

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ALEX RIVERA, SARAH
RIVERA, and BERNARDO M. RIVERA, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

UNPUBLISHED
August 23, 2005

v

No. 259164
Wayne Circuit Court
Family Division
LC No. 04-427288

MARGARETA RIVERA,

Respondent-Appellant,

and

BERNARDO MARQUEZ,

Respondent.

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Respondent-mother (“respondent”) appeals as of right the trial court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(ii), (g) and (j). We affirm.

I

This case arose after respondent’s seven-month-old child, Sarah (DOB, 7/1/03),¹ suffered a life-threatening injury while under the care of respondent-father, Bernardo Marquez, and respondent failed to seek medical treatment for the child until several days later when the baby was foaming from the mouth and twitching. Respondent initially reported that according to Marquez, whom she believed, Sarah had fallen off a toddler bed on February 9, 2004, and hit her head on a sandal; she stopped breathing, turned purple, and Marquez administered CPR.

¹ Respondents’ parental rights concerning the siblings, Alex (DOB, 9/4/01) and Bernardo (DOB 3/20/04), are at issue on the basis of Sarah’s injuries.

Respondent did not seek medical treatment for Sarah because she seemed all right until a few days later. On February 12, 2004, respondent began noticing problems with Sarah: she had vomited in the morning, and she did not act normally, seeming lethargic. After respondent went to work that evening, Marquez called her and said Sarah was twitching and foaming from the mouth. Respondent told Marquez to give Sarah a bottle and see if she stopped twitching, which she did. Later respondent called Marquez, who said Sarah seemed fine. However, when respondent returned home at approximately 11:30 p.m., Sarah was still twitching, so she took her to the hospital. Sarah was admitted to the hospital at 1:00 a.m., February 13, 2004.

The treating pediatric neurosurgeon, who had special expertise in Shaken Baby Syndrome (SBS), testified that Sarah's injuries were inconsistent with the alleged two to three feet fall and were instead consistent with a fall from an open window at two stories (twenty feet) or from unrestrained impact in a car hitting a concrete wall at fifty miles an hour. Sarah was initially diagnosed with a severe closed head injury and had suffered seizures. She was rushed into surgery because of abnormally high pressure in her brain. The neurosurgeon placed an intracranial placement monitor to monitor pressure on Sarah's brain, evacuating a subdural hemorrhage and making an incision to place a drainage tube. Tests indicated that Sarah had various prior injuries that had occurred within a week, but the majority of the blood was from an injury that had occurred within the past eight hours. The neurosurgeon indicated that Sarah's injuries were nonaccidental, consistent with SBS, and that Sarah would have died without treatment.

The trial court found that Sarah was a victim of SBS, inflicted by Marquez, and that there was evidence of old injuries that indicated some ongoing abuse of Sarah. The court found respondent's behavior and testimony problematic, essentially concluding that respondent's delay in obtaining treatment for Sarah and her initial failure to question the basis of the injury, posed a severe danger of future harm to the children, given the possibility of death in this instance. The court found clear and convincing evidence to terminate the parental rights and that it was not in the children's best interest to be returned to respondent.

II

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). If the trial court determines that petitioner established the existence of one or more statutory grounds for termination by clear and convincing evidence, then the trial court must terminate respondents' rights unless it determines that to do so is clearly against the children's best interests. *In re Trejo*, 462 Mich 341, 353-354; 612 NW2d 407 (2000).

This Court reviews a trial court's decision to terminate parental rights for clear error. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). To be clearly erroneous, a decision must be more than maybe or probably wrong. *Id.* In applying the clearly erroneous standard, this Court should recognize the special opportunity the trial court has to assess the credibility of the witnesses. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

III

Respondent contests the trial court's findings that clear and convincing evidence established three statutory grounds for termination, and that termination was not contrary to the children's best interests.² Respondent's parental rights were terminated under MCL 712A.19b(3)(b)(ii), (g) and (j) which provide:

(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:

* * *

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(g) The parent, without regard to intent, 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.

Considering the entire circumstances of this case, and the evidence presented, we find no clear error in the termination of respondent's parental rights under § 19b(3)(b)(ii). Sarah suffered repeated head injuries, culminating in severe brain trauma requiring emergency surgery. Respondent failed to comprehend or to properly respond to the life-threatening circumstances to protect Sarah. Marquez told respondent that Sarah had fallen off a toddler bed, stopped breathing, and turned purple, which necessitated CPR. This explanation of Sarah's injuries was later shown to be implausible. In circumstances in which a child suffers severe brain injury and near death from intentional abuse sustained in her immediate care environment, we cannot ignore the inescapable conclusion that those responsible for care failed to protect the child. The gravity of the failure in this case warranted the termination of parental rights.

² While it is not clear that the full lower court record was provided to this Court on appeal, it is still possible to determine that the trial court did not clearly err when it found that the statutory grounds for terminating respondents' rights had been established.

Viewing the record as a whole, and giving deference to the trial court's superior opportunity to evaluate the testimony, we find no clear error in the trial court's determination that § 19b(3)(b)(ii) was proven by clear and convincing evidence. *In re Miller, supra* at 337. For the same reasons, the trial court did not clearly err in finding that termination of respondent's parental rights was not contrary to the children's best interests.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot