no point in this case was it shown that the children could not be returned to their mother because they would be harmed as a result. There was no prior history of abuse and the allegations of neglect were largely overblown. Moreover, by the time that termination was ordered, respondent had taken significant action to address the reasons that the children were removed. She entered a drug program, moved in with her boyfriend and his mother and was employed as a caregiver for the mother. The home was found to be proper and safe. Her boyfriend was employed, had no criminal history and neither the boyfriend nor his mother was on the central registry. Nevertheless, respondent's efforts in obtaining this level of stability was considered inconsequential in the best interests hearing even though the initial problem was her lack of housing and income.

Respondent children were housed, clothed, fed and provided with care by their mother despite the fact that she was without funds and temporarily living in a motel. At the time of removal, the children were healthy and developing normally. There was no testimony that the children had been harmed psychologically.[10] Further, after removal the parenting visits went well and respondent was appropriate with the children at all times. The caseworker who supervised the visitation described respondent's behavior this way:

March 18, 2019 order of adjudication also directs that such services be provided and the order finding a statutory basis continues that order.

[10] The majority repeatedly notes that there was suspicion that respondent may have been engaging in prostitution at the motel, but *no* evidence was ever presented in that regard, and the trial court indicated it would not consider those allegations. The issue was inserted into the proceeding by the CPS investigator who testified she had been told this by someone who had heard it from the hotel manager, i.e., double hearsay. The investigator ultimately conceded that he had never spoken to the manager of the hotel or anyone else who could offer any direct evidence of such activity. According to respondent, the hotel had security cameras but CPS did not make any effort to view the recordings that would, if the hearsay accusation was true, show men coming in and out of her room. The majority's reliance on this unsupported and inadmissible allegation suggests that it is not fully convinced that respondent's other actions were sufficient to justify a denial of services and the termination at disposition.

> [Mother] is very—very appropriate during the parenting time. She feeds the children. She gives them a bath or wipes them down after they're done eating if they're messy. She uses positive reinforcement to get [her son] to eat his food. Sometimes he doesn't want to eat his food. She's appropriate. [The children and respondent] definitely have a strong bond.

She went on to testify that the respondent "brings food [and] clothes" as well as craft activities do with the children.

Finally, the primary circumstances justifying removal, that respondent was living in a motel and had no source of income, ceased to be true months before the preliminary hearing was even concluded. And the secondary circumstance, respondent's use of marijuana, was wholly inadequate to justify taking these children from their mother without even making reasonable efforts to assist respondent and reunify the family. The trial judge was right to be concerned about finality, but making reasonable efforts toward reunification—at least to a parent who has not harmed their children—is a necessary part of doing so.

For these reasons, I conclude that the trial court clearly erred by terminating respondent's parental rights under MCL 712A.19b(3)(j) and by finding that termination was in the children's best interests.

III. CONCLUSION

Without a lawful basis, the department refused to make reasonable efforts to reunify this family. And the trial court—to the degree its various orders can be reconciled—erred by authorizing the request for immediate termination in the initial petition. Putting that error aside, the court's decision to terminate was not supported by clear and convincing evidence. I would reverse and remand for further proceedings.

/s/ Douglas B. Shapiro