STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CALVIN MARKUS GERWATOWSKI, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

HARVEY GIDDENS,

Respondent-Appellant.

UNPUBLISHED
December 2, 2008

No. 283283
Luce Circuit Court
Family Division
LC No. 06-004630-NA

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(*i*). We reverse.

Due to the reliance in these proceedings on the concept of anticipatory abuse and neglect, and in order to obtain a perspective regarding the origin of this case, it is necessary to review the history involving respondent and the Department of Human Services, which occurred before the current petition was initiated. This matter actually begins following injuries sustained to the minor child, Brooklyn Gerwatowski (dob: 11/23/05), involving a hairline fracture to the distal tibia and a buckle fracture of the metatarsal. Brooklyn is the minor child of respondent's girlfriend, Jennifer Gerwatowski, and is not the biological child of respondent, but was in respondent's care at the time the injury was believed to have occurred.[1] The nature of the injury to the five and one-half month old child was deemed unusual and resulted in a diagnosis of possible child abuse.

According to respondent, Brooklyn was in her car seat in his vehicle when she spontaneously projectile vomited with evidence of blood in the mucus. Respondent acknowledged that he responded by tipping her car seat forward quickly due to concerns

[1] Respondent is inaccurately identified as Brooklyn's father in various reports and documents contained in the lower court record.

pertaining to the potential for choking. At the hospital, it was noted that the minor child was not using her right leg. Jennifer and respondent both indicated that they had observed the child using the leg, only on an off and on basis, over the previous two week period. Testing done at Helen Newberry Joy Hospital, including x-rays and CT scan, failed to reveal any abnormal results. The following day, when respondent and Jennifer took the minor child for further evaluation at Butterworth Hospital, the hairline fracture was diagnosed but "[n]o abornomalities" were noted "regarding the child vomiting with blood since her admission to the hospital." Neither respondent, nor the child's mother had an explanation for the origin of the injury, except the child's mother suggested she might have incurred the injury when her young niece tripped over the infant.[2] Jennifer averred that she provided the majority of Brooklyn's care.[3] At this point in time, respondent and Jennifer Gerwatowski had been dating for approximately six weeks. Brooklyn was placed in foster care with a relative of her mother, but was ultimately returned to Jennifer's care and custody. During this period, services were also offered to respondent, who refused to participate or was uncooperative. In addition, the record indicates the confirmation of allegations of neglect pertaining to respondent's older daughters from his previous marriage for permitting them to "drive his pick up truck in the woods" and "drive a go cart on a main road, with no safety certificate and no supervision."[4]

Respondent and Jennifer are the biological parents of Calvin Gerwatowski (dob: February 17, 2007), the child who is the subject of this petition. Immediately following Calvin's birth, the Department of Human Services filed a petition and the child was taken into custody based on allegations of anticipatory abuse or neglect. Shortly after these proceedings initiated, respondent entered a plea of admission to allegations in the petition, which the trial court accepted. Although, respondent admitted that Brooklyn's leg could have been broken when he tipped up her car seat he indicated that, at the time, he believed he was acting correctly and did not really know how the injury occurred. However, at the plea proceedings, respondent acknowledged that Brooklyn, while in his car, was injured due to his mishandling.[5] Respondent

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[2] The examining physician opined, "Whereas it is impossible to say that a 5 year old could not have caused these injuries, it is extremely suspicious."

[3] Although the adult psychological assessment authored by Michael Powers indicates as the "Presenting Problem" that, in addition to the current fracture experienced by the minor child, "[u]pon x-ray examination, it was discovered that he [sic] leg had been broken previously. Harvey did not offer a viable explanation for either of her injuries." However, we have been unable to identify any documents in the lower court record verifying the existence of a prior orthopedic injury. We would further note that this report also incorrectly identifies Brooklyn as the "daughter" of respondent.

[4] When his daughters were interviewed regarding these allegations they denied they were unsupervised or that they were not required to wear helmets when using the off road vehicles. Other investigations conducted pertaining to these children were either unsubstantiated or did not involve allegations regarding respondent.

[5] The exchange that occurred at this hearing is provided below, in relevant part:

Q. Does it seem reasonable that her leg was broken when she got tipped up?

A. That it got broke then—

(continued…)

was permitted supervised visitation and required to comply with the recommendations of the parent-agency treatment and service agreement, which included submission for drug/substance abuse testing, completion of a psychological evaluation, and participation in a parenting class. Respondent was initially uncooperative, but ultimately complied with the requirements of the treatment plan. Proceedings against Jennifer Gerwatowski were terminated, with custody of both Brooklyn and Calvin returned to her subject only to a restriction precluding unsupervised contact between respondent and the minor children.

The petitioner sought termination of respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), which provides:

(…continued)

Q. Yes.

A. –or it was broke?

Q. That it was broke then.

A. Well the records show on—

Q. I'm not asking . . . for what the records I'm just saying in your mind do you think that's what happened?

A. To be honest with ya I—I have no idea. I mean—

Q. Do you have any reason to doubt that's what happened?

A. Like I said if it happened then then—then it happened then. I mean but when—you know—I wasn't looking down at her foot so I mean—

Q. Okay. Now when . . . you talked to . . . you mentioned you'd talked to Trooper Graham and you told Trooper Graham that's probably what had happened when I tipped her up.

A. Well he said something about the fracture that happened—that was before I guess, but then the buckle fracture that happened, I guess, when I did it, so I told him if I did it well then—you know—if it happened when it did then I'm guilty of-of doing the first think [sic] that come to mind is tipping her up.

* * *

Q. You're admitting to paragraph two because it's true?

A. Yeah, if I—yeah, if I hurt her foot.

Q. Yes or no.

A. Yes.

> The Court may terminate the parental rights to a child if the court finds, by clear and convincing evidence, . . . the parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed . . . and the court . . . finds . . . [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable period of time considering the age of the child.

The trial court determined that "[t]he conditions leading to the adjudication were essentially the injuries received by Brooklyn Gerwatowski while in Respondent's care." The trial court indicated its concern that respondent "has never fully acknowledged his role in causing the injuries," yet stated: "At the plea proceedings, Respondent acknowledged that the injuries were caused due to his mishandling of the child." The trial court, relying on the results of a psychological test performed on respondent and a clinical interview, terminated respondent's parental rights, finding that "the Petitioner has proven by clear and convincing evidence that the conditions leading to adjudication continue to exist and there is no reasonable likelihood given the age of the child that these conditions can be rectified within a reasonable period of time."

Notably, the trial court and petitioner placed their emphasis on the results of the Minnesota Multiphasic Personality Assessment (MMPI), a psychological test given to respondent.[6] Respondent is diagnosed with Attention Deficit Hyperativity Disorder (ADHD) and is reportedly prescribed Ritalin for the condition. Because respondent initially failed to follow the instructions for the MMPI, which consists of over 500 questions, the first two times the test was administered, the resultant scores were deemed invalid. Although the testing psychologist acknowledged, "Re-administration within a short time frame violates standardized procedures," he indicated that the "clinical and content scale profiles" obtained "are likely to be a valid indication of his present personality functioning." The evaluator determined that the resultant profile "is frequently found among hospitalized psychiatric patients" and used terms such as "suspicious, mistrustful, delusional, confused, irrational thinking and poor impulse control" among others to describe respondent's personality characteristics as determined by this test. Although the evaluator recommended further assessment "to determine if and to what extent [respondent] is a danger to himself or others" no such assessment was undertaken. The evaluator also suggested respondent was prone "to addictive behavior," however based on respondent's completion of a separate substance abuse evaluation, it was determined that "no further services regarding controlled substance were recommended." The evaluator opined that individuals with characteristics shown by respondent are "generally unresponsive to insight-oriented psychotherapy" and the existence of "some feelings and attitudes that could be unproductive in psychological treatment." Despite referral for "anger" issues and other psychological characteristics or personality traits of concern to the court and petitioner, no further assessments were proffered to either rule out certain diagnostic conditions or for services to address the stated behavioral concerns.

Respondent fared no better in the clinical interview, where the evaluator opined:

[6] The version of the test administered was not verified.

> Due to the chronic and persistent nature of his potential personality disorders and his marked unwillingness to participate or, cooperate with services, Harvey's prognosis for long-term improvement is guarded to poor. In the short term, his ability to make meaningful changes, which could impact his ability to safely parent his children in the next 6-9 months, is near zero.

In contrast to the opinions expressed by the psychological evaluators, respondent did successfully complete the "Nurturing Parenting Program" and demonstrated improved scores from pre-test levels, with the consultant indicating respondent being "very receptive to the information and suggestions made." The assigned foster care worker discounted this improvement as only having been demonstrated in an artificial context. However, observations of respondent with the minor child during supervised parenting did not evidence any inappropriate behavior. In terminating respondent's parental rights the trial court focused on the testimony of the psychological evaluator who opined that only "if [respondent] invested himself completely in therapy, there was a guarded possibility that he could improve enough in 12 to 18 months to know whether or not he could safely parent children."

On appeal of a trial court's order for termination of parental rights, this Court reviews conclusions of law on legal issues de novo. *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002). The trial court's findings of fact are reviewed for clear error. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). A factual finding is deemed to be clearly erroneous even if there is evidence to support it if the reviewing court forms a clear and definite conviction that a mistake has been made, following a review of the entire record and giving due deference to the ability of the trial court to observe the demeanor of witnesses and to evaluate the weight and credibility of their testimony. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

At the outset, we are compelled to state that concerns pertaining to the injuries sustained by Brooklyn are amply justified. In addition, we do not dismiss or ignore determinations made regarding respondent's lack of judgment and cooperation regarding prior investigations involving his older minor children and Brooklyn and the need to minimize any potential risk to the minor child who is the subject of this petition. Finally, although we are very aware of the deferential standard imposed for reviewing a trial court's decision we are also concerned regarding the subjective nature of the petitioner's conclusions in this matter and must balance these interests with regard to the best interests of the minor child.

This case initiated under the umbrella of *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973), which stands for the proposition that, "[h]ow a parent treats one child is certainly probative of how that parent may treat other children." Consistent with the principle of anticipatory neglect enunciated in *In re* Dittrick, 80 Mich App 219, 222; 263 NW2d 37 (1977) and as interpreted in *In re* Powers, 208 Mich App 582, 592-593; 528 NW2d 799 (1995), recognizing the probative value of evidence of prior abuse of an unrelated child to determine how a parent will treat his or her own children, we agree with the necessity of evaluating the potential risk for Calvin based on the unexplained etiology of Brooklyn's injury and the assumption of jurisdiction by the trial court. However, under the unique circumstances comprising this case, we believe that the best interests of the child would have been better served by providing respondent additional services and an expanded opportunity to demonstrate his parenting ability.

Despite his initial lack of compliance, respondent ultimately complied with the treatment or service plan developed by the petitioner. Typically, demonstration of compliance or completion of a parent-agency agreement is evidence of a respondent's ability to provide proper care and custody of the child. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). Despite acknowledging that respondent demonstrated a benefit from the services offered or that evaluations conducted, such as those pertaining to substance abuse, did not recommend the need for any additional services, the petitioner discounted these results and, instead, relied, on the findings and reports of the psychological evaluations.

Aside from problems, acknowledged by the therapists, regarding multiple administrations of the MMPI, the possible impact of respondent's ADHD diagnosis on his test performance and factual errors contained within the reports, we are concerned regarding the conclusory nature of the findings and reliance on a single test instrument to substantiate termination of respondent's parental rights. Notably, the therapists indicated that certain diagnostic conditions should be "ruled out." However, additional testing was never conducted to verify the diagnoses. Importantly, Michael Powers, who conducted the clinical interviews with respondent indicated he would alter his prognosis for respondent from "poor" to "guarded" based upon his receipt of new or additional information not available at the time of the evaluation.

