STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BIANCA NULL, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CHRISTOPHER NULL,

Respondent-Appellant.

UNPUBLISHED
October 11, 2007

No. 277191
Oakland Circuit Court
Family Division
LC No. 06-724690-NA

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Respondent appeals by right from the trial court's order terminating his parental rights. Respondent argues that the trial court erred in terminating his parental rights because there was no clear and convincing evidence sufficient to satisfy MCL 712A.19b(3)(g) and because the trial court clearly erred by declining to find that termination of his parental rights is clearly not in the child's best interests. MCL 712A.19b(5). We affirm.

In this case, the minor child's mother is mentally impaired, functioning at the level of a seven to nine year old child. Bianca was born two months' premature on July 19, 2006. Although initially it was thought Bianca had only the usually problems associated with an early birth, it soon was discovered she suffered from Pierre-Robins Syndrome. Children with this condition do not have a fully developed lower jaw; the child's tongue blocks her airway resulting in feeding and breathing difficulties. Kaitlan McNally, a registered nurse, testified that Bianca might require lifetime medical care and required 24-hour care by a trained caregiver. It is not disputed that mother, even with the help of her own mother with whom she lived, is incapable of caring for Bianca, and that their home was unfit.

Respondent father was mother's live-in boyfriend in the home of maternal grandmother. Before fathering Bianca, respondent at age 19 was convicted of third-degree criminal sexual conduct arising out of a relationship with a fourteen-year-old girl who respondent testified he believed to be sixteen. Respondent also had convictions indicating substance abuse, including possession of marijuana and impaired driving. Respondent testified that he had been dating Bianca's mother for three years; he worked delivering items for a catering and party rental company; he recognized Bianca's special needs and vowed to accept those responsibilities, and he intended to marry Bianca's mother, but at the time of the hearing they were separated.

Respondent also testified that before he was incarcerated for CSC, he had been employed as a babysitter for two different families with children ranging in age from six months to eight years old. Nurse McNally, prenatal case manager during mother's high-risk pregnancy, described respondent's cooperation as excellent. Respondent attended McNally's prenatal classes with mother and met all of her expectations. Respondent and his mother attended every pretrial, adjudicative, and dispositional hearing in the family court.

On the day of Bianca's birth, respondent was injured at work and had gone to a hospital emergency room. Respondent had lost his driver's license as a result of traffic tickets. Mother spent the day at the emergency with respondent where she began experiencing side pain that neither she nor respondent recognized as premature labor, despite McNally having instructed them in prenatal classes that mother's pregnancy required bed rest except for bathroom breaks and that side pain would be a sign of premature labor. Respondent told McNally later that he did not think that mother's side pain was severe or important. On mother and respondent's return to grandmother's home, respondent left to obtain prescription medicine for his injury. Grandmother later called respondent to inform him that mother was having contractions and bleeding. Respondent returned to the home and asked a neighbor for a ride to the nearest hospital, where Bianca was born.

Respondent testified that on the day of his injury, he called home seeking transportation to the hospital. Mother called a friend of hers for a ride, and they picked respondent up at his work site and took him to the emergency room. Regarding mother's need for bed rest during her pregnancy, respondent testified, "he was not her guardian," and if "she wants to get out of bed, I cannot strap her to a bed; I cannot make her stay." He also testified he did not learn of mother's complaint of side pain until they returned home from the hospital. He explained his failure to respond because he considered mother to be a hypochondriac who was always complaining of aches and pains. Respondent also testified that he was not thinking clearly because he was in severe pain himself, and that his priority was to get his own pain medication.

Although the initial petition did not seek to terminate either parent's rights to the child, an amended petition sought to terminate respondent's parental rights but not those of mother. An attorney-referee, whose findings were adopted by the family court, conducted all hearings below. The hearing officer concluded that the court had jurisdiction because of mother's inability to care for Bianca and because the home she shared with her mother was unfit for the child. On appeal, respondent does not dispute these findings.

With respect to termination, the hearing officer recognized that the case was complicated by the petitioner's request to terminate one parent's rights but not the other parent's rights, and by the significant and potentially life threatening medical condition of the child. The hearing officer determined that the evidence of the circumstances surrounding respondent's CSC conviction, his relationship with the child's mother, a vulnerable adult, and the circumstances of Bianca's birth demonstrated respondent lacked the necessary judgment to care for Bianca, a special needs child. The hearing officer also noted that respondent had not presented a viable plan to take custody and to care for Bianca.

The hearing officer summarized his findings regarding termination:

> Based on the testimony that's been presented, this Court is satisfied that there is clear and convincing evidence, under MCL 712A.19b(3)(g), that without regard to intent, [respondent] has failed to provide proper care and custody for Bianca. And given this history so far at least, and the concerns about impaired judgment, not just about the CSC issue; it's not that the Court is finding that he is unfit father specifically because he engaged in this sexual act but it encompasses the circumstances around that and it encompasses other issues of judgment that he has exercised, that I think caused the evaluator in the psychological evaluation some concern, although the determination is not just based on one person's assessment; it goes beyond that.
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> It is a combination of things that causes this Court to have real concern about the level of [respondent's] judgment in the context of providing care for Bianca, not that he doesn't want to because I believe his intentions are good, but based on the totality of the circumstances presented so far, the Court is satisfied that there is clear and convincing evidence that there is no reasonable likelihood in the foreseeable future that a proper custodial plan would be provided to address Bianca's particular needs, given her age which is she's - - chronologically she's fragile; mentally she's fragile. She's a child who has tremendous physical needs and needs, as was stated, 24-hour ongoing care at this point in time.
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> So the Court is satisfied that there is a satisfactory basis presented by clear and convincing evidence that would warrant termination of parental rights.

The hearing officer subsequently entertained testimony for the purpose of addressing the best interests of the child under MCL 712A.19b(5). At that hearing, Elizabeth Shear, respondent's mother testified regarding respondent's experience as a babysitter of young children. She believed that respondent successfully handled his babysitting duties, and did everything a parent would do. She also said she would assist her son in caring for Bianca and act as his supervisor if need be, although she did not doubt respondent's ability to parent Bianca and attend to her medical needs. Shear testified that she worked a weekend shift at a factory; she worked 12-hour days from Friday through Sunday. Shear had not discussed with respondent whether he would move to Indiana to live with her. However, she testified that respondent intended to move to Indiana at an unspecified time "down the road." Shear noted her son had obligations in Michigan, including paying a fine so that he could obtain his driver's license.

Respondent testified again about his babysitting experience when he was between 15 and 18 years old. Respondent also demonstrated his knowledge of Bianca's medical condition and her ongoing treatment. But respondent did not understand the prosecutor's question about his plan for making a home for Bianca. He conceded that the home where he presently lived was not suitable for Bianca. Respondent testified he had discussed with Bianca's mother and maternal grandmother Bianca's living with his mother, who resided near hospitals. Respondent asserted he would move to Indiana and get a landscaping job as soon as he paid off what he owed to his current employer. Respondent acknowledged that within the past six months he had paid $2,800 in fines and fees on tickets and that he needed to pay $1,300 in driver responsibility fees to obtain his license. He admitted this was "a major issue that I'm working on." Respondent thought that if the court were to place Bianca with his mother, it would take him two months to pay his debts and join them in Indiana.

After the best interests hearing, the hearing officer noted that respondent had "done an admirable job" educating himself on the child's significant medical problems. Respondent, the hearing officer found, was motivated by his love for Bianca and desire to provide for her care. The hearing officer also stated his "impression of [respondent] is that he's a good man who has at times exercised poor judgment in his life, even to the point of resulting in a criminal conviction for which he served time." But the hearing officer ruled that respondent "is not in a position to provide a home or the type of care that Bianca needs in order to best assure her chance, not only to thrive but really at this point, just to survive." The hearing officer continued:

> The testimony indicates that his present living situation is relatively unsettled. He has wavered in the past as to whether he will continue his relationship with [Bianca's mother]. More recently he says that's resolved but it's not totally clear that that is the case. He acknowledges that he does not have a present plan to implement for Bianca; that his home at this point in time is not appropriate. He would like to move to his mother's residence in Indiana but he acknowledges that he must first take care of financial obligations.
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> He's not able to drive at this point in time. He's got to pay off a substantial amount of tickets yet, and a reinstatement fee. So there are limitations at this point and uncertainties as to just to what extent Mr. Null can intervene on behalf of Bianca in order to assure a safe environment for her.
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> Mr. Null's mother, Ms. Shear, has offered to help in whatever way she can. She is employed and her availability is uncertain, in terms of what exactly could be provided for Bianca to address her many medical concerns.
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> These are the more immediate concerns, in this court's opinion; there are longer term concerns that include Bianca's health needs as she gets older and we don't really know where that will result. But the psychological evaluation which is part of the evidence and part of the record, suggests that there would be problems in the future, in terms of perhaps emotional or psychological issues that could impact on Mr. Null's - - or could affect or impact Mr. Null's ability to be able to provide the type of care that Bianca needs now and likely will need in the foreseeable future.
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> So with the acknowledgement that I think Mr. Null has done what he could do, in terms of attempting to educate himself relative to this child's extremely unfortunate physical situation, in this court's opinion and consistent with this court's understanding of the court rule and statute, there is not clear and convincing evidence presented that to terminate Bianca - - to terminate father's parental rights to Bianca would be adverse to her best interest.
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> The Court acknowledges that this is an emotionally charged situation, that Mr. Null does have a lot of love for his daughter and has endeavored as best he can, at this point in time, to try and establish some type of ongoing plan for Bianca's care. But it is uncertain at best, in this court's opinion, and consistent with the law, so today the court will enter an order that does terminate the parental rights of Mr. Null to Bianca.

This Court reviews for clear error both the trial court's decision that a statutory ground for termination has been proven by clear and convincing evidence and the court's decision whether termination of parental rights is not in the best interests of the child. MCR 3.977(E), (J); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A clearly erroneous finding must be more than just maybe or probably wrong. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). Further, we recognize that the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). But this Court will determine a finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Id*.; *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

Parental rights may be terminated if clear and convincing evidence supports the family court finding that a parent both failed to "provide proper care or custody for the child" *and* that "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." MCL 712A.19b(3)(g); *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990). Because respondent conceded that at the time of the hearings below he could not provide a proper home for Bianca, the issue is whether the evidence supported the trial court's determination that respondent could not do so within a reasonable time in light of the child's age and care requirements.

The family court's decision regarding termination of parental rights must be based on the totality of circumstances of the case, including the circumstances that prompted the court to assume jurisdiction of the child. *In re Harmon*, 140 Mich App 479, 481; 364 NW2d 354 (1985); *In re LaFlure*, 48 Mich App 377, 390-391; 210 NW2d 482 (1973). Relevant considerations include a parent's ability to provide a proper home, sufficient food, clothing, and provide for the future emotional and physical well being of the child. *Harmon*, *supra* at 483; *In re Boughan*, 127 Mich App 357, 364; 339 NW2d 181 (1983). A parent's failure to obtain suitable housing and to offer a viable custodial plan are grounds for termination of parental rights when there is clear and convincing evidence that no reasonable likelihood exists that these conditions would be rectified within a reasonable time considering the child's age. *In re Trejo*, *supra* at 359-360.

Respondent makes several arguments regarding the hearing officer's finding that § 19b(3)(g) was a ground for termination of his parental rights. Most of respondent's arguments are not relevant given that it was undisputed neither respondent nor mother could provide a suitable home for Bianca. It was not necessary that the court determine respondent caused harm to Bianca or that his actions caused the child's medical condition. Rather, the critical facts were that Bianca's medical conditions required 24-hour care by trained caregivers, and respondent could not provide a suitable home for Bianca given her medical needs and respondent's existing and likely future circumstances. The hearing officer did not use the circumstances surrounding the birth of the child as indicating respondent caused either Bianca's premature birth or her medical condition but as probative of respondent's ability to make necessary judgments to provide a suitable home and proper care for Bianca. Likewise, respondent's attending prenatal class and being aware that mother required bed rest during her high-risk pregnancy yet making decisions contrary to those requirements was probative of respondent's ability to make appropriate decisions regarding the care of Bianca in the future. Respondent's knowledge of Bianca's medical condition and his good intentions are insufficient, where despite knowledge and good intentions, respondent exercised poor judgment in the past. Respondent conceded he

could not provide Bianca a suitable home at the time of family court proceedings. And he failed to provide the court with a realistic plan for establishing, within a reasonable time considering her age, a suitable home where proper care would be provided for Bianca.

Respondent argues that he did present a custodial plan for Bianca. But the record below establishes that respondent's only plan was to place Bianca with his mother who lived in Indiana. But respondent presented no evidence that his mother's was suitable for Bianca, and no plan for caring for Bianca after respondent might join them at some indefinite point in the future. The record reflects the family court was involved with Bianca from when it issued a temporary order within a month after her birth. Yet at the best interests hearing held six months later, respondent had not even discussed with his mother whether Bianca could be placed with her. Although we cannot determine a witness's demeanor from the written record, MCR 2.613(C), when asked about his plan for Bianca, respondent stated that he did not understand the question. On appeal, respondent still fails to describe his proposed custodial plan or when it could have been implemented. Rather, respondent makes excuses for his failing to plan for Bianca by arguing that the family court's intervention, the uncertainty of his relationship with the child's mother, and his CSC conviction impeded his ability to plan for a suitable home for Bianca.

Respondent also argues that Bianca's medical condition would not necessarily continue to require 24-hour care. We disagree. The time frame at issue is "within a reasonable time considering the child's age." MCL 712A.19b(3)(g). The reasonable inference from the evidence before the family court was that the life-threatening dangers of Pierre-Robbins Syndrome would continue at least throughout Bianca's infancy. Moreover, Nurse McNally testified that based solely on her premature birth, Bianca could face a lifetime of medical care, medications, monitoring, therapies, and special education. This evidence supported the inference that Bianca would require specialized care for the reasonably foreseeable future.

Respondent next asserts his only meritorious argument: that he was not given an adequate opportunity to work on a parent-agency agreement to demonstrate that he could plan for a safe custodial home for Bianca. But to be clearly erroneous, the family court's decision must be more than just maybe or probably wrong. *In re Sours*, *supra* at 633. Here, based on respondent's own testimony, it would have taken at least two months to pay his traffic ticket fines and the assessments necessary to regain his driver's license and which would enable him to move to Indiana, look for employment, and arrange for qualified medical care assistance for Bianca. This assumes without any evidentiary support that respondent's mother's home would be suitable for respondent and Bianca. The petitioner bears the burden of proof with respect to a petition to terminate parental rights. *In re Trejo*, *supra* at 350. Here, after six months of court involvement with Bianca, respondent had not developed a plan to provide a safe custodial home for her. Further, there was no evidence before the court that respondent could do so "within a reasonable time considering the child's age." MCL 712A.19b(3)(g); *In re Trejo*, *supra* at 359-360. Accordingly, the family court did not clearly err by finding by clear and convincing evidence a statutory basis for terminating respondent's parental rights.

Respondent next argues that the family court erred by not finding "that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5). Respondent asserts that he behaved appropriately during supervised visitation with Bianca and that he bonded with the child. Although respondent's visits with Bianca were uneventful, and *he* bonded with the child, neither fact is evidence that terminating respondent's parental rights is

contrary to the *child's* best interests. While an argument might be made that it is not in the best interests of a child to terminate father's parental rights while at the same time not terminating mother's parental rights, "[t]he statute does not require that the court affirmatively find that termination is in the child's best interest." *In re Trejo, supra* at 357. Rather, once the court finds clear and convincing evidence supports at least one ground for termination, "the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *Id*. at 354. Respondent fails to point to any evidence in the record that would have supported the trial court's concluding that although the requisite evidence existed to support one ground for termination of his parental rights, to do so was clearly not in the child's best interests. Consequently, we cannot find that the family court erred in its assessment regarding the best interests of the child.

We affirm.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey