STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 14, 2013

In the Matter of BROCKITT, Minors.

No. 310814; 311097
Sanilac Circuit Court
Family Division
LC No. 11-035529-NA

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 310814, respondent-father appeals by right the trial court order terminating his parental rights to the two minor children. In Docket No. 311097, respondent-mother appeals by right the trial court order terminating her parental rights to the two minor children. We affirm both appeals.

Jurisdiction was established by admissions made by respondent-mother to allegations contained in the petition. She admitted that respondent-father's biological child, her stepson, was forced to sit in cold showers with urine soaked pants on his head, and she observed this occurrence. Respondent-mother also identified photographs of the minor child depicted bound with tape and urine soaked pants on his head while in the bathtub to a Department of Human Services (DHS) worker. Ultimately, respondent-mother pleaded guilty to second-degree child abuse premised on an aiding and abetting theory and testified against respondent-father at his jury trial. Respondent-father was convicted of torture, first-degree child abuse, fourth-degree child abuse, and four counts of second-degree child abuse.[1]

Petitioner investigated the family after receiving horrific reports of the abuse of respondent-father's biological child,[2] the stepchild of respondent-mother. Specifically,

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[1] The petition also contained allegations that respondent-father urinated on the minor child and forced him to eat feces.

[2] Respondent-father was the biological father of six children. His rights to his first two children were terminated in St. Clair County. Initially, petitioner sought to terminate the parental rights to all four remaining children. However, respondent-father voluntarily relinquished his rights to the two oldest children with the condition that the court afford first priority to the adoption of those children by the maternal grandparents. The birth mother to these children, Jennie Podolan, also

respondent-father would check the beds of his two older children for bedwetting. If the oldest son had wet the bed, respondent-father would place the child naked in the bathtub, bind the child's hands behind his back with tape, and cover the child's head with his soiled clothing. Respondent-father would leave for work and not return for eight to fifteen hours. Respondent-mother would either leave the child in the bathtub in the condition left by respondent-father or would sometimes loosen the tape and remove the child from the tub and return him there shortly before respondent-father returned home from work. Respondent-mother would only loosen the tape because she did not have any other tape to put back on the child, and she did not want the child to get in trouble for being untied. The abuse happened three to four times per week. The duration of the time spent in the bathtub would vary from minutes to hours. On one or two occasions, the child spent the night in the tub. If the child was untied and out of the bathtub, he would be spanked and returned to the tub. Respondent-mother admitted that there were two other adults present in the home. However, no one contacted the police or other authorities to report the abuse of the child. Initially, respondent-mother testified that respondent-father never threatened her if she untied the minor child, but she testified that he would yell at her. Later in her testimony, respondent-mother stated that she feared respondent-father because he had "smacked" her in the past. She denied any testimony in the underlying criminal proceedings that, on at least two occasions, she placed the child in the bathtub. Rather, respondent-mother testified that her only discipline was placing the child against the wall.

Respondent-mother was shown a photograph of a child's bottom with welts on the buttocks. She identified respondent-father as the individual who struck the minor child, causing those welts. Respondent-mother explained that she was afraid that her children would be placed in foster care if she reported the abuse. She denied knowing that pictures were taken of the minor child, but admitted to seeing the boy in that same position. Although services were not provided by petitioner, respondent-mother testified that she was employed, started counseling sessions, and took parenting classes. Respondent-mother filed for divorce, but admitted that she did so because "they said I had to [.]" Ultimately, she admitted that she aided the child abuse, and in light of the testimony and the photographs, she would not give herself another chance to parent her children.

The Child Protective Services (CPS) worker testified that she sought termination of the parental rights of both parents. Respondent-father had a prior child abuse conviction and termination of parental rights. Additionally, in light of his convictions, respondent-father would be incarcerated and absent from the children's lives until they reached adulthood. The CPS worker also testified that she recommended the termination of parental rights of respondent-mother because she did nothing to protect the minor child, and it was unlikely that she would protect her own children. The CPS worker testified that the severity of the abuse, in this case torture, was not something addressed in parenting classes; those classes taught an individual redirection to proper discipline techniques. She opined that she was at a loss regarding what services could be offered to teach an individual that torture of a child was never appropriate. Additionally, respondent-mother's problems arose from her poor selection of a partner to whom

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relinquished her parental rights. Consequently, respondent-father's two youngest children, his biological children with respondent-mother, are the subject of this appeal.

she did not take a stand. Irrespective of the duration of the sentences, the worker nonetheless recommended termination of parental rights of both parents.

The trial court terminated the parental rights of respondent-father and held that termination was in the children's best interests. Although the trial court terminated the parental rights of respondent-mother, it found that termination was not in the best interests of the minor children at that time. However, after respondent-mother was sentenced to thirty months to four years' imprisonment, the trial court, on reconsideration, found termination was in the children's best interests.

On appeal, respondent-father contends that the trial court erred by admitting photographs of the abused child when petitioner failed to establish a proper foundation. We disagree. "A trial court's evidentiary rulings in a child protection proceeding are reviewed for an abuse of discretion." *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2000). When termination of a respondent's parental rights is sought at the initial dispositional hearing, petitioner must establish a statutory ground for termination by legally admissible evidence. MCR 3.977(E)(3)(b). Judicial notice is a replacement for proof. *Winekoff v Pospisil*, 384 Mich 260, 268; 181 NW2d 897 (1970). "[A] circuit judge may take judicial notice of the files and records of the court in which he sits." *Knowlton v Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). A judge may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b)(2).

> Under MRE 201(c), a court may take judicial notice whether or not requested to do so. MRE 201(c) allows judicial notice to be taken at any stage of the proceeding. At the very least, the rule implies that appellate courts can review the propriety of the judicial notice taken by the court below and can even take judicial notice on their own initiative of facts not noticed below. [*People v Burt*, 89 Mich App 293, 297; 279 NW2d 299 (1979) (footnote omitted).]

The circuit court properly took judicial notice of the photographs admitted in the criminal trial. *Knowlton*, 355 Mich at 452. The contention that MCR 3.977(H)(2) was violated is without merit. Respondent-father was not deprived of the opportunity to cross-examine the author of a written report. Moreover, these photographs were verified by respondent-mother's testimony as mirroring her observations of the abuse of the minor child. Additionally, the photographs were cumulative evidence to the testimony offered by respondent-mother. Admission of cumulative evidence is not prejudicial. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Furthermore, this was a bench trial, and the trial court possesses an understanding of the law that allows it to ignore evidentiary errors and to decide a case solely based on the evidence properly admitted at trial. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Respondent-father's claim of reversible error is without merit.

In Docket No. 311097, respondent-mother alleges the trial court erred in concluding that the statutory grounds had been established and that termination was in the best interests of the minor children. We disagree. "A petitioner must establish by clear and convincing evidence at least one statutory ground for termination of parental rights." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). We review the trial court's factual findings for clear error. MCR

3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). Once the court finds a statutory basis for termination, it shall order termination of parental rights if it finds that termination is in the children's best interests. MCL 712A.19b(5). A trial court may consider the entire record when evaluating the children's best interests. *In re Trejo Minors*, 462 Mich 341, 356; 612 NW2d 407 (2000).

Respondent-mother's parental rights were terminated pursuant to MCL 712A.19b(3)(b)(*ii*), (3)(g), and (3)(j). The trial court properly concluded that MCL 712A.19b(3)(b)(*ii*) was proven by clear and convincing evidence through the doctrine of anticipatory neglect. Under the doctrine of anticipatory neglect, how a parent treats one child is probative of how he or she may treat other children. *In re Hudson*, 294 Mich App at 266. In the present case, the minor child was subjected to torture; he was bound naked in a bathtub with urine soaked clothing on his head for hours at a time. He suffered welts on his buttocks from the discipline imposed by respondent-father. Respondent-mother did not take a stand against respondent-father and took no steps to prevent the abuse or to report it to the appropriate authorities. Although she testified that respondent-father was responsible for the discipline of his two older biological children, her stepchildren, and that she was responsible for the discipline of the couple's youngest biological children, there was no indication that the couple's infant children would be treated any differently when they reached potty training age. The CPS worker testified that the abuse in this case was extreme, and there was no indication that services could be provided to remedy the situation. Furthermore, respondent-mother was sentenced to a minimum term of thirty months' imprisonment, and she was unavailable to provide proper care of her children within a reasonable time. The trial court also did not clearly err in concluding that termination was in the children's best interests. MCL 712A.19b(5). Respondent-mother lacked insight into proper parenting and appropriate discipline techniques, and the children needed safety, permanency, and stability.

Affirmed.

/s/ David H. Sawyer
/s/ Karen M. Fort Hood

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GLEICHER, J., (*concurring*).

I concur with the majority's decision to affirm the termination of both respondents' parental rights to their two shared biological children arising from the severe abuse of respondent-father's son, respondent-mother's stepson. I write separately to respond more specifically to respondent-mother's argument that the prosecutor failed to prove a statutory ground for termination of her rights to her own two children.

The amended petition sought termination of respondent-mother's parental rights based on MCL 712A.19b(3)(b)(*ii*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). MCL 712A.19b(3)(b)(*ii*) provides that a court may terminate a parent's parental rights if "[t]he child or a sibling of the child has suffered physical injury or physical . . . abuse" and:

> 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.

Respondent-mother contends that because she does not qualify as the "parent" of the minor child as that term is defined in MCR 3.903(18), she is not subject to termination of parental rights based on MCL 712A.19b(3)(b)(*ii*). This Court expressly rejected respondent-mother's argument in *In re Jenks,* 281 Mich App 514, 517 n 2; 760 NW2d 297 (2008). *Jenks* involved the interpretation of MCL 712A.19b(3)(b)(*i*), which provides for termination when "[t]he child or a sibling of the child has suffered physical injury or physical . . . abuse" and

> The parent's act caused the physical injury or physical . . . 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.

This Court observed in *Jenks* that "the prior version of this section did not apply if the injured or abused child was not also the child of the parent whose parental rights the petitioner sought to terminate." *Id.*, *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995). *Jenks* further explained that the amended version of MCL 712A.19b(3)(b)(*i*) "clarif[ies] that grounds for termination are established when the parent against whom termination is sought is responsible for the physical injury or physical . . . abuse of a sibling of the minor child, regardless of whether that parent is also a parent of the injured or abused sibling." *Jenks*, 281 Mich App at 517 n 2.

Similar interpretive logic compels the conclusion that MCL 712A.19b(3)(b)(*ii*) establishes a ground for termination when the parent against whom termination is sought had an opportunity to prevent physical injury or abuse of his or her child's sibling, but failed to do so. While general and amorphous "anticipatory neglect" arguments cannot serve as evidentiary bases for termination of parental rights, the Legislature has identified two specific pathways to termination—subsections 19b(3)(b)(*i*) and 19b(3)(b)(*ii*)—predicated on the notion that in certain behavioral realms, past misconduct does indeed predict future parental unfitness. Because the evidence clearly and convincingly demonstrated that respondent-mother failed to protect the sibling of one own children from severe physical abuse, the petitioner fulfilled its obligation to prove a specific statutory ground for termination.

/s/ Elizabeth L. Gleicher