STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of A.R.P., Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ADRIAN JAMES PEPPERS, JR.,

Respondent-Appellant.

UNPUBLISHED
December 23, 2008

No. 285207
Wayne Circuit Court
Family Division
LC No. 07-469819-NA

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(i). We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

Respondent is the biological father of ARP. On June 20, 2007, respondent and the mother took six-week old ARP to Garden City Hospital because of bruising on the cheeks, ears, eyelids and forehead. While at the hospital, both respondent and the mother cooperated with questioning from the medical personnel and police. Although their stories were somewhat inconsistent, both respondent and the mother indicated that the child was injured on June 17, 2007, when she fell from a couch to a soft mattress, a fall of no more than a foot.

Petitioner sought termination of both parents' parental rights as an initial disposition. The parents stipulated to the court's jurisdiction over the child, and the case proceeded to the dispositional phase. Prior to the dispositional trial, the parents were observed during their visitation with ARP, and they were interviewed by the Clinic for Child Study. The trial court heard from the Child Protective Services worker, a physician who saw ARP at Garden City Hospital, a police officer who questioned the parents, and received into evidence the CCS evaluation and pictures of the bruising. Neither respondent nor the mother (who was a respondent at the time) testified.

The testimony at the hearing concentrated on the bruising, how it occurred, and the petitioner's observation of respondent and the mother. With respect to the observations, the

testimony revealed that respondent (and the mother) interacted very well with ARP, and that he was at all times appropriate during the visitation.[1] The CCS evaluation also positively reflected on respondent's ability to parent. There was no concern about housing, income, or drug or alcohol use. The child was otherwise healthy.

The medical testimony was to the effect that the bruising could not have been caused by the fall, and that a six-week old baby could not independently roll over. The cause of the bruising, which did not result in any subdermal hematomas or require any medical treatment, was blunt trauma. However, the medical testimony could not indicate how the trauma occurred, other than it did not occur as described by respondent and the mother.[2]

After hearing the evidence and argument of counsel, the trial court concluded that respondent bruised the child, and would likely do so again. The pertinent findings were as follows:

> I have read closely the report from the Clinic for Child Study. I have looked at the pictures.
>
> What happened here, I think dad slapped the child a good bit. I don't think mom did.
>
> I am thinking what kind of physical injury is the statute referring to.
>
> The legislature didn't put severe physical injury. I've always read that in there.
>
> The testimony that I have is regarding bruising.
>
> Looking again at Dr. Nazer's testimony, he talks about extensive bruising. He talks of the bruising being consistent with being slapped first with the left hand and the right hand and it happening repeatedly. Forcefulness of the impacts, hard to say.
>
> I have no evidence that the juvenile had anything more than bruises. Lots of bruises.
>
> One scratch. No telling how that happened and when that happened.
>
> No testimony regarding Shaken Baby Syndrome or other things.

[1] On one occasion, during visitation, an iron that had fallen to the floor burned the child. Both respondent and the mother were exercising visitation when this occurred, and it was ruled accidental.

[2] The physician could not testify about when the bruising on the child occurred.

I've had a chance to observe both dad and mom in the courtroom and their reactions to these charges.

I believe I find dad's reactions are consistent with him having injured the child.

Regarding dad, bruises to the child is bad. I'm a parent myself and I'm quite familiar with how difficult children are when they're crying or screaming.

Sometimes there's not anything a parent can do to get them to be quiet. Bottles don't work, changing diapers, patting them on the back, taking them for a car ride.

Sometimes about the best thing a parent can do is let the juvenile exercise their lungpower by screaming a little bit.

These parents, it's their first child. The child was relatively new. Dealing with this situation is extraordinarily difficult.

Are the injuries here of the sort that a parent should lose parental rights for?

The statute doesn't talk about how severe they have to be. That's left up to a poor soul like me.

I was in the legislature when this was enacted. I don't think the legislature meant that it mean any injury. I think they meant severe injury.

Was this child severely injured? I'll find, yes.

That means I've found grounds for dad under subsection (3)(b)(i). I have not found grounds for mom.

Having found grounds for dad, subsection (5) states that if the Court finds there are grounds for termination parental rights the Court shall order termination of parental rights except where the Court finds that termination is clearly not in the child's best interests.

* * *

Essentially, in my mind, it comes down to, do I think dad would do this kind of thing again, and here I'd have to find that dad wouldn't do anything like this again.

I don't think I can find that. So where that leaves us.

For dad, there are grounds for termination of parental rights and I do terminate parental rights.

An order was entered to this effect, and this appeal followed.

II. Analysis

It is well established in our law that the permanent termination of a parent's rights to his child is an extremely serious matter. *In re Sanchez*, 422 Mich 758, 765-766; 375 NW2d 353 (1985). Hence, to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Sours*, 459 Mich 624, 632-633; 593 NW2d 520 (1999). This standard was more thoroughly explained in *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995):

> Evidence is clear and convincing when it "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [Quoting *In re Jobes*, 108 NJ 394, 407-408; 529 A2d 434 (1987).]

If a statutory ground for termination is established, the trial court must terminate parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests. MCL 712A.19b(5)[3]; *In re Trejo Minors*, 462 Mich 341, 353; 612 NW2d 407 (2000). The trial court's decision terminating parental rights is reviewed for clear error. MCR 3.977(J); *Trejo, supra* at 355-357; *Sours, supra* at 632-633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re Miller*, 433 Mich 331, 337; 455 NW2d 161 (1989).

While recognizing the deference due trial court's decisions regarding these fact intensive cases, we are compelled to hold that there was not clear and convincing evidence establishing that one of the statutory criteria was met. The section cited by the trial court requires that there be clear and convincing evidence that the child suffered physical injury caused by a parent and that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parents' home. MCL 712A.19(b)(3)(b)(i). Although the evidence arguably supported the trial court's conclusion that respondent caused the bruising, there was no clear and convincing evidence establishing a reasonable likelihood that the child would be injured or bruised if placed into the parents' home. Indeed, there was no evidence that

[3] MCL 712A.19b(5) was amended, effective July 11, 2008. 2007 PA 199. The amended version now requires that the trial court order termination 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." However, as this case decided before the recent amendment, we continue to use the language of the prior version of the statute.

would support such a finding against respondent.[4] Instead, all that can be said from the evidence was that the bruising was a one-time occurrence. However, respondent took the child to the hospital out of concern for her health, cooperated with the medical personnel and police, and never showed anything but concern for the child when at the hospital.

Once these proceedings were initiated, respondent acted appropriately with the child during visitation and had a positive review from the CCS evaluation. Indeed, the CCS findings as to both respondent and the mother reflect that they more than adequately cared for the child during the supervised visitation:

> The parents shared responsibilities for the child, behaved in a caring and bonded fashion. The child also appeared bonded to her parents, and comfortable with either of them holding her, which they did in an appropriate and careful manner.

This positive analysis continued in the summary and recommendations:

> There appeared nothing amiss in the brief supervised contact between the parents and now 10-month old [ARP], a child who was quite agreeable and appeared delighted by her parents' affections. It was Brenda Crocket's feedback that these parents provided appropriate care while she has observed them in contact with her granddaughter and, although both parents are admittedly quite young, Brenda Crocket reported they anticipate and attend to the baby's basic needs for diapering, feeding and affection.

In fact, the only concern expressed about *both* respondent *and* the mother was that they better understand how to accept responsibility for any harm, accidental or otherwise, that occurs to their child. And, importantly, the CCS determined that could be addressed through counseling under the parent agency agreement.

Nothing in this record suggests that what occurred to the child in June 2007 would be reasonably likely to occur again, and the trial court pointed to no supporting evidence. Without any evidence regarding respondent's disposition to repeat this type of behavior, or other such evidence placing his parenting skills into question, the trial court's decision was based on speculation rather than clear and convincing evidence. *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990). Thus, at the time of termination, there was no clear and convincing evidence showing a reasonable likelihood that the child would be injured or abused if placed back with respondent and the mother. We therefore vacate the trial court's order terminating respondent's parental rights and remand for further proceedings under the juvenile code.

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[4] Although regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it, MCR 2.613(C); *Miller*, *supra* at 337, respondent did not testify at trial. Though we do not doubt that the trial court had the opportunity to view how respondent appeared throughout trial, this is not the same as having the ability to view and listen to a witness testifying, which is generally how credibility is determined.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder