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STATE OF MICHIGAN
COURT OF APPEALS

In re CARTER/FOHS, Minors.

UNPUBLISHED
June 10, 2021

No. 355373
Berrien Circuit Court
Family Division
LC No. 2018-000074-NA

In re I. M. FOHS, Minor.

No. 355374
Berrien Circuit Court
Family Division
LC No. 2018-000103-NA

In re S. N. FOHS, Minor.

No. 355430
Berrien Circuit Court
Family Division
LC No. 2019-000088-NA

Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

In these consolidated appeals,¹ respondent-father appeals by right the trial court’s orders terminating his parental rights to the minor children, SNF, EMC, PAF, and IMF, under MCL 712A.19b(3)(b)(i) (parent’s act caused physical injury or abuse to child or sibling), MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), and

¹ See *In re Carter/Fohs*, unpublished order of the Court of Appeals, entered March 2, 2021 (Docket Nos. 355373, 355374, 355430).

MCL 712A.19b(3)(k)(ix) (parent abused child or sibling and abuse included sexual abuse). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 27, 2018, petitioner filed a petition for the removal of EMC and PAF from their home. Petitioner alleged that respondent² had knowingly placed the children in a home with a registered sex offender, that respondent had ongoing issues with cocaine use, and that respondent had refused to receive substance abuse treatment. EMC and PAF were taken into the custody of the court and placed in non-relative foster care. Respondent subsequently pleaded no contest to the allegations in the petition, and the trial court took jurisdiction over EMC and PAF.

On December 12, 2018, after IMF's mother gave birth to him, petitioner filed another petition for removal, alleging that IMF should not remain in the home because of substance use, the lack of adequate housing, and the case involving EMC and PAF. Additionally, petitioner claimed that respondent had tested positive for cocaine on multiple occasions in August, September, October, and November. The referee found probable cause to support the petition, and IMF was removed and placed in non-relative foster care.

Throughout the dispositional period from October 2018 to May 2019, respondent made little progress in rectifying the barriers that led to removal, and he largely refused to engage in substance abuse treatment. On May 13, 2019, respondent was criminally charged with five counts of first-degree criminal sexual conduct (CSC-I) and one count of second-degree criminal sexual conduct (CSC-II) against SNF and SNF's sibling, and he was arrested shortly thereafter.³ In September 2019, petitioner filed a petition for termination of respondent's parental rights to SNF. The trial court authorized the petition and ordered that SNF be placed with her mother. Also in September 2019, petitioner filed petitions seeking termination of respondent's parental rights to the other three children. Petitioner sought termination of respondent's rights to all four children under MCL 712A.19b(3)(b)(i), (c)(i), and (k)(ii) on the basis of the allegations of sexual abuse and respondent's failure to rectify the barriers to reunification, namely his substance abuse issues.

Prior to the termination hearing, petitioner filed a motion in limine seeking to have SNF declared an unavailable witness and to admit the testimony she gave at respondent's criminal preliminary examination in July 2019, arguing that SNF had suffered mental illness and trauma from respondent's sexual abuse and had been hospitalized for suicidal ideation after testifying in July. Respondent objected on the ground that SNF had not been shown to be unavailable and respondent had not had an opportunity to cross-examine SNF in the termination case. The trial court granted petitioner's motion.

² The mother of PAF, EMC, and IMF was a respondent in the proceedings below, and her parental rights were terminated at a different termination hearing. SNF's mother was not a respondent. Neither mother is a party to this appeal. For ease of reference, we will refer to respondent-father simply as "respondent."

³ SNF's sibling is not at issue in this appeal.

At the termination hearing, SNF's adult sister testified that respondent had sexually abused her from the age of 9 until she moved out at age 15. SNF's preliminary examination testimony was admitted, wherein SNF described how respondent had sexually touched and penetrated her multiple times when she was younger than 13 years of age. SNF's case worker, Jaquaya Williams (Williams), testified that SNF continued to suffer mentally and emotionally from respondent's sexual abuse, and opined that termination of respondent's parental rights was in SNF's best interests. Emily Gruber (Gruber), the foster care worker for EMC and PAF testified that both of the children had also alleged in counseling sessions that respondent had touched their genitals, and that both children had begun to "act out sexually" in foster care. Gruber testified that EMC and PAF were doing well in their placements and were receiving treatments for their trauma, and opined that termination was in their best interests. Regarding IMF, Gruber also opined that termination was in IMF's best interests due to the risk of harm if returned to respondent's care; Gruber also noted that IMF had never lived with respondent. Gruber testified that respondent "did not engage in services other than two days of inpatient rehab and participating in some parenting time and random drug screens" and had never rectified his substance abuse issues.

The trial court found that petitioner had proven each statutory ground by clear and convincing evidence and that termination was in the children's best interests, and entered orders terminating respondent's parental rights. This appeal followed.⁴

II. STATUTORY GROUNDS FOR TERMINATION

Respondent argues that the trial court erred by holding that statutory grounds for termination had been proven by clear and convincing evidence. We disagree. We review for clear error the trial court's decisions both on whether statutory grounds existed to support termination and whether termination was in the children's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). Clear error occurs when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted). The trial court's decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). We will not substitute our judgment for that of the trial court, see *In re Hall Minors*, 483 Mich 1031, 1031; 765 NW2d 613 (2009), and must consider the trial court's special opportunity to evaluate the credibility of witnesses, MCR 2.613(C); *In re Miller Minor*, 433 Mich 331, 337; 445 NW2d 161 (1989). Only one ground for termination need be proven by clear and convincing evidence in order for a trial court to order termination of parental rights. *In re HRC Minors*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

To terminate parental rights, a trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination listed within MCL 712A.19b has been met. *In re Fried*, 266 Mich App 535, 540-541; 702 NW2d 192 (2005). In this case, the trial court

⁴ Respondent also appealed SNF's adjudication in a separate appeal. See *In re Fohs Minor*, unpublished per curiam opinion of the Court of Appeals, issued November 12, 2020 (Docket Nos. 353386 and 353387). This Court affirmed the trial court's adjudication, and additionally rejected respondent's argument that the trial court erred by granting petitioner's motion in limine and admitting SNF's preliminary examination testimony. See *id.* at 8, 9-10.

terminated respondent's parental rights to SNF under MCL 712A.19b(3)(b)(i) and MCL 712A.19b(3)(k)(ii), and to EMC, PAF, and IMF under MCL 712A.19b(3)(b)(i), MCL 712A.19b(3)(c)(i), and MCL 712A.19b(3)(k)(ii). These statutory provisions 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:

* * *

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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.

* * *

(k) The parent abused the child or a sibling of the child, the abuse included 1 or more of the following, and there is a reasonable likelihood that the child will be harmed if returned to the care of the parent:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

In a prior decision, we summarized relevant portions of SNF's testimony at respondent's preliminary examination, which was admitted at the termination trial under MRE 804(a)(4) and (b)(1):⁵

⁵ Although respondent challenges the admission of this testimony, as stated, we have already decided this issue in our prior decision. See *Fohs*, unpub op at 7-9 (addressing admission of the testimony in the adjudication trial). That decision stands as law of the case. See *Cipriano v Cipriano*, 289 Mich App 361, 375; 808 NW2d 230 (2010) ("The law-of-the-case doctrine holds

SNF testified that when she would stay with respondent-father, when he was drunk or his girlfriend was absent, he would touch her private parts and make her uncomfortable. . . . SNF testified that respondent father touched her butt, touched her breasts outside her clothes, and when she was 10 or 11 years old, he penetrated her vagina with his penis and his finger. . . .

On the second day of testimony, the prosecutor recalled SNF as a witness, and she again testified that respondent-father had penetrated her vagina with his penis and his finger, when she was younger than 13.⁶

Additionally, SNF's adult sibling testified at the termination trial that respondent sexually abused her between ages 9 or 10 and 15. Gruber testified that, in counseling sessions, EMC "has said that her father has touched her . . . vaginal area with his mouth" and that respondent had "wiggled his . . . penis in front of her"; similarly, PAF had "said that . . . his father touched his penis and his butt hole." Gruber further testified that both children had started to "act out sexually."

Clear and convincing evidence supported the finding that respondent had sexually abused SNF, EMC, and PAF, as well as SNF's adult sibling when she was a child. The trial court therefore did not clearly err by finding that respondent sexually abused the children or siblings of the children and that, if the children were returned, there was a reasonable likelihood of further abuse occurring. Having concluded that at least one statutory ground for termination existed, we need not address the additional grounds for termination. *HRC*, 286 Mich App at 461.

III. BEST-INTEREST DETERMINATION

Once the trial court determines that one or more of the statutory grounds provided in MCL 712A.19b(3) have been proven by clear and convincing evidence, "the trial court must find that termination is in the child's best interests before it can terminate parental rights." *Olive/Metts*, 297 Mich App at 40. See also MCL 712A.19b(5). The trial court's best-interest determination must be supported by a preponderance of the evidence. *In re Moss Minors*, 301 Mich App 76, 90; 836 NW2d 182 (2013). When deciding whether termination is in the children's best interests, the trial 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." *Olive/Metts Minors*, 297 Mich App at 41-42 (citations omitted). The trial court may also consider evidence that the children are not safe with the parent, that they are thriving in foster care,

that an appellate court's ruling on a particular issue binds the appellate court and all lower tribunals with respect to that issue."); *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) ("[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same."). Moreover, even if our prior decision were not the law of the case, we would hold that the trial court did not abuse its discretion by admitting the testimony at the termination hearing, for the reasons stated in our prior opinion. See *Fohs*, unpub op at 7-9.

⁶ *Fohs*, unpub op at 5.

and that the foster care home can provide stability and permanency. *In re VanDalen Minors*, 293 Mich App 120, 141; 809 NW2d 412 (2011).

Gruber testified that termination was in SNF's best interests in light of the sexual abuse and SNF's mental health issues stemming from that abuse, noting that, each time there had been a court hearing regarding respondent, SNF's mental health had regressed extensively for long periods of time. Gruber also testified to similar concerns about EMC's and PAF's mental well-being if returned to respondent. Gruber believed that any contact between respondent and the children would be harmful to their mental health. Moreover, Gruber felt the children needed "long term permanency." She opined that termination was in EMC's and PAF's best interests in light of the sexual abuse allegations and trauma both children had already endured. Gruber believed the children would be at a risk of harm if termination did not occur. Furthermore, Gruber testified that there were no services that could be offered to respondent to address the sexual abuse and provide a safe environment for EMC and PAF with respondent. According to Gruber, EMC and PAF had recently been doing "excellent" in both their placements and in working through their trauma. She testified that EMC and PAF needed caregivers who could provide the necessary stability for the children to go through the intensive therapy they needed and to work through their trauma. Gruber believed that termination was in IMF's best interests because of risk of harm; moreover, IMF had also never lived with respondent, having been removed at birth. In light of the amount of time that had already passed, Gruber did not believe that waiting more time was in the children's best interests.

Williams testified that SNF desired that respondent's parental rights be terminated so that her stepfather could adopt her. Williams believed that termination was in SNF's best interests on the basis of the allegations against respondent, SNF's mental health issues, her self-harm, her suicidal ideations, and the hospitalization that had occurred. Furthermore, Williams did not believe that there were services or rehabilitation that could be offered to respondent such that Williams would be confident in SNF's safety if she returned to respondent's care.

There was ample evidence presented to the trial court in support of its determination that termination of respondent's parental rights was in the children's best interests. Three of the four children had alleged that respondent had repeatedly sexually abused them, while the fourth was an infant who had never resided with respondent. This abuse caused mental and emotional trauma and behavioral issues that were best treated in an environment in which the children had no contact with respondent and could feel safe and stable. The trial court did not clearly err in its determination that termination was in the children's best interests. *Olive/Metts*, 297 Mich App at 40.

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Deborah A. Servitto