

STATE OF MICHIGAN
COURT OF APPEALS

In re KENDALL-FLORES, Minors.

UNPUBLISHED
September 10, 2020

No. 351942
Wayne Circuit Court
Family Division
LC No. 19-001595-NA

Before: JANSEN, P.J., and K. F. KELLY and CAMERON, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor children, CKF and CAKF, under MCL 712A.19b(3)(j). Finding no errors warranting reversal, we affirm. This appeal is decided without oral argument. MCR 7.214(E)(1)(b).

I. BASIC FACTS

Respondent lived with his toddler twin daughters, CKF and CAKF, their mother,¹ and CK, the mother’s four-year-old daughter from a prior relationship. The children routinely climbed into the parents’ bed at night, but were carried to their own beds after falling asleep. In March 2019, the mother was in her bedroom when the children came in to watch cartoons. Respondent entered the room to play video games, and the children’s mother left the room to lay on the couch because she was not feeling well. Respondent brought the mother a glass of water, but then went into their bedroom and closed the door. The mother heard the door close and got up because “[w]e never close doors in my house.” Although respondent’s legs initially blocked the door, the mother walked in the room to find respondent completely naked and masturbating within inches of CK. Although all three children were in the bed, CK was closest to respondent, the bed was on the floor, and he was kneeling over her. Respondent also had his telephone in his other hand. He did not answer when she asked what he was doing. The mother picked up the children and left the room. Because of a history of domestic violence with respondent, the mother texted a friend to

¹ A petition was also filed against the mother. However, it only sought temporary custody and the plan was to reunify her with the children following the provision of services. She is not a party to this appeal.

alert the police. Consequently, the police removed respondent from the home. Respondent was apparently charged with two counts of criminal sexual conduct that were later dismissed.

Petitioner, the Department of Health and Human Services (DHHS), made a safety plan with the mother that prohibited respondent from having any contact with the children. However, in July 2019, a welfare check was conducted, and respondent was found alone with the three children. Consequently, a petition was filed involving both parents.

The mother testified regarding the incident of sexual abuse. However, she also delineated the couple's tumultuous relationship and physical abuse by respondent. The police had been called on 10 to 15 occasions. Additionally, the mother obtained personal protection orders (PPO) against respondent in 2016 and 2018. The first PPO was precipitated by an argument that led to respondent flipping the mother out of the chair she was seated in and then hitting her with the chair. She required medical treatment from this injury and needed four staples to close the wound. The mother also reported that respondent tried to set her hair on fire, punched her in the thigh, and repeatedly threatened to kill her and her daughter. The second PPO was obtained after the mother was watching television with the children and friends when respondent broke the front window, entered the home, and kicked her. He yelled and screamed at the mother even in front of the children.

The caseworker testified that petitioner became involved after the incident of sexual abuse. Respondent acknowledged that the incident occurred and that he knew the children were in the room. He advised the caseworker that she was not a man so she would not understand. A safety plan was put in place, but the caseworker was unable to contact the mother. In an attempt to close the case, an unannounced visit to the home occurred in July 2019. At the time, the children were a little dirty, the toddlers were not completely dressed, and the house was a mess. Respondent did not initially identify himself to the caseworker, but represented that he was merely a friend at the house. However, after one of the children referred to him as dad, respondent admitted that he had returned to the home over two weeks earlier. All three children were placed with the paternal grandmother. The caseworker filed a petition for permanent custody against respondent. The caseworker testified that termination of respondent's parental rights was warranted in light of the incident of sexual abuse and the history of domestic violence. She also opined that termination was in the best interests of the children despite a relative placement citing the nature of the sexual act.

Respondent testified that he was walking around his house in only his underwear in March 2019. The children came in the bedroom to watch television, and he rolled over and went to sleep. Respondent woke up to find the children in the bed and the mother on the living room couch. He gave the mother a glass of water, went back to the bedroom where the girls were asleep under the covers, and closed the door. Respondent placed his phone on the bed and began to watch pornography. He got off the bed, pulled his underwear down, knelt down, and began masturbating two feet away from the children. His legs obstructed the entry into the room. Respondent believed that the bedroom was the best place to perform this sexual act because the mother "wasn't going to come back because she doesn't want to be there." In other words, it was the least likely place that the mother would revisit. He denied experiencing any sexual arousal from the children's presence in the room. In fact, respondent testified that the children's presence made the act "less enjoyable." It was distracting to have the children in the room because he had to "watch for them"

and try not to wake them. His plan was to not wake up the girls, and if they woke up, he would stop and cover himself. Respondent admitted that there were two other bedrooms, a bathroom, a kitchen, a living room, and a storage room in the house. He testified that he did not want anyone to see him masturbating. When asked to explain why he did the act in a room with three other people, he responded, "Naw, that sound silly but they were sleeping." He also stated it "didn't feel right" to do the act in the children's bedroom. He stated that he did not want to be caught watching pornography by the mother.

Respondent denied hitting the mother with a chair. He explained that the chair was unstable and tipped over, but he admitted to "probably" approaching her in a manner that caused her concern. He denied other allegations of physical violence and prior knowledge of the existence of the PPOs. However, he did admit to raising his voice to the mother in a manner that placed her in fear, and this conduct occurred in front of the children. Respondent did not know why he did this. Although he denied physical abuse, he admitted to being "psychologically aggressive." This meant he made the mother feel uncomfortable mentally and gave her the impression that he would be physical with her through his tone of voice and "his stature." Respondent may have "yelled too loud" or "talked too much," and the children heard him being "verbal," but he denied directly threatening the mother. However, the mother was aggressive toward him. Nonetheless, respondent admitted being arrested for domestic violence twice. He also acknowledged 10 contacts with the police. He never called the police, but the mother or the neighbors did. Respondent admitted that he broke a window, but he explained that he was knocking on it when it shattered.

Respondent met the mother in 2014, and they began living together in July 2015. Respondent had a steady managerial job, and the mother held various jobs. With their combined incomes, they were able to support the household. Respondent worked until December 2017, when it was determined that he would care for the children and maintain the household, and the mother would work. He recently worked in June 2019, but was currently unemployed.

Respondent testified that he participated in supervised visitation with his children, but he missed two visits; one visit was missed because of transportation issues. The visits were supervised at the agency, and respondent did not bring snacks, diapers, or toys. Respondent's mother, the children's foster care provider, brought those things. He did not change diapers, but his mother did if it was necessary. At the visits, respondent played with the girls, chased them, and talked to them. He wished for more frequent and unsupervised visits. He cared for his children without supervision or aid while the mother worked. Respondent opined that it was not in the children's best interests to terminate his parental rights because he loved them and wanted to be a part of their lives. He would participate in a treatment plan and services if the children were made temporary court wards. When questioned about participating in domestic violence counseling, respondent said, "it would be a benefit if not a detriment." When asked to expand on that answer, respondent stated if he stayed the same, "it's not hurting me, so, you know."

Respondent's visits at the agency were supervised. The worker testified that respondent missed two visits. Other visits were cancelled, but the grandmother notified the worker of the cancellations. The children were fed before they arrived at the visits. Additionally, the children were no longer in diapers, but wore pull-ups because the grandmother was trying to potty-train them. Respondent was attentive to the children at the visits.

At the conclusion of the hearing, the trial court exercised jurisdiction over the children. The trial court terminated respondent's parental rights, concluding that respondent's reasoning for engaging in the sexual act in the presence of the children was illogical. Specifically, respondent offered that he remained in the bedroom and risked being observed by the children to avoid being seen watching pornography by the mother, his sexual partner. The court found that the statutory ground for termination, MCL 712A.19b(3)(j) requiring a reasonable likelihood that the children would be harmed if returned to respondent's care, was satisfied. The domestic incidents coupled with the sexual act presented a risk of harm, and action was necessary to prevent an elevation in respondent's conduct. The trial court also held that respondent did not have a parental relationship with the children, but rather, he relied on his mother to care for the children. Therefore, despite the relative placement, termination of respondent's parental rights was in the best interests of CKF and CAKF.

II. STATUTORY GROUND

Respondent alleges that his single act of masturbating near the children did not establish by clear and convincing evidence that he posed a risk of harm to his children in the absence of evidence of long-term neglect or a pattern of abuse. We disagree.

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *Id.*; see also MCR 3.977(K). Once a statutory ground for termination has been established, the trial court must conclude that termination of parental rights is in the child's best interests before it can terminate parental rights. MCL 712A.19b(5); *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). A trial court's decision regarding a child's best interests is also reviewed for clear error. *In re Laster*, 303 Mich App 485, 496; 845 NW2d 540 (2013). This Court defers to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

MCL 712A.19b(3)(j) provides that parental rights may be terminated if the trial court finds, by clear and convincing evidence, that:

(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.

In this case, the testimony indicated that respondent resided in a home with three bedrooms, a living room, a kitchen, a bathroom, and a storage room. The children routinely came into their parents' bedroom and fell asleep, but were later carried to their own room. In March 2019, the mother left the children in her bedroom and went to lay on the couch. Respondent brought her a glass of water, then returned to the bedroom and closed the door. The mother became suspicious because doors in her home were not closed. The mother entered the room to find respondent masturbating within two inches of her eldest child CK. The mother carried the children out of the door and texted a friend to call the police. She explained that there was a history of domestic violence by respondent against her, the police had responded on 10 to 15 occasions, and there were

two prior PPOs obtained by her against respondent. The mother also testified to injuries inflicted by respondent and verbal abuse that occurred in front of the children.

Although respondent denied actual physical abuse of the mother, he acknowledged that his words and his stature had an emotional impact on the mother and may have caused her to fear a physical assault. He further acknowledged that the police were called by the mother or neighbors on multiple occasions, and he was arrested for domestic violence on two occasions.

The harm necessary to satisfy MCL 712A.19b(3)(j) is not limited to physical harm, but may be satisfied by emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Irrespective of the fact that only one act of sexual gratification occurred, the evidence established a long-term course of physical and verbal assaults that prompted the mother to obtain two PPOs against respondent. Although respondent denied the actual physical assault of the mother, he admitted to verbal assaults that occurred in front of the children. Despite the children's removal from his care, respondent did not provide any support to his mother for the children's maintenance. He was allowed supervised visits, yet respondent did not bring any snacks or necessities for his children, but relied on his mother to ensure the children were fed. Respondent asserted that he demonstrated his ability to care for his children. However, when a caseworker conducted a surprise visit, the children were dirty, not completely dressed, and the house was messy. The caseworker learned that respondent had been at the home for two weeks. The evidence may have only uncovered one act of sexual gratification, but respondent's cumulative conduct across time revealed the children were exposed to the longstanding abuse by respondent against the children's mother. Under the circumstances, the trial court did not clearly err in finding that MCL 712A.19b(3)(j) was satisfied.

III. BEST INTERESTS

Respondent contends that termination of his parental rights was not in the children's best interests because he shares a bond with the children and is willing to complete any services the trial court orders. We disagree.

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90 (footnote omitted). This Court reviews the trial court's ruling that termination is in the child's best interests for clear error. *In re Hudson*, 294 Mich App at 264. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App at 80 (citation and quotation marks omitted).

"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." MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance

with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). The court must "explicitly address whether termination is appropriate in light of the children's placement with relatives." *In re Olive/Metts*, 297 Mich App at 43. The court may consider whether the parent has engaged in sexual conduct toward a child. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016).

The trial court did not clearly err by finding that termination of respondent's parental rights was in the children's best interests because the evidence established that respondent performed a sexual act in the children's presence, habitually assaulted their mother, failed to provide for the children, and left caretaking activities to his mother during visitation. The trial court also considered the fact that the children were placed with respondent's mother, but held that respondent did not assume parental responsibility, but left the support and care of the children to others.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Thomas C. Cameron