

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 29, 2011

In the Matter of JETT, Minors.

No. 302732
Muskegon Circuit Court
Family Division
LC No. 10-039599-NA

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Respondent, the father of the involved minor children, appeals as of right a circuit court order terminating his parental rights. He contends that the circuit court erred by rejecting evidence that metabolic bone disease, combined with a defectively-designed crib, caused his daughter's five leg fractures. The circuit court determined that respondent injured the child, and found termination warranted pursuant to MCL 712A.19b(3)(g), (j), and (k). We affirm.

The involved twin children, KJJ and KMJ, were born in September 2009. From the time of their birth, respondent served as the twins' primary care provider. On April 28, 2010, respondent told the twins' mother that seven-month-old KJJ had "been kind of fussy all day," and "got her leg stuck in the crib this morning." The mother attempted to feed KJJ, but the child "wasn't eating." She noticed that KJJ's right leg appeared "just a little bit swollen," but not red. The mother brought KJJ to DeVos Children's Hospital, where x-rays revealed a spiral fracture of the child's right proximal femur and bilateral metaphyseal fractures of both distal femurs and both distal tibias.

On April 28, 2010, the Muskegon Circuit Court authorized petitioner to file a petition naming both parents as respondents. In June 2010, the circuit court exercised jurisdiction over the children based on respondent's no-contest plea to an amended petition averring that the children's home environment was unfit by reason of neglect. Petitioner offered case service plans to respondent and the mother, and both participated in psychological evaluations, parenting classes, and a parent mentor program.

At the initial dispositional hearing, respondent presented a report authored by Dr. Marvin Miller, a pediatric geneticist, attesting that metabolic bone disease rather than child abuse likely caused KJJ's fractures. Respondent's counsel also notified the court that KJJ's crib had been subject to a product recall based on reports that other children had "broken bones" when crib levers malfunctioned. Petitioner requested an opportunity to consult with KJJ's physicians

regarding the medical evidence supporting metabolic bone disease. In September 2010, petitioner filed a petition seeking termination of respondent's parental rights.¹

The evidence presented at the December 2010 termination hearing primarily focused on whether KJJ suffered from a metabolic bone condition that rendered her vulnerable to fractures. Dr. Miller opined that KJJ's fractures resulted from "metabolic bone disease of infancy," also known as temporary brittle bone disease. Miller rested his opinion on a combination of factors, including KJJ's status as a premature twin, her "modestly low level" of Vitamin D when tested after birth, and her mother's intrauterine exposure to six-days' of magnesium sulfate. He summarized as follows:

Babies or fetuses that don't move well in utero, they're not banging against the mother's uterus, they're quiet, they don't move a lot, they don't load their skeletal system; they will be born with a weaker skeletal system. And that – that I found in this case because these were twins. They were confined. They did not have the full intrauterine luxury of movement that they would in a single pregnancy.

Now the second critical factor that I think is relevant to many of these cases is Vitamin D status. And indeed, in this case, I found that the mother had a low Vitamin D level and the baby had a modestly low level.

We all accept the fact that prematurity is a contributing factor to bone strength, and indeed, this baby was mildly premature; not markedly premature, but mildly premature.

And then another factor that I thought might be relevant is the fact that the mother was exposed to six days of intravenous magnesium. And it's known that magnesium, prolonged magnesium exposure to the fetus can affect bones.

So my assessment was that there were several factors that I've seen in other cases that were present in this case which could cause a weakened skeletal system. Now the novel observation or the novel difference in this particular case is that there was this environmental issue; the fact that it was alleged that this baby got trapped in a crib and trying to get out probably caused the long bone fracture. And the question is, is that plausible? And in my opinion it certainly is plausible.^[2]

¹ The mother and the twins were permitted to move together into the maternal grandmother's home during the pendency of the proceedings. Petitioner ultimately decided against petitioning to terminate the mother's parental rights.

² Respondent introduced into evidence voluminous reports provided by the Consumer Product Safety Commission concerning problems encountered by users of the same model crib in which KJJ had slept. Most of the reports described that children's legs had become stuck in the crib

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Respondent vehemently denied having injured his daughter, and the mother expressed disbelief that he had injured the child.

Dr. N. Debra Simms evaluated KJJ at DeVos Children's Hospital, and testified in opposition to Dr. Miller. According to Dr. Simms, temporary brittle bone disease remains an unaccepted medical diagnosis. Dr. Simms further disagreed that the combination of prematurity, intrauterine confinement, magnesium sulfate and Vitamin D deficiency could have weakened KJJ's bones. She opined:

The American Academy of Pediatrics and in the Position Paper that they published on the evaluation of young infants with fractures, we do not find the notion of a temporary brittle bones disease to be credible, to have any underlying support for this. This is a hypothesis. Individuals have tried to say for these various factors that you're giving that you can take this, this and this and it's enough to add up. There's no studies, there are no studies, there's nothing that verifies this information. . . . So the idea of a temporary brittle bone disease is not one that I find credible.

Given KJJ's size and weight and assuming her bones were healthy, Dr. Simms summarized, it "would be beyond her abilities to generate enough force to fracture" her femur.

The circuit court determined that clear and convincing evidence justified terminating respondent's parental rights under MCL 712A.19b(3)(g), (j) and (k). The court rejected that KJJ's injury was an accidental occurrence. Specifically, the court ruled that reliable medical evidence established that KJJ could not exert the necessary force to accidentally fracture her femur in the manner described, and that KJJ's injury was likely caused by physical abuse. The court agreed with Dr. Simms' characterization of Dr. Miller's theory as "a hypothesis," finding that his analysis "is not supported by conventional medical science. It has not been accepted and put forward by virtually anyone in the medical community except for Dr. Miller and the person who really brought this theory forward, Dr. Patterson." The court concluded that termination of respondent's parental rights served his children's best interests.

Respondent disputes that the record clearly and convincingly evidences his 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

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rails, and that the children sustained bruises and abrasions when their limbs were freed. The data included four reports of fractures, including a fractured femur.

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 a reasonable likelihood that KJJ, or her brother, would suffer harm if returned to respondent's custody. KJJ sustained five fractures while in respondent's care. MCL 712A.19b(3)(j). After hearing extensive testimony concerning the potential causes of the fractures, the circuit court determined that KJJ did not suffer from a bone abnormality, and that the force necessary to break her bones precluded an accidental origin for her injuries. Based on this record, we are unable to characterize as clearly erroneous the circuit court's finding that Dr. Miller's theory remains unproven and generally unaccepted in the medical community. Thus, the record substantiates that respondent abused KJJ, and could not provide his children with proper care and custody within a reasonable time considering their ages. MCL 712A.19b(3)(g) and (k). We conclude that the circuit court appropriately invoked all three statutory grounds for termination of respondent's parental rights.

We also detect no clear error in the circuit court's finding concerning the children's best interests. MCL 712A.19b(5). Despite the obvious bond that existed between respondent and the twins, the record establishes that respondent caused KJJ's injuries and emphatically refused to either acknowledge or take responsibility for his actions. This evidence sufficed to demonstrate that the children were unlikely to remain safe while in his care.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens