

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JAYLA DAWN WILKERSON,
JEREMY RALPHEAL WILKERSON, and
MARVIN LETT, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

SHARLESE LETT,

Respondent-Appellant.

UNPUBLISHED
February 22, 2005

No. 256111
Wayne Circuit Court
Family Division
LC No. 02-409656

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating her parental rights to the minor children Jayla and Jeremy Wilkerson under MCL 712A.19b(3)(a)(ii), (c)(i), (f)(i), (g), and (j), and to the minor child Marvin Lett under MCL 712A.19b(a)(ii), (c)(i), (c)(ii), and (g).¹ We reverse and remand.

The court took jurisdiction over the children on grounds of neglect after Marvin was born positive for cocaine and marijuana. It is important to note that both at the trial level and on appeal the Lawyer-Guardian Ad Litem (GAL) for the minor children opposed termination of respondent's parental rights, a very unusual circumstance. We also note that respondent was her sister's legal guardian from 1990.

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once this has occurred, the court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Id.* at 462; MCR

¹ The order also terminated the parental rights of the unknown father of Marvin. Rights of Jayla and Jeremy's father, James Wilkerson, were not terminated.

3.977(J). This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). 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. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). A decision must be more than maybe or probably wrong to be labeled clearly erroneous. *Sours*, *supra* at 633.

Respondent's parental rights terminated under MCL 712A.19b(3)(a)(ii), (c)(i) and (ii), (f)(i), (g), and (j), which provide:

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

(a) The child has been deserted under any of the following circumstances:

* * *

(ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, and both of the following have occurred:

(i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing

of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(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.

We will discuss each of the grounds for termination in turn.

Desertion - MCL 712A.19b(3)(a)(ii)

The evidence under subsection (a)(ii) was insufficient because respondent never "deserted" the children for ninety-one or more days. The petitioner points to the period of December 2003 through May 2004, when respondent admittedly failed to visit the children. However, during at least part of this time, respondent was in a court-ordered inpatient drug treatment program. She was attempting to address her problems to be able to regain custody of her children. Unfortunately, we lack court reports and other exhibits for this period, so we do not know how much time respondent spent in the inpatient facility. However, some inpatient centers forbade visitation; here, there was an attempt to arrange a visit on May 8, but none could occur because the visits had to be supervised. Clearly, respondent never intended to desert or abandon her children. She was affectionate and appropriate with them during visitations and provided supplies and money for their care throughout the case. Moreover, at the end of the period in question, the court granted her unsupervised visitation. Considering these facts, we find that clear and convincing evidence did not support the trial court's findings on subsection (a).

Child in Guardianship; Failure to Support - MCL 712A.19b(3)(f)(i)

Termination of respondent's parental rights under subsection (f)(i) was also clearly erroneous, as there was no evidence that Jeremy, Jayla, or Marvin were under a guardianship, and no evidence that both (f)(i) and (f)(ii) were satisfied, as the statute requires. The petitioner has admitted that sufficient evidence did not exist under this subsection.

Conditions of Adjudication Continue; Failure to Provide Proper Care or Custody; Reasonable Likelihood of Harm if Children Return to Parents - MCL 712A.19b(3)(c), (g), and (j)

These subsections will be reviewed together because the same evidence was used to support all three.

There is no question that at the time the court took jurisdiction over the children respondent was not providing proper care for her children. However, the record reflects that at the time of the termination trial approximately two years later, she had made significant progress in addressing her problems and was largely in compliance with her treatment plan. As noted, the GAL argued that the statutory grounds were not established. Respondent had adequate housing and was seeking training and a job. She was dealing, apparently successfully, with her drug and mental health issues. The children were closely bonded with respondent; respondent cares for her children and kept in contact with them and their caregiver throughout. In fact, petitioner's first witness, a psychologist, testified that both parents had "great interactions with the children." The foster care supervisor testified that respondent demonstrated "good positive parenting skills" when with her children.

Much was made of respondent's history of problems and relapses. However, this history was well known soon after the court took jurisdiction of the children. If there was a belief that respondent was unable to confront and overcome her problems, why establish the extensive treatment plan for her only to declare that even though she complied with it she still could not regain custody of her children? We agree that the court had to consider whether the needs of the children for permanence and stability outweighed their need for continued contact with respondent, but we conclude that the trial court clearly erred in closing off respondent's options when it did. Sufficient evidence does not exist on this record under these subsections.

Even if the petitioner arguably established a ground for termination of respondent's parental rights, we also find clear error in the trial court's decision on the best interests issue. The children were bonded with respondent and she was appropriate and affectionate with them, she had made significant progress in dealing with her problems and in complying with the treatment plan. We are left with a definite and firm conviction that the trial court committed clear error in finding that termination of respondent's parental rights was in the children's best interests. MCL 712A.19b(5); *Trejo, supra*, at 356-357.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper