Order

Michigan Supreme Court
Lansing, Michigan

July 19, 2024

165815

In re BATES, Minors.

SC: 165815
COA: 361566
Grand Traverse CC Family Division:
18-004645-NA

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On May 8, 2024, the Court heard oral argument on the application for leave to appeal the December 21, 2023 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*dissenting*).

In this termination of parental rights case, the trial court severed the relationship between respondent-mother and her two young sons, despite a lack of evidence that termination was in their best interests. The children lived in a stable placement with their father, and there was insufficient evidence that a continued relationship with respondent would be detrimental to them. Therefore, the trial court erred by terminating respondent's parental rights, and I respectfully dissent from this Court's order denying leave to appeal.

I. FACTS

Respondent is the mother of AAB and AMB, who were born, respectively, in 2010 and 2015. Respondent was married to the children's father,[1] but he filed for divorce in 2017. Respondent and father were awarded roughly equal custody of the children.

The record demonstrates that respondent has struggled with substance use disorder, particularly alcoholism, for quite some time. Following the divorce, respondent's substance use struggles persisted, and her mental health declined. Child Protective Services (CPS) became involved with the family in April 2018. Respondent was drinking in excess while the children were in her care. She invited a friend over to watch the boys

[1] The father is not a respondent in this matter.

so she could sleep. That friend called emergency services after observing the state that respondent and the home were in. Respondent was hospitalized with a blood alcohol content of .337. Respondent later characterized this incident as a suicide attempt. CPS was notified, and, after she was discharged from the hospital, the Department of Health and Human Services (DHHS) offered respondent services to address her substance use disorder and mental health issues. Respondent participated in the offered services, and DHHS believed that she benefited from them.

However, despite the services offered, respondent continued to struggle. In November 2018, she was injured from falling down a flight of stairs after drinking and abusing benzodiazepines. Following that incident, DHHS petitioned the family court to remove the children from respondent's care and place them with their father. The trial court determined that reasonable efforts were made to prevent the removal, authorized the petition, and granted respondent supervised parenting time.

In March 2019, respondent and the children's father entered a stipulated custody and parenting time agreement that gave father physical custody and granted respondent supervised parenting time until she completed mental health and substance abuse evaluations. The parties agreed that if respondent complied with the agreement for two months, the prior equal custody agreement would resume. In light of the stipulated order, DHHS withdrew its petition, and the case was never adjudicated. Respondent abided by the conditions of the agreement, and she resumed equal custody over AAB and AMB.

In December 2019, while in respondent's care, AAB experienced diabetic ketoacidosis[2] after respondent failed to give him insulin or monitor his blood sugar levels for several days. The child nearly died and was in a coma for several days. Based on respondent's failure to properly care for AAB, DHHS filed a new petition. This time it requested that the trial court take jurisdiction over the children, remove them from respondent's care, place them with their father, and terminate respondent's parental rights. In January 2020, the trial court authorized the removal petition and granted respondent supervised parenting time. The case was then delayed for several years because of scheduling conflicts and the COVID-19 pandemic. Throughout 2020 and 2021, respondent exercised both in-person and virtual supervised visitation.

Respondent also faced criminal charges based on her medical neglect of AAB. In November 2020, she pleaded guilty to third-degree child abuse, MCL 650.136b(5), and

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[2] AAB was diagnosed with diabetes in September 2018. Diabetic ketoacidosis (DKA) is a "serious complication of diabetes" that can lead to loss of consciousness or death. Mayo Clinic, *Diabetic ketoacidosis* <https://www.mayoclinic.org/diseases-conditions/diabetic-ketoacidosis/symptoms-causes/syc-20371551> (accessed June 12, 2024) [https://perma.cc/59PK-7838].

was later sentenced to five months in jail and an 18-month probationary term. While in jail, she maintained contact with the boys through phone calls and letters. Respondent was released from jail in April 2021, and supervised parenting time resumed. Although the terms of respondent's probation required her to abstain from alcohol consumption, respondent continued drinking. It was alleged that on several occasions respondent showed signs of intoxication during visits with the boys. In July 2021, she was caught shoplifting alcohol on two separate occasions while heavily intoxicated. She was remanded to jail for these probation violations.

Although DHHS sought termination in the petition filed in December 2019, respondent did not actually plead to the allegations in that petition until August 2021. At that time, she was incarcerated for the probation violations described above. Respondent characterizes this second stint of incarceration as her "wakeup call." While in jail, she took steps to address her alcoholism, including obtaining a prescription for Vivitrol, a drug that reduces cravings for alcohol and other substances. Following her release from jail in October 2021, respondent entered an inpatient alcohol treatment program. While participating in the program, respondent was reported as forthcoming about her history of mental health, substance use, and parental supervision issues. She attended group and individual counseling meetings two to three times per week. She was screened every day for alcohol and tested negative each time. While in therapy, respondent worked on developing healthy coping skills. Respondent's therapist indicated that respondent expressed tremendous guilt for her role in AAB's near-fatal DKA incident. According to the therapist, respondent took responsibility for her actions and the role that she played in AAB's hospitalization. Respondent successfully completed her inpatient treatment program and was released early, in December 2021.

A review hearing was held before the family court referee on December 7, 2021, the day after respondent completed her inpatient program. DHHS recommended that respondent's parenting time and all supervised contact be suspended. However, the referee ordered that supervised parenting time continue and that DHHS continue to expend reasonable efforts for reunification, noting that respondent had made progress during the reporting period.

A permanency-planning hearing took place on March 1, 2022. The CPS worker testified that supervised parenting time had been taking place weekly. She opined that the visits were going "as well as can be expected" and that there were "no noted concerns." Respondent was screened for alcohol before each visit and had no positive results during the reporting period. However, respondent had reported an alcohol relapse to her probation officer. According to the CPS worker, respondent admitted that she had a few sips of wine before realizing "it was not worth it" and dumping the remainder of the wine down the sink. Respondent reported that she remained engaged in outpatient services. DHHS again asked that respondent's parenting time be suspended "due to the ongoing substance abuse concerns, the lack of progress despite the length of the case, and the nature and severity of

both removals." In light of respondent's self-reported relapse, the referee concluded that only "partial progress" had been made during that reporting period and noted that a termination trial date would be set. That said, the referee concluded that respondent would continue supervised parenting time with the boys in the interim.

The termination trial began on March 30, 2022, and took place over the course of three days. At its conclusion, the trial court found that there was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(c)(*i*) (conditions that led to the adjudication continue to exist) and (j) (reasonable likelihood of harm if returned to parent). The trial court also concluded that termination was in the boys' best interests.

Specifically, as to best interests, the trial court reasoned that the boys' "need for permanence, stability and finality, and the length of time both children may be required to wait for [respondent] to rectify her substance abuse and mental health issues weighs in favor of termination . . . ." Respondent's mental health and substance abuse issues had been affecting her ability to care for the children, including AAB nearly losing his life. AAB and AMB had been removed from respondent's care for more than two years, but respondent was only recently showing progress with regard to her substance use disorder and had experienced a relapse. Referencing a 2018 psychological evaluation, which indicated that respondent had a tendency to externalize blame and responsibility, the court concluded that respondent continued to externalize blame.

The trial court found that it was "clear" that respondent loved AAB and AMB. While "the children appear to enjoy spending time with [respondent]," they had both expressed "concerns about being alone" with her. Supervised visitation had been going well. However, those visits had only been taking place over a short length of time and, therefore, the number of positive visits was limited. The court further found:

> [AAB's] trauma therapist, regularly asks about [AAB's] time with his mother, and he does not give negative or positive responses; rather he is very neutral. Notably, [AAB] expressed that if he was to go back to his mom or spend more time with his mom, he was concerned that he would have to take care of his little brother.
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> [AAB's therapist] has never observed parenting time or met [respondent]; however, she testified that she believed that stopping the visits with [respondent] would not negatively affect [AAB]. She indicated that she believes [AAB] would miss his mother; however, she does not believe that the relationship is providing sustenance to his development. She testified that she believes that given their removal in January 2020 and the inconsistent visits owing to [respondent's] incarceration and unavailability[, AAB] has already experienced the loss of his mother.

> . . . [AMB's] therapist testified that [AMB] knows that he needs to be in [a] safe environment and has indicated that he wants to visit his mother, but he wants an adult to come every day to check on him to make sure that he is okay.

The court concluded that the boys were doing well in their father's care and that, despite placement with their father, termination was in their best interests.

Respondent appealed, and the Court of Appeals majority affirmed over a dissent from then Chief Judge GLEICHER. *In re Bates*, unpublished per curiam opinion of the Court of Appeals, issued March 23, 2023 (Docket No. 361566) (*Bates I*). Respondent only raised issues pertaining to the statutory grounds for termination and the statutory duties of the guardian ad litem. However, in her dissent Judge GLEICHER opined that she was "at a loss to understand why it is in the children's best interests to terminate their relationship with their mother." *Id*. at 5 (GLEICHER, C.J., dissenting). Respondent obtained new counsel and filed an application for leave to appeal in this Court. She argued that the trial court erred by concluding that the statutory grounds were proven by clear and convincing evidence and that termination was in the children's best interests. In lieu of granting leave to appeal, we retained jurisdiction and remanded to the Court of Appeals to consider whether the trial court clearly erred by concluding that termination of respondent's parental rights was in the children's best interests. *In re Bates*, 513 Mich 875 (2023). On remand, the Court of Appeals again affirmed. *In re Bates*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2023 (Docket No. 361566) (*Bates II*). Judge GLEICHER again dissented. Following the remand, we ordered oral argument on the application. *In re Bates*, 513 Mich 1001 (2024).[3]

II. STANDARD OF REVIEW & STATUTORY FRAMEWORK

We review for clear error the trial court's decision regarding a child's best interests. *In re JK*, 468 Mich 202, 209 (2003). A trial court's decision is clearly erroneous "if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. at 209-210.

When DHHS petitions to terminate parental rights, the family court must make two separate decisions. First, the court must find "by clear and convincing evidence" that at least one of the statutory grounds for termination exists. MCL 712A.19b(3). But such a finding does not necessarily result in termination of parental rights. Rather, once the trial court finds that the statutory grounds have been proven, the court must separately decide

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[3] This case was heard alongside *In re Dailey*, 513 Mich 1002 (2024). I join Justice WELCH's dissenting statement in that case in full.

whether termination of parental rights is in the child's best interests. MCL 712A.19b(5) ("If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made."). The focus at the best-interests stage is on the child, not the parent. *In re Atchley*, 341 Mich App 332, 346 (2022). The trial court must find that termination is in the best interests of the child by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 83 (2013). Notably, a child's placement with relatives must be considered in determining whether termination is in the child's best interests, and such placement weighs *against* termination. *In re Mason*, 486 Mich 142, 164 (2010), citing MCL 712A.19a(6)(a).

III. ANALYSIS

I conclude that the trial court clearly erred by finding that a preponderance of the evidence supported that termination was in AAB and AMB's best interests. The boys enjoyed visitation with respondent and were bonded to her. Respondent was taking steps to address her substance use disorder. There was no evidence that the current arrangement—full custody with their father and weekly supervised visitation with respondent—was detrimental to them or that discontinuing contact with respondent would promote their welfare. Accordingly, I am left with a definite and firm conviction that the trial court erred.

Before turning to the specifics of this case, I first acknowledge that this Court asked the parties to brief whether a trial court is required to consider and eliminate available alternative remedies short of termination as a matter of constitutional due process. While we do not decide that specific issue today, I note that when the family court considers whether termination is in a child's best interests, the parent has already been deemed unfit by virtue of the trial court's findings by clear and convincing evidence that the statutory grounds for termination have been proven.[4] "Once the petitioner has presented clear and convincing evidence that persuades the court that at least one ground for termination is established . . . the liberty interest of the parent no longer includes the right to custody and control of the children." *In re Trejo*, 462 Mich 341, 355 (2000).

Nonetheless, children have rights and interests at stake in a termination proceeding. This is why the focus of the best-interests phase of a termination trial is solely on the child's

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[4] This is why ensuring that the statutory grounds are truly proven by clear and convincing evidence—the highest burden applied in a civil case—is so important. *Santosky v Kramer*, 455 US 745, 747-748 (1982) ("[T]he Due Process Clause of the Fourteenth Amendment demands . . . that the State support its allegations [of parental unfitness] by at least clear and convincing evidence.").

well-being. Specifically, as noted, MCL 712A.19b(5) requires that the trial court conclude that termination is in the child's *best* interests. Something is "best" where it is "excelling all others" and produces the "greatest advantage."[5] While the preponderance-of-the-evidence standard that applies to the best-interests phase is significantly less demanding than the burden of proof that applies to the statutory grounds phase of a termination proceeding, it still requires that evidence supporting termination, when weighed against evidence supporting retaining parental rights, "has more convincing force and the greater probability of truth." See *People v Cross*, 281 Mich App 737, 740 (2008). I conclude that, even under this less-stringent standard, DHHS failed to carry its burden.

Common human experience as well as the briefing this Court received from amici demonstrate that children generally benefit from relationships with their biological parents, even if limitations on the parent-child relationship are warranted.[6] See U.S. Department of Health and Human Services, Administration for Children and Families, *Achieving Permanency for the Well-being of Children and Youth*, Log No. ACYF-CB-IM-21-01 (January 5, 2021), p 2 ("Children have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible."), available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf> (accessed June 12, 2024) [https://perma.cc/F9VY-XDJZ]. "Psychological and sociological research over the past thirty years has confirmed . . . the importance of the biological parent-child relationship as a determinant of the child's personality, resilience and relationships with others . . . ." Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 NYU Rev L & Soc Change 237, 240 (2004). Family separation can lead children to experience "ambiguous loss." Sankaren, Church, & Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and their Families*, 102 Marquette L Rev 1161, 1169 (2019). Experiencing ambiguous loss—"a lack of clarity about the psychological or physical presence of members in the psychological family"—may "provoke anxiety, confusion, despair, and other negative mental health experiences." *Id*.; see also Kennedy, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 Emory LJ 911, 948 (2023) (writing that ambiguous loss "generates a unique combination of grief, stress, and anxiety").

Moreover, the parent-child relationship remains important "regardless of whether the child in fact lives with that parent . . . ." *Subordination of Subsidized Guardianship*, 29 NYU Rev L & Soc Change at 240; see also Guggenheim, *The Effects of Recent Trends*

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[5] Merriam-Webster.com Dictionary, best <https://www.merriam-webster.com/dictionary/best> (accessed June 14, 2024) [https://perma.cc/5DVK-PYYL].

[6] This is not without exception. For example, where there is evidence that a parental relationship is physically or psychologically harmful to the child, any potential benefit from the continued relationship is likely outweighed by the risk of continuing harm.

to Accelerate the Termination of Parental Rights of Children in Foster Care, 29 Fam LQ 121, 135 (1995) ("The psychological and emotional bonds between parents and children can endure even when they no longer live together."). And "parents can be a vital resource for a child even if the parent is unable to care for a child in his or her own home." *Id*. Studies demonstrate that frequent visitation with a noncustodial parent is "correlated strongly with higher ratings on a variety of scales designed to measure the child's intellectual and emotional development." Garrison, *Why Terminate Parental Rights?* 35 Stanford L Rev 423, 463 (1983). Moreover, visitation is preferable to complete loss of contact even when a parent-child relationship was less than ideal or where visitation was infrequent. *Id*. at 464-465.

Given the above, I believe the trial court in this case erred when it permanently severed respondent's parental rights when the children were in a relative placement that could facilitate continued contact with respondent through supervised parenting time and when there was a lack of evidence that this continued relationship would harm the children. Without such evidence, I do not think that the trial court could satisfactorily conclude that termination was in the children's "best" interests as required by MCL 712A.19b(5).

First, the trial court noted that respondent was only recently showing improvement with her substance abuse disorder and that she had a recent relapse. This evidence was, in my opinion, both understated in one respect and overstated in another. Other than the recent relapse, the evidence suggested that respondent had been sober since July 2021. Notably, respondent's self-reported relapse—that she took a few sips of wine and then poured the rest out—did not appear to be of concern to her clinical therapist. In fact, when asked whether there was an expectation that a person in recovery would never drink again, the therapist said, "absolutely not." Her clinical opinion was that respondent's setback was "absolutely not" considered a failure of recovery, nor was it indicative of a lack of commitment to her recovery. Clearly, respondent's "recovery trajectory has not been perfect." *Bates II* (GLEICHER, C.J., dissenting), unpub op at 5. But the best-interests phase must be centered on what is best for the child, not used as a punitive measure for a parent's mistakes. I agree with Judge GLEICHER that "mother's continuing efforts to remain substance free should be a factor that counts as highly favorable." *Id*. at 6. Moreover, there was no evidence that respondent's setback was detrimental to the children, as there was no allegation that she was anything but sober at the weekly visits with the children.

An important factor that trial courts must take into account when considering a child's best interests is the child's bond to the parent. *In re White*, 303 Mich App 701, 713 (2014). Here, there was evidence that the children were bonded to respondent. The supportive visitation specialist testified that the boys were always happy to see respondent, enjoyed the visits, and were "always anxious to plan their next visit and [to] know when they're going to see her . . . ." The boys would "run" to respondent, "jump into her arms," and give her hugs and kisses. The boys asked the visitation specialist if they would have more visits or longer visits with respondent. As Judge GLEICHER aptly noted, the only

apparently objective witness at the termination trial with first-hand knowledge of the children's relationship with respondent testified that she believed it would be " 'detrimental' " to both children if they ceased contact with respondent. *Bates II* (GLEICHER, C.J., dissenting), unpub op at 4.[7]

Although the trial court acknowledged the parent-child bond, it appeared to downplay the beneficial relationship between respondent and the children in favor of testimony provided by the children's therapist. In particular, the trial court credited the testimony of AAB's therapist that termination would not negatively affect AAB because the therapist did not believe that the relationship was "providing sustenance to his development." In my opinion, this evidence was insufficient to show that termination was in AAB's best interests. AAB's therapist had never met respondent or observed any interaction between the two. Her opinion seemed to be based on the fact that the pre-teen did not often talk about his mother during their bi-monthly therapy sessions and that he gave "neutral" responses about respondent. However, the therapist acknowledged that AAB was doing well and that when parenting time resumed in December 2021, she did not observe any increased "stressors."

As for the younger child, AMB, his therapist testified that she was unable to testify about the bond between respondent and the child because she had never met respondent. However, she testified that AMB was doing well and that when parenting time resumed, AMB had no increased behavioral issues. AMB's therapist was not concerned about visitation. While AMB did not talk about respondent, he also did not talk about his father, with whom AMB clearly had a bond. Taken together, and in light of the other evidence presented, I fail to see how this evidence affirmatively supports that termination would promote AAB's and AMB's best interests. While, according to both therapists, the boys expressed some hesitation about spending alone time with respondent, this is not surprising considering that their contact with respondent had been supervised-only over the past two years. And, importantly, the choice before the trial court was not a binary one between termination or completely unsupervised contact with respondent.

Ultimately, the court's decision rested on its conclusion that AAB and AMB needed permanency, stability, and finality. I agree that permanency and stability are important considerations that are particularly weighty when a child may be languishing in a temporary placement with no guarantee of parental reunification. In those instances, it may serve a child's best interests to terminate rights so that they may achieve permanency through adoption or another arrangement. But permanency may look different depending on the specific circumstances of a child's life. Here, as Judge GLEICHER noted, the boys

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[7] The boys' father seemingly confirmed their enthusiasm about visiting respondent when he acknowledged that on visitation days the boys were "rowdier" and didn't listen as well, admitting that it may have been because they were excited for their visits with respondent.

already had permanence and stability with their father. *Bates I* (GLEICHER, C.J., dissenting), unpub op at 5. The trial court paid lip service to the fact that the children were living with their father, but did not actually explain why, despite this permanent and stable living arrangement, a continued relationship with their mother would not serve their best interests. At the time of the termination trial, stability meant living with their father and weekly supervised visits with their mother. By terminating respondent's parental rights, the court actually interrupted that apparently positive status quo.

Overall, the evidence demonstrated that the children were doing well in a stable and permanent situation with their father. Respondent appeared to be on the path to recovery. The boys loved respondent, were bonded to her, and enjoyed supervised parenting time. At the time of the termination trial, respondent was not yet able to share custody of AAB and AMB. However, because of the children's placement with their father, the relevant inquiry was not whether respondent resuming full joint custody over them was in their best interests. Instead, the relevant inquiry was whether it was beneficial for the children to continue a relationship with respondent.[8] Because there was insufficient evidence that terminating respondent's parental rights and permanently removing her from their lives was in their best interests,[9] I conclude that the trial court erred by terminating respondent's parental rights.

IV. CONCLUSION

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[8] I see no indication in the record that the trial court actually considered whether being "permanently placed with a fit and willing relative," MCL 712A.19a(4)(d) (here, their father) as contemplated in the permanency-planning statute would be a viable option for the children. I also note that the Child Custody Act specifically contemplates that in some circumstances, it will be in the best interests of the children for one parent to have sole custody and for the other parent to have supervised parenting time. See MCL 722.25(1); MCL 722.27a(1), (9)(f). I question why the status quo could not have been maintained through entry of a custody order. A custody order would have ensured the continued safety of the children while avoiding the unquestionable harm to the children wrought by termination. Importantly, as the department acknowledged at oral argument, and as amici have suggested, a custody order can be a viable permanency option in cases where termination is not in the children's best interests. Indeed, in this very case, the department dismissed its previous petition at least in part because of the entry of a custody order.

[9] Unlike some other states, see, e.g., Conn Gen Stat 45a-719, Michigan does not have a process by which a parent can seek to have their parental rights reinstated. Accordingly, in this state, termination of parental rights could be properly characterized as "tantamount to imposition of a civil death penalty." *In re Parental Rights as to AJG & ACW*, 122 Nev 1418, 1423 (2006) (quotation marks and citations omitted).

I fear that too often, even when other alternatives are available, the best-interest determination defaults to a binary choice of unrestricted full custody versus termination, rather than nuanced consideration of whether a less-than-ideal parent-child relationship is worth maintaining. At bottom, for something to be the "best" it must be the most desirable. Therefore, in order to make a determination about what is truly in a child's "best interests," a trial court should consider whether termination is necessary to protect the child from harm and whether termination would actually benefit the child. In my opinion, a preponderance of the evidence did not support that termination was in AAB and AMB's *best* interests. The evidence was simply insufficient to conclude that the boys' continued relationship with their mother, even an unconventional or imperfect one, was not worth maintaining. Accordingly, I am left with a definite and firm conviction that a mistake was made and I respectfully dissent from this Court's order denying leave to appeal.

WELCH, J., joins the statement of CAVANAGH, J.