As noted by this same evaluator, respondent never varied in his insistence that he was uncertain regarding how the injuries to Brooklyn occurred. Although the origin of Brooklyn's injury was suspicious and respondent's role in the injury can neither be confirmed nor disproved, the evaluator questioned whether the actions described by respondent could have inflicted the injury. Medical reports failed to conclude precisely how Brooklyn sustained the injury or when it occurred. Despite respondent taking responsibility for "mishandling" the infant, there has been no factual or definitive medical determination that his actions were the cause of the child's injury. Rather, it appears to have been assumed that because the injury was discovered after the child was in respondent's care, he was the precipitating cause. However, we note that the hospital and medical personnel that initially saw the minor child did not diagnose the existence of the fracture. Consequently, a possibility exists that it occurred at an alternative time and simply went undetected until the conditions that precipitated respondent taking the child to the hospital occurred.

Another concern involves the failure of petitioner to provide respondent with additional or alternative services given its stated concerns regarding anger management and respondent's need for ongoing therapy. In general, a petitioner is required to make reasonable efforts to rectify the conditions that caused a child's removal by adopting a service plan. MCL 712A.18f(4). Although service plans are not deemed to be required in all situations, the petitioner determined, solely based on the psychological evaluations, that additional services were unlikely to be beneficial due to the amount of time necessary for improvement to be attained. *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000). However, respondent was not given a reasonable or fair opportunity to demonstrate progress as services were not offered and there existed no real-life verification that respondent behaved in a manner consistent with that predicted by the evaluators.

Further, we are concerned by inconsistencies pertaining to the petitioner's concern regarding the risk to Calvin but failure to suggest any action was necessary to protect respondent's older children. Lack of action was justified based on the age of the children and

because they are in the custody of their biological mother. While we agree that respondent has demonstrated poor judgment when with these older children, we must also acknowledge that no form of abuse, such as comprises the concerns regarding Brooklyn, were placed into evidence. Hence, the principle of *LaFlure*, *supra* is equally applicable. Although respondent has demonstrated questionable judgment with his older children, there is no evidence of physical abuse to these children to substantiate the petitioner's concerns regarding the potential or risk of future abuse of Calvin by respondent.

Further, the determination of the trial court appears to place form over substance. Although respondent's parental rights have been terminated, the child remains with its biological mother. This is important from several different perspectives. The termination of respondent's parental rights does not preclude future contact with the child, which is to be anticipated given the historical relationship between respondent and Jennifer Gerwatowski. Hence, any alleged protection afforded by the termination of respondent's parental rights is illusory and reinforces our opinion that the minor child would have been afforded greater protection by the provision of additional services and supervision for respondent rather than termination. Termination has also served to diminish any financial resources available to the child as respondent's obligation to support Calvin is also ended. In most circumstances involving a petition such as this, the minor child is in foster care and the need to establish permanence and stability for the child has obvious temporal limitations and requirements. However, this situation is unique. Calvin remains with his biological mother so the urgency to terminate respondent's rights is not as evident as the custodial situation is stable. As a result, we concur with the guardian ad litem that termination of respondent's parental rights was not clearly in the best interests of the minor child.

Reversed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot

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Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

WHITBECK, J. (*dissenting*).

The majority concludes that the trial court erred in terminating respondent Harvey Giddens' parental rights to the minor child, Calvin Gerwatowski. I respectfully disagree. I would affirm the trial court's order of termination.

To terminate parental rights a trial court must find that the petitioner has proven at least one of the statutory grounds for termination by clear and convincing evidence.[1] This Court thereafter reviews for clear error the trial court's decision terminating parental rights.[2] A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.[3] This Court must give deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.[4]

[1] MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

[2] MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Sours*, *supra* at 633.

[3] *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

[4] MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court reviewed the evidence and testimony regarding Giddens' lack of compliance with service plan recommendations, his psychological evaluations, and his prognosis for long-term improvement. The trial court then found that a statutory ground for termination had been met. Although acknowledging the highly deferential standard of review that this Court must use to evaluate a trial court's decision to terminate parental rights, the majority concludes that Calvin's best interests "would have been better served by providing [Giddens] additional services and an expanded opportunity to demonstrate his parenting ability." However, unlike the majority's implicit conclusion, I am not left with a definite and firm conviction that termination was a mistake.

The majority notes that Giddens was "initially uncooperative, but ultimately complied with the requirements of the treatment plan." The majority then goes on to conclude that Giddens "was not given reasonable or fair opportunity to demonstrate progress." However, I find it significant that at the time of the December 2007 termination hearing—10 months after Calvin's birth and approximately a year and half after Brooklyn's injury (for which Giddens never fully took responsibility)—even the witnesses who testified to Giddens' improvement remained concerned about his ability to parent children safely. Foster care worker Karen Bontrager admitted that Giddens benefited from his parenting classes, but she believed he still constituted a risk to Calvin. And Michael Powers, the psychological evaluator, stated that Giddens' prognosis to make meaningful changes in the next 6-9 months was near zero. Powers also said that, even assuming that Giddens invested himself completely in therapy, there was a only a guarded possibility that he could improve enough in 12 to 18 months to know whether or not he could safely parent children. I do not believe that the trial court clearly erred in ordering termination on the basis of Giddens' psychological assessment that indicated many serious, unresolved, deeply ingrained developmental issues that continued to exist and could not be resolved within a reasonable time. I believe that Giddens was clearly given a reasonable and fair opportunity to demonstrate progress.

The statute requires the trial court to order termination upon a finding that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that the conditions will be rectified within a reasonable time considering Calvin's age.[5] Here, the evidence established that there was at best only a guarded possibility, not a reasonable likelihood, that Giddens would rectify the conditions of adjudication in over a year, which is not a reasonable time given Calvin's young age. "A child should not be required to wait for parents to acquire parenting skills that may never develop."[6] I would conclude that termination of Giddens' parental rights under MCL 712A.19b(3)(c)(*i*) was proper.

The majority reasons that termination was questionable when there is no evidence that Giddens harmed his two older children. However, the evidence substantiated the abuse of one child. And there is no statutory requirement that termination only be ordered after multiple

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[5] MCL 712A.19b(3)(c)(*i*).

[6] *In re Roe*, ___ Mich App ___; ___ NW2d ___ (2008), Docket No. 283642, slip op p 10 (internal quotation and citation omitted).

instances of abuse. "How a parent treats *one* child is . . . probative of how that parent may treat other children."[7]

The majority concludes "termination of [Giddens'] parental rights was not clearly in the best interests of the child." In fact, the trial court did not address the best interests of the child.[8] But neither statute nor court rule requires the trial court to make specific findings on the question of best interests.[9] "[A] court speaks through its written orders and . . . , in entering the order terminating parental rights, the court necessarily found that statutory grounds for termination existed and could not have found that termination of parental rights was clearly not in the best interests of the children."[10]

The statute requires that once a petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court *shall* order termination of parental rights, *unless* the trial court finds from evidence on the whole record that termination is clearly *not* in the child's best interests.[11]

The majority concludes that termination was not in Calvin's best interests because it would "serve to diminish any financial resources to the child as [Giddens'] obligation to support Calvin is also ended." In my view, the continued availability of financial support is not a proper ground on which to negate a trial court's finding that a statutory ground for termination has been met. Indeed, in my opinion it would never be in a child's best interests to remain in the custody of an abusive parent merely for continued access to financial resources. Moreover, the record indicates that Giddens is "unemployed due to his 'disability.'" Therefore, it is unclear how much Giddens contributes or is capable of contributing to Calvin's support.

The majority also concludes that the trial court was placing form over substance in ordering termination because it is likely that Giddens will nevertheless remain in contact with Calvin in light of Giddens' relationship with Calvin's mother, who retains custody of Calvin. However, if petitioner determines that this contact continues to pose a risk to Calvin, then it has the obligation to pursue necessary proceedings to alleviate that risk.

In sum, I would affirm.

/s/ William C. Whitbeck

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[7] *In re La Flure*, 48 Mich App 377, 392; 210 NW2d 482 (1973) (emphasis added).

[8] See MCL 712A.19b(5).

[9] *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005).

[10] *Id*.

[11] MCL 712A.19b(5); *Trejo*, *supra* at 350. MCL 712A.19b(5) was recently amended such that the trial court must now find that termination of parental rights is in the child's best interests. 2008 PA 199, effective July 11, 2008. However, the trial court here made its original disposition under the prior version of the statute.