STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 31, 2011

In the Matter of P. BERUBE, Minor.

No. 300138
Chippewa Circuit Court
Family Division
LC No. 09-013734-NA

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Respondents, the parents of the involved minor child, appeal as of right a circuit court order terminating their parental rights under MCL 712A.19b(3)(j) [both respondents], (k)(*iii*) and (*v*) [respondent father], and (m) [respondent mother]. We affirm.

Respondent mother bore three children: MS (born 11/10/07), AW (born 3/16/09), and PB (born 4/30/10). Respondent father is the biological parent only of PB. On December 10, 2008, while pregnant with AW, respondent mother went to a bar and left MS in the care of respondent father. Later that evening, respondent father telephoned respondent mother and reported that MS "had fallen off the couch and bumped her head." Respondent mother returned home to find MS asleep. When MS began vomiting the next day, respondent mother took the child to a doctor, but neglected to mention that she had "bumped her head" the previous evening. The doctor diagnosed MS with gastritis. On December 14, 2008, respondent mother took MS to an emergency room, complaining that MS was behaving out of the ordinary. The emergency room doctor diagnosed MS with thrush. Three days later, respondent mother returned MS to the hospital, reporting that the child had vomited and displayed seizure-like symptoms. Respondent mother once again neglected to mention the head injury, and the hospital discharged MS. On December 18, 2008, MS had a seizure in the family doctor's waiting room. After a computer tomography (CT) scan revealed subdural hematomas, an air ambulance transferred MS to a Grand Rapids hospital.

Additional testing revealed that MS had a skull fracture, bilateral subdural hematomas, and a fractured left arm. Kent County Children's Protective Services (CPS) commenced an investigation of MS's injuries, as did Detective Michael Whitney of the Sault Ste. Marie police department. In February 2009, Detective Whitney interviewed respondent father. Initially, respondent father claimed that MS had fallen from a living room couch while he did laundry in the basement. Respondent father later admitted that he had thrown MS in the air "and one time he had thrown her too far forward and the child landed head first onto a tile floor."

In March 2009, respondent mother gave birth to AW. Shortly thereafter, the Chippewa Circuit Court exercised jurisdiction over both MS and AW. In May 2009, the court ordered that respondent mother have no contact with respondent father, and afforded her supervised parenting times with AW three to four times weekly.

On December 1, 2009, respondent father pleaded guilty to third-degree child abuse, MCL 750.136(b)(5), and received a sentence of 330 days in jail and 18 months' probation. Eight days later, respondent mother voluntarily relinquished her parental rights to AW. Respondent mother regularly visited respondent father in jail over the course of his confinement, and in April 2010 she gave birth to PB.

On April 30, 2010, the Department of Human Services (DHS) petitioned to terminate respondents' parental rights to PB. The petition highlighted respondent father's third-degree child abuse conviction "for causing serious physical injury to" MS, and his current incarceration. Regarding respondent mother, the petition averred that she had released her parental rights to another child "in lieu of completing a reunification services plan," married respondent father approximately a week later, and visited respondent father "at least 9 times since his incarceration." At a July 2010 hearing, respondents admitted these allegations, and the circuit court assumed jurisdiction over PB.

Both respondents testified at the termination hearing. Respondent father maintained that he had accidentally injured MS. He attributed her vomiting after the accident to the fact that he had given her a cookie late in the evening. Respondent father expressed that his "biggest mistake" was "not telling what really happened . . . because . . . I lost . . . four months of my life and my wife lost two of our children because of this." Respondent father offered to take anger management classes, but later denied that he needed them. He averred that he would treat PB differently than he had treated MS because PB was his "flesh and blood." Respondent mother insisted that she did not receive the "full detail of what all had happened" to MS until February 2009:

> *Q.* And what were you told and by whom?
>
> *A.* I was told by [respondent father] he was playing with her. He had thrown her up a little too high and she had fallen and bumped her head.
>
> *Q.* How did you react when you found out about that?
>
> *A.* I was actually quite angry and mad at him, very upset because I didn't know about it, and I really did want to have her back, but.

Respondent mother described that respondent father "had changed since the whole incident had happened," by becoming more willing to "discuss[] everything with me" and play with his nieces and other children without throwing them into the air. According to respondent mother, these changes signified that she could trust respondent father "110 percent with [her] child alone," and also explained why she had violated the court's no-contact order.

In an August 2010 bench ruling, the circuit court found that respondent father had abused MS causing life-threatening injuries, and that respondents had lied to medical personnel

concerning the origin of MS's symptoms. The circuit court additionally determined that respondent mother had repeatedly violated the no-contact order and lacked the capacity to place her child's needs ahead of her own. The court further concluded that termination would serve PB's best interests.

Respondents first contend that the circuit court erred by allowing Detective Whitney to review MS's medical records while testifying, because the prosecutor had refused to give the records to respondent's counsel. To the extent that our resolution of this issue involves court rule interpretation, we consider de novo this legal question. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Nearly a month before the termination hearing, respondents' counsel sent the prosecutor a letter "requesting any and all documentation you plan to use at trial," citing MCR 2.310. The prosecutor responded as follows:

> You asked me for the complete police report and file on the People v [respondent father] matter, wherein [respondent father] was convicted of child abuse. Upon reviewing the file, I noticed there are numerous medical records and DHS reports that are not relevant to the instant case and for which the victim is entitled to privacy and confidentiality.
>
> As we discussed on the telephone, I will send you the entire police report, however, if you wish to have the medical records and DHS records, I would request that you set a motion for same so that I can request an in-camera review of the documents. I would be asking that the Court allow release of only the records that pertain to the instant case. If you are willing to have me disclose only the records I believe are relevant, I am willing to provide same. If you want an in-camera review of same I completely understand. Please advise of your position.

Respondents' counsel did not respond to the prosecutor's letter.

At the termination hearing, respondent's counsel voiced the following objection to the prosecutor's questioning of a case worker concerning the events that led to the diagnosis of MS's head injury:

> *Respondent's Counsel*: Your Honor, at this time I object. They're testifying from medical records that have not been given to Counsel, nor has Counsel had an opportunity to review these. And they're part of a previous cas[e] that's already been adjudicated in this matter.
>
> *The Court*: That's all the more reason why it's admissible. He can testify from his recollection. The records are furnished and files available to you just like anybody else and previously testified to. Your objection will be overruled.

The prosecutor did not offer MS's medical records into evidence as an exhibit, and they do not appear in the circuit court record in the proceedings relating to PB. However, the hearing transcript reflects that Detective Whitney relied on the records to refresh his recollection about the events surrounding the diagnosis of MS's head injury.

MCR 3.922 governs discovery in child protective proceedings and sets forth, in pertinent part:

> (A) Discovery.
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> (1) The following materials are discoverable as of right in all proceedings provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate:
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> (a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;
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> (b) all written or recorded nonconfidential statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including police reports;
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> * * *
>
> (f) the results of all scientific, medical, or other expert tests or experiments, including the reports or findings of all experts, that are relevant to the subject matter of the petition;
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> * * *
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> (2) On motion of a party, the court may permit discovery of any other materials and evidence[.] . . . Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery.
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> * * *
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> (4) Failure to comply with subrules (1) and (2) may result in such sanctions, as applicable, as set forth in MCR 2.313.

Contrary to the position taken by the prosecutor, MS's medical records fell within MCR 3.922(A)(1)(f), and the prosecutor should have supplied the records to respondents' counsel. "The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). The prosecutor's protestation that the records were confidential because "the victim is entitled to privacy and confidentiality" rings hollow, especially when we take into account that the prosecutor shared the records with Detective Whitney and apparently filed them in the record of the proceedings involving AW. Furthermore, that the records were available in another case file does not excuse or exempt the prosecutor from complying with a properly made discovery request for the same materials.

Nevertheless, we fail to discern any prejudice stemming from the prosecutor's refusal to give MS's medical records to respondents' counsel. During respondents' testimony, they admitted to the substance of the information related by Detective Whitney with respect to MS's doctor and hospital visits. Given that the medical records were not admitted into evidence at the hearing, and the incriminating nature of respondents' testimony at the hearing, we find groundless respondents' suggestion that the medical records somehow "inflam[ed]" the circuit court. We conclude that the erroneous withholding of the medical records does not warrant our reversal of the order terminating respondents' parental rights. MCR 2.613(A).

Respondents next dispute that the record clearly and convincingly evidences their parental unfitness under any statutory ground invoked by the circuit court. A court may terminate a respondent's parental rights if clear and convincing evidence proves one or more of the statutory grounds listed in MCL 712A.19b(3). Once a statutory ground for termination is established, the court shall order termination of parental rights if it finds that termination serves the child's best interests. MCL 712A.19b(5). "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest" under MCL 712A.19b(5). *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); see also MCR 3.977(K). "A finding is 'clearly erroneous' if 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." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation omitted). This Court gives deference to a trial court's special opportunity to observe and judge the credibility of witnesses. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

The record clearly and convincingly establishes that on the basis of respondents' conduct, a reasonable likelihood exists that PB would suffer harm if returned to the custody of either parent. Respondents' pleas of admission to the allegations in the petition acknowledged that respondent father caused "serious physical injury to" MS, and that respondent mother had visited respondent father in jail "at least 9 times." At the termination hearing, respondent mother conceded her awareness that her jail visits violated a court order, and admitted that she had shielded respondent father from official scrutiny by deliberately withholding information concerning the possible origin of MS's medical symptoms. Respondent mother elected to continue her relationship with respondent father even after he acknowledged causing MS's injuries. Notably, neither respondent expressed regret for what had happened to MS, or concern for her future well being. This evidence clearly and convincingly substantiates the circuit court's conclusion that PB faced a substantial risk of harm if returned to either respondent. Moreover, clear and convincing evidence, including respondent father's hearing testimony, proved the propriety of terminating his parental rights under MCL 712A.19b(3)(k)(*iii*) and (*v*), and clear and convincing evidence, including respondent mother's concession that she had relinquished her parental rights to AW, established the ground enunciated in MCL 712A.19b(3)(m).

Lastly, we reject respondents' claim that the DHS should have offered them services before seeking to terminate their parental rights. "Petitioner … is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286

Mich App at 463. Under the circumstances of this case, MCL 722.638(2) mandated the DHS to pursue termination of respondents' parental rights at the initial dispositional hearing.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens