

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
May 14, 2020

In re KING/BENTON/WRIGHT, Minors.

No. 350334
Oakland Circuit Court
Family Division
LC No. 16-842375-NA

Before: GADOLA, P.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to her children pursuant to MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent). We affirm.

I. FACTS

In April 2016, Child Protective Services (CPS) removed respondent's three children, then ages six, four, and two, from her home after she left two of the children with a relative and disappeared for approximately three weeks with the third child without anyone knowing her whereabouts. The trial court assumed jurisdiction of the children, and the children were removed from respondent's care on the grounds of improper supervision, physical neglect, failure to provide necessary care for the children, and subjecting the children to substantial risk of harm. After respondent participated in services provided to her through a parent agency treatment plan put in place by petitioner, Department of Health and Human Services (DHHS), the children were returned to her care in March 2017, and the trial court terminated its jurisdiction over the children.

In June 2017, the children again were removed from respondent's care after she left the children home alone all night. When police investigated, they also found there was no food in the home. Petitioner filed a petition requesting that the court assume jurisdiction, alleging physical neglect of the children. Respondent pleaded no contest to the petition's allegations of neglect, and the trial court again assumed jurisdiction over the children. The trial court ordered respondent to comply with and benefit from the parent agency treatment plan.

In August 2018, the trial court adopted petitioner's recommendation and returned the children to respondent's custody and care, with in-home services in place. The trial court retained jurisdiction over the children. In November 2018, petitioner advised the trial court that respondent again was not adequately parenting the children, and that the children had missed a significant amount of school and had also missed scheduled dental appointments. Petitioner also reported that respondent was not complying with the parent agency treatment plan, was not participating in mental health treatment, was unemployed, and was not staying in contact with the caseworker. The trial court ordered that the children again be removed from the home.

In January 2019, petitioner filed a supplemental petition seeking to terminate respondent's parental rights. Petitioner alleged that respondent had not fully complied with and benefited from services, and that the children were being harmed by her ongoing parental neglect. The supplemental petition included factual allegations not included in the initial petition, including the allegation that the children had missed a significant amount of school after being again returned to respondent's care.

At the termination hearing, the foster care caseworkers testified that respondent had not complied with the parent agency treatment plan. The caseworkers testified that respondent was not participating in therapy, was unemployed, had missed several parenting visits with the children, had not demonstrated a legal source of income, had not permitted the foster care worker to inspect her housing, and did not maintain regular contact with the worker. The foster care workers further testified that petitioner had provided respondent with all the services that were available.

One foster care caseworker testified that the children were not regularly attending school. She testified that in October 2018, the children's school reported to her that the children had excessive absences and tardies, and that respondent had enrolled one of the children in the third grade when he had not successfully completed second grade. Respondent's trial attorney objected that this testimony did not relate to the allegations in the initial petition. The trial court's referee determined that the testimony was relevant, reasoning that the children's schooling had been an issue throughout the case. The caseworker then testified that the children's school also had reported that the children lacked adequate winter clothing and had poor hygiene, often wearing the same dirty clothes several days in a row. The caseworker testified that the school attempted to provide the children with winter coats, gloves, socks, and shoes, as well as backpacks with school supplies, but that the children informed them that they could not accept the items because it made respondent angry.

The caseworker also testified that one of the children told her they were happy to be back in foster care. Respondent's trial counsel objected to the witness repeating the children's statements as hearsay, but the trial court overruled the objection on the basis that rules of evidence did not apply at the dispositional stage of the proceedings. The caseworker then further testified that the children told her that they did not have a regular eating schedule at respondent's home, and that they were provided meals at school, but respondent often did not provide food on weekends or in the evening. The children also expressed concern to the caseworker that respondent would be angry if she found out what they were saying. The caseworker further testified that the children were doing well in their respective foster homes, and that the foster parents were coordinating sibling visits and were interested in adopting their respective foster children.

Respondent testified that she knew that she had an ongoing responsibility to continue with therapy when the children were returned to her care and admitted that she stopped, but she explained that she was unable to find childcare. Respondent denied that she had failed to take the children to their dental appointments, claiming that the dentist would not see them because of insurance issues. Respondent testified that the children missed school because their own misbehavior caused the school to call respondent, and also testified that the children were afraid to go to school because they feared removal by CPS. Respondent testified that the children had appropriate shoes and coats and bathed regularly, and that no one ever came to her home to investigate those claims. Respondent testified that she was employed as a home health care aide and had stable housing. Respondent also testified that she loved her children, was bonded with them, and wanted them to be returned to her home.

The trial court adopted the findings of the referee that clear and convincing evidence established a basis to terminate respondent's parental rights under MCL 712A.19b(3)(c)(i), (g) and (j). The trial court thereafter held a hearing on the issue of the children's best interests. The psychologist who had conducted respondent's psychological evaluation testified that respondent placed her own needs above those of her children, had failed to consistently address mental health issues, and was unlikely to gain the insight necessary to meet her children's needs in the foreseeable future. The psychologist opined that respondent could not rectify her issues within a reasonable time based upon her history of noncompliance with the parent agency treatment plan, and that it would be detrimental to the children to be returned to her care and then removed again.

The foster care caseworker testified that since the statutory basis hearing, respondent had not complied with her parent agency treatment plan. She was not attending therapy, was not working because she had just given birth, and was inconsistent in visiting the children. The foster care caseworker testified that although there was a parent-child bond, respondent was unable to provide the children with the necessary stability and permanency.

The foster care worker testified that the children were adjusting well in their foster homes and that the foster families had expressed a desire to adopt. The foster care worker also was assessing maternal family members who had expressed an interest in adopting the children. She testified that termination of respondent's parental rights was necessary because the children were young and needed permanency that only adoption, rather than a relative guardianship, could provide. At the conclusion of the hearing, the trial court found that termination of respondent's parental rights was in the best interests of the children and terminated respondent's parental rights.

II. DISCUSSION

A. STATUTORY BASIS

Respondent contends that the trial court erred by finding that a statutory basis to terminate her parental rights was demonstrated by clear and convincing evidence, arguing that the trial court erroneously permitted petitioner to introduce hearsay to prove the allegations of the supplemental petition. We disagree.

1. STANDARD OF REVIEW

To terminate parental rights, the trial court is required to find that at least one statutory basis for termination under MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Keillor*, 325 Mich App 80, 85; 923 NW2d 617 (2018). We review for clear error the trial court's determination that a statutory basis for termination of parental rights has been proven by clear and convincing evidence. *Id.* We also review for clear error the trial court's factual findings; a factual finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Id.* A trial court's finding is not clearly erroneous unless it is more than possibly or probably incorrect. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). We review de novo issues involving the application and interpretation of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

2. HEARSAY EVIDENCE

To initiate a child protective proceeding, the DHHS must file a petition in the family division of the circuit court alleging facts that constitute an offense by the respondent parent against the child under MCL 712A.2(b). *In re Sanders*, 495 Mich at 405. The parent may respond to the petition either by admitting or pleading no contest to the allegations, or alternatively, by requesting a trial (an adjudication) to contest the allegations of the petition; if a trial is held, the rules of evidence generally apply. *Id.* If the trial court assumes jurisdiction over the child at the conclusion of the adjudication phase, the case enters the dispositional phase; in proceedings held during the dispositional phase, the rules of evidence do not apply. *Id.* at 406.

If, after adjudication occurs, the DHHS seeks termination of parental rights in a supplemental petition asserting new grounds, the DHHS must demonstrate the new grounds with legally admissible evidence. *In re DMK*, 289 Mich App 246, 258; 796 NW2d 129 (2010). Stated another way, when a trial court considers termination on the basis of circumstances different from the circumstances upon which the adjudication was based, the trial court must do so only on the basis of legally admissible evidence. *Id.* at 257. In that regard, MCR 3.977(F)(1) provides:

(F) Termination of Parental Rights on the Basis of Different Circumstances.

The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if

(a) the supplemental petition for termination of parental rights contains a request for termination;

(b) *at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:*

(i) are true; and

(ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (l), or (m); and

(c) termination of parental rights is in the child's best interests. [Emphasis added.]

In this case, petitioner filed a petition in June 2017 alleging, in relevant part, that respondent “neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for the children’s health or morals, or . . . subjected the children to a substantial risk of harm to his or her mental well-being. . . .” The petition also included specific factual allegations, stating in part that respondent “left the children alone in the home where they were located by the [police]. Despite previous court involvement and service provision, [respondent] continues to place her children at imminent risk of harm. [Respondent] left the home at approximately 8 PM on 06/19/17 and did not contact law enforcement to report her children as missing until approximately 5 AM on 06/20/17.”

In January 2019, petitioner filed a supplemental petition, seeking termination of respondent’s parental rights under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j). The supplemental petition again alleged in part that respondent “neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for the children’s health or morals, or . . . subjected the children to a substantial risk of harm to his or her mental well-being. . . .” The supplemental petition also included additional factual allegations of neglect occurring after adjudication, including allegations that the children had missed dental appointments and also had missed several days of school after being returned to respondent’s care.

At the termination hearing, when the foster care caseworker testified that the children had missed an excessive amount of school while in respondent’s care, respondent’s counsel objected on the basis that the testimony did not relate to the allegations of the initial petition. The trial court overruled respondent’s objection, stating that the children’s schooling was an ongoing issue in the case. Respondent’s counsel thereafter also objected on the grounds of hearsay to the caseworker’s testimony regarding the children’s statements. The trial court overruled the objection, holding that the rules of evidence did not apply because it was a post-adjudication hearing.

Respondent argues that the 2017 petition alleged only that respondent failed to properly supervise the children, but that the supplemental petition alleged further acts of negligence that had allegedly occurred after the children were returned to respondent’s care in August 2019. Respondent argues that the trial court erred by permitting petitioner to demonstrate these additional factual allegations by introducing hearsay evidence, namely, the testimony of the foster care caseworker repeating information allegedly provided to her by the children’s school that the children had missed several days of school and did not have adequate clothing and hygiene. Respondent argues that because there were no specific allegations of educational neglect, or failure to feed, clothe and bathe the children in the initial petition, the new allegations of the supplemental petition could be demonstrated only by legally admissible evidence in accordance with the rules of evidence.

We acknowledge that the trial court permitted petitioner to introduce hearsay. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c); *In re Utrera*, 281 Mich App 1, 18; 761 NW2d 253 (2008). Generally, hearsay is inadmissible unless the rules of evidence provide otherwise. MRE 802; *In re Utrera*, 281 Mich App at 18. The testimony of the foster care caseworker that the school had informed her that the children were frequently either absent or tardy was hearsay. The testimony of the foster care caseworker that some person from the children’s school told her that the children told that person that respondent would not permit them to accept clothing from the school is also hearsay. However, we have observed that hearsay is admissible at the dispositional phase of the proceedings unless it relates to issues alleged in a supplemental petition not subject to the prior adjudication. See *In re DMK*, 289 Mich App at 258.

Here, we conclude that although the children were removed from respondent’s care in 2017 because of her failure to properly supervise them, the 2017 petition was not premised solely on an allegation of improper supervision. It alleged that respondent “neglected or refused to provide proper or necessary support, education, medical, surgical, or other care necessary for the children’s health or morals, or . . . subjected the children to a substantial risk of harm to his or her mental well-being. . . .” The hearsay testimony regarding the children’s school attendance related to this allegation in the initial petition, to which respondent pleaded no contest, as did the hearsay statements of the witness regarding what the children and others had told her about the children’s clothing, hygiene, and their desire to return to foster care. Because these statements were post-adjudication with respect to the allegations of the initial petition, the rules of evidence did not apply.

Respondent also briefly suggests that her counsel at trial failed to challenge this testimony and therefore provided ineffective assistance of counsel at trial. We note that respondent’s counsel at trial did, in fact, object to the introduction of hearsay on the basis that it related to the additional factual allegations of the supplemental petition, and was overruled by the trial court. Further, “[f]ailing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Thus, respondent’s claim of ineffective assistance of counsel, based on counsel’s failure to challenge this evidence, also fails.

3. BASIS FOR TERMINATION

Again, to terminate parental rights, the trial court must find that at least one statutory basis for termination under MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Keillor*, 325 Mich App at 80. In this case, the trial court terminated respondent’s parental rights under MCL 712A.19b(3)(c)(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:

* * *

(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.

* * *

(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.

* * *

(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.

Termination of parental rights is proper under subsection (c)(i) when "the totality of the evidence amply supports" that the parent has not accomplished "any meaningful change in the conditions" that led the trial court to assume jurisdiction of the child, *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009), and when there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. MCL 712A.19b(3)(c)(i). Termination under subsection (g) is proper when the parent, although 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 do so within a reasonable time considering the child's age. The trial court may consider a parent's failure to comply with and benefit from a parent agency treatment plan as evidence that the parent will not be able to provide proper care and custody. *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). Termination under subsection (j) is proper when there is a reasonable likelihood based upon the parent's conduct or capacity that the child will be harmed if returned to the parent's home. Although termination may be warranted under more than one statutory section, only one statutory basis need be demonstrated to support termination. *In re Ellis*, 294 Mich App at 32.

In this case, we conclude that the trial court did not clearly err by determining that there was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(c)(i). Here, the children were removed from respondent's care three times over the course of three years as a result of respondent's neglect. Respondent lacked stable income, neglected the children's medical and hygiene needs, failed to consistently ensure that the children attended school, failed to provide food and clothing for the children, and failed to supervise them. Each time the children were removed from her care, respondent at least partially complied with the parent agency treatment plan. Each time she regained custody of the children, respondent stopped participating in the services and failed to provide the children with proper care and supervision. The result is that respondent failed to accomplish any meaningful change in the

conditions that led the trial court to assume jurisdiction of her children. See *Williams*, 286 Mich App at 272. In sum, more than 182 days had elapsed since the issuance of the initial disposition order and the conditions that led the trial court to assume jurisdiction of the children persisted. Therefore, we hold that the trial court did not clearly err in finding that termination of respondent's parental rights was proper under MCL 712A.19b(3)(c)(i). This same evidence supports the trial court's finding that termination of respondent's parental rights was also warranted under MCL 712A.19b(3)(g) (proper care and custody) and (j) (risk of harm).

B. BEST INTERESTS

Respondent also contends that the trial court clearly erred by finding that a preponderance of the evidence demonstrates that termination of her parental rights was in the best interests of the children. Again, we disagree.

Once a statutory ground for termination has been demonstrated, the trial court must terminate the parent's parental rights if it finds by a preponderance of the evidence that termination is in the best interests of the child. MCL 712A.19b(5); *In re Medina*, 317 Mich App 219, 226; 894 NW2d 653 (2016). We review for clear error the trial court's decision regarding a child's best interests. *Id.*

When determining whether the termination of parental rights is in a child's best interests, the trial court should weigh all the available evidence and consider a variety of factors, including the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, the advantages of a foster home over the parent's home, the parent's compliance with the case service plan, the parent's visitation history with the child, the child's well-being in the foster home, and the possibility of adoption. *In re White*, 303 Mich App at 713. In considering the child's best interests, the trial court should focus on the child and not the parent. See *In re Moss*, 301 Mich App 76, 87; 836 NW2d 182 (2013). At this stage, the interest of the child in a stable home is superior to any interest of the parent. *In re Medina*, 317 Mich App at 237.

We conclude that the trial court in this case did not clearly err in finding that a preponderance of the evidence demonstrated that termination of respondent's parental rights was in the children's best interests. Here, the trial court considered the evidence that there was a bond between the children and respondent, but also considered that respondent lacked parenting ability, and that the children were in need of permanence, stability, and finality. The trial court considered that the foster homes provided for the children's needs, in contrast to respondent's inability or unwillingness to provide a stable home. The trial court also properly considered that the children were bonded with their respective foster parents, the willingness of those parents to adopt the children, and that the foster families had facilitated sibling visits so that the children's relationships with each other could continue.

In light of the record, we conclude that the trial court did not clearly err in concluding that a preponderance of the evidence demonstrated that termination of respondent's parental rights is in the children's best interests.

Affirmed.

/s/ Michael F. Gadola
/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro