S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

UNPUBLISHED
June 13, 2013

In the Matter of SHARROW and COOK, Minors.

Nos. 313515, 313517
Genesee Circuit Court
Family Division
LC No. 09-126101-NA

Before: K. F. KELLY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondents appeal as of right the trial court order terminating their parental rights to their three minor children pursuant to MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(c)(*ii*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). We find termination under MCL 712A.19b(3)(c)(*ii*) inappropriate, but affirm the trial court's decision that MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j) constituted grounds for termination, and that termination is in the best interests of the three minor children.

I. BASIC FACTS

Respondents have dated for six years and are the parents of the three minor children.[1] Their eldest child was born in 2007. In 2008, the family had two substantiated CPS complaints while living in Lapeer County. Both alleged domestic violence and both resulted in injury to their eldest child. During the first incident, one of the respondents inadvertently struck her, leaving a mark under her left eye, and during the second, she suffered a scratch to her back. In early 2009, petitioner referred respondent father to anger management classes and respondent mother to domestic violence classes. In December 2009, petitioner referred respondent mother to Family First life skills classes, and both respondents to couples counseling. Respondents attended only two sessions of couples counseling.

On December 21, 2009, the Family First worker noticed that respondent mother was bruised and took her to the hospital. Respondent mother admitted that respondent father had hit her, choked her, and slammed her into the wall and floor and that their eldest child had witnessed

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[1] At the time of the termination hearing, respondent mother was approximately eight months pregnant with respondents' fourth child.

the domestic violence. On that same day, petitioner petitioned the trial court to exercise jurisdiction over their two eldest children (respondents' second child was little more than one month old and had tested positive for marijuana at birth). The trial court authorized the petition, the two children were removed from the care of respondents and placed with their current foster parents, and the trial court assumed jurisdiction over them on January 26, 2010.

The trial court then ordered respondents to complete psychological evaluations and follow the evaluation's recommendations, to have an Intake Assessment and Referral Center (IARC) assessment and follow the assessment's recommendations, and to attend parenting classes, complete counseling and domestic violence classes, submit to random drug screens, obtain and maintain appropriate housing, attend parenting time, and receive substance abuse treatment. Both respondents took and completed parenting classes in March 2010. Respondent mother began a program to treat substance abuse, completing it in September 2010. Due to continued positive drug screens, she began a second program in April 2011, which she completed in August 2011, and a third program in December 2011 which was ongoing at the time of the termination hearing. Respondent father, on the other hand, reported at his assessments that he did not have a substance abuse problem and therefore was not referred to substance abuse services in 2010. Nevertheless, every drug screen he underwent from February 2010 through September 2010 came back positive for alcohol, marijuana, or both.

Respondents' third child, ES, was born in September 2011. She was removed from respondents' home four days after her birth, and the trial court assumed jurisdiction over her on November 10, 2011. Also in September, respondent father volunteered for a substance abuse assessment and, possibly as a result of this assessment, began substance abuse treatment at Catholic Charities. Although it is unclear when respondent father began treatment, the record shows that he stopped treatment on December 2, 2011. He scheduled an appointment for December 29, 2011, but failed to attend. At the time of the termination hearing, both respondents were in programs for substance abuse.

Respondents also attended classes and therapy to address their problems with domestic violence. Both respondents completed anger management classes, and respondent mother participated in domestic violence prevention classes and individual therapy. Nevertheless, domestic violence continued. On May 16, 2010, respondent mother, crying and hysterical, left a telephone message for one of her caseworkers saying that respondent father had injured her and she could not walk. When the caseworker returned her call, respondent mother claimed that she did not remember leaving the message. Respondent father's explanation of the incident was that he had been out of the house, respondent mother had had a seizure, and her injuries resulted from the seizure and the efforts of respondent father's brother to pull her up the stairs.[2] Respondent father stated that respondent mother was confused after the seizure and mistakenly believed respondent father was assaulting her and it was actually his brother.

[2] Respondent mother suffers from a seizure disorder for which she takes medication. Her seizures are triggered by stress. She has a minimum of two seizures every six months, and they cause her to have a poor memory.

A second incident occurred on November 15, 2011, when respondent mother punched respondent father either in the context of an argument or because they were drinking at home with friends and he tried to do a body shot off her chest. Someone called the police; respondent mother threatened to kill herself and was admitted to the behavioral unit of the hospital.

Two months prior to the termination hearing, a third potential domestic violence incident occurred. On August 19, 2012, respondent mother, who was four or five months pregnant at the time, called 911 to report that respondent father assaulted her and that he had pointed a BB gun at her. She was crying and having a hard time breathing. Respondents had both been drinking.[3] When asked about this at the termination hearing, respondent testified that she had just overreacted because the pregnancy was making her overemotional. They had been arguing about bills and money, she needed to calm down and wanted him out of the house but he would not leave, so she pretended to be panicky because she knew that respondent father had a warrant out for his arrest and if the police were to get involved and come to the house, he would leave.[4]

A potential fourth incident occurred during the multi-day termination hearing. On or around October 16, 2012, respondent father reported that respondent mother had had a seizure the previous day. Respondent mother had bruises on her leg, neck, face, and eye, alleged that she had stayed in the hospital that night, and claimed to have no memory of the seizure. However, respondent mother had no documentation of her hospital stay and, although she attempted to have her doctor fax a note about the seizure to the trial court, the doctor never sent any documentation. Notwithstanding respondent father's denial that he had assaulted respondent mother that night, the caseworker thought respondent mother's injuries were a result of domestic violence because respondent mother changed her story several times. The trial court acknowledged that some of respondent mother's injuries could have resulted from her seizures, but it was clear that not all of them came from falling out of bed.

Because respondents had been participating in services and seemed to be making progress, petitioner twice considered reuniting the family. Both times, however, respondents cycled back into patterns of domestic violence and substance abuse. In April 2010, petitioner considered reuniting the family, but respondents had a domestic violence incident the next month. In January 2011, petitioner began services to reunite the family, but respondents began testing positive for marijuana and allowed a man who was on parole for murder to live with them.[5]

On February 15, 2012, petitioner finally submitted a petition to terminate respondent's parental rights to their two eldest children, alleging as grounds MCL 712A.19b(3)(a)(*ii*), MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(c)(*ii*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). The termination petition alleged ongoing domestic violence, substance abuse, mental illness, and poor parenting skills. It further alleged that respondent father had deserted the children. The

[3] Respondent father later denied that he testified that he had been drinking.

[4] The basis for the arrest warrant is not clear from the record.

[5] Respondents are required to seek approval from DHS before anyone lives with them.

trial court allowed petitioner to amend its petition to add respondents' youngest child to the petition, pursuant to the same statutory and factual bases. The termination hearing began on October 12, 2012, and on November 13, 2012, the trial court terminated respondents' parental rights to all three children pursuant to MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(c)(*ii*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). This appeal followed.

I. STATUTORY GROUNDS

First, respondents argue that the trial court erred by finding that there was clear and convincing evidence that statutory grounds for termination existed. We disagree.

Petitioner bears the burden of establishing the existence of a statutory ground for termination of parental rights by clear and convincing evidence. *In re JK*, 468 Mich 202, 213-214; 661 NW2d 216 (2003); *In re LE*, 278 Mich App 1, 26; 747 NW2d 883 (2008), citing MCR 3.977(F)(1)(b).

> [Clear and convincing evidence] must produce 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. [*Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009) (internal quotations omitted).]

We review the trial court's "decision that a ground for termination has been proven by clear and convincing evidence" for clear error, and set aside the trial court's findings only if we are "left with a definite and firm conviction that a mistake has been made." *In re Olive/Metts*, 297 Mich App 35, 40-41; 823 NW2d 144 (2012) (internal quotations and citations omitted). "When reviewing the trial court's findings of fact, [we] accord[] deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

MCL 712A.19b(3) provides, in relevant part:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions,

the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(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.

MCL 712A.19b(3)(c)(*i*)

Although respondents have completed anger management and domestic violence classes, the record clearly indicates that domestic violence is still a part of their lives. Respondent father argued that respondent mother's most recent injuries, from incidents in August and October of 2012, were attributable to her seizures, while DHS and respondent mother's attorney asserted that they were signs of physical abuse that arguable came about as a result of domestic violence. Presented with the long history of the couple, and being in a superior position to assess the credibility of the witnesses, the trial court concluded that at least some of the injuries were attributable to domestic violence. We are not, therefore, left with a "definite and firm conviction" that the trial court erred when it determined that after more than three years and multiple opportunities for services, respondents have not made progress toward resolving the domestic violence and substance abuse issues that led to the adjudication. *In re Olive/Metts*, 297 Mich App at 40. While being the victim of domestic violence alone is insufficient to terminate respondent mother's parental rights, *In re Plump*, 294 Mich App 270, 273; 817 NE2d 119 (2011), this was just one of a myriad of issues with which respondent mother had to address.

MCL 712A.19b(3)(g)

Michigan's Supreme Court has held that "a parent's failure to comply with the parent-agency agreement is evidence of a parent's failure to provide proper care and custody for the child. By the same token, the parent's *compliance* with the parent-agency agreement is evidence of her ability to provide proper care and custody." *JK*, 468 Mich at 214 (emphasis in the original, internal citation omitted). In order to fully comply with the case service plan, respondents must physically participate in the services provided and demonstrate that they benefitted from these services. *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

The trial court found that, although respondents had received services for domestic violence and substance abuse going back to 2009, these two issues continued to be part of their lives. The trial court acknowledged that the father had a good work ethic and worked hard when

he had a job, that the couple loved each other, and that they had done their best to comply with services. Nevertheless, the trial court found that clear and convincing evidence showed that respondents had not benefitted from services. Respondent mother did not appear to have benefitted from domestic violence classes or therapy, and respondent father continued to abuse alcohol and other substances, as well as possibly to engage in domestic violence.[6] While there is always hope that respondents would continue to receive services, it is not fair to make the children wait, particularly given respondents' history of progressing to a point and then cycling back into habits of domestic violence and substance abuse. Once again according "deference to the special opportunity of the trial court to judge the credibility of the witnesses," we cannot say that we are "left with a definite and firm conviction" that the trial court made a mistake when it found clear and convincing evidence that "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." MCL 712A.19(b)(g); *In re Olive/Metts*, 297 Mich App at 41.

Additionally, it appears from the record that respondent father was only ordered to engage in anger management classes and not batterers intervention services. If that is accurate, it is not likely that there would have been any improvement in respondent father's assaultive behavior.

712A.19b(3)(c)(*ii*) and 712A.19b(3)(j)

Petitioner also relied on MCL 712A.19b(3)(c)(*ii*) and 19b(3)(j) as grounds for termination. However, since it made no findings of fact or conclusions of law regarding either of these statutory grounds, MCR 3.977(I), it appears to us that neither provided a basis for the trial court's termination decision. However, petitioner need only establish the existence of one statutory ground for termination, *JK*, 468 Mich at 213-214, and we affirm the trial court's determination that respondents' parental rights to the three minor children may be terminated pursuant to MCL 712A.19b(3)(c)(i) and MCL 712A.19b(3)(g).

II. BEST INTERESTS

Once the petitioner presents clear and convincing evidence of a statutory ground for termination, "the parent's interest in the companionship, care, and custody of the child[ren] gives way to the state's interest in the child[ren]'s protection." *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). "'If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child[ren]'s best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made.'" *Olive/Metts*, 297 Mich App at 42, quoting MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child[ren] must be proven by a preponderance of the evidence." *In re Moss*, ___ Mich App ___, ___; ___NW2d (2013) (slip op at 6).

[6] Again, a parent's parental rights may not be terminated solely because he or she is a victim of domestic violence. *In re Plump*, 294 Mich App at 273. However, domestic violence is just one in a constellation of issues that make termination appropriate in this case.

When determining the children's best interests, a trial court may consider the respondent's history, psychological evaluation, parenting techniques during parenting time, family bonding, participation in the treatment program, the foster environment and possibility for adoption, and the parent's continued involvement in situations involving domestic violence. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009); *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004); *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001). A court may also consider "the child's need for permanency, stability, and finality." *Olive/Metts*, 297 Mich App at 42.

We review the trial court's best interest determination according to the same clear error standard used in reviewing the trial court's decision regarding the statutory grounds for termination. *Olive/Metts*, 297 Mich App at 40; *Fried*, 266 Mich App at 541.

Respondents argue that the trial court erred by finding that termination was in the best interests of the minor children. We disagree.

After three years of domestic violence, anger management, and substance abuse counseling and classes, respondents have failed to demonstrate that they have learned the skills necessary to end the domestic violence and substance abuse that is occurring in their home, and to provide their children with the proper care and custody they need. Respondents had a three year documented history of periodic negative drug screens followed by periods of positive drug screens. They attended substance abuse counseling and therapy. Although petitioner referred respondent mother to substance abuse classes a total of three times, respondent mother stated that she learned little from her classes, and she continued to relapse. Respondent father testified that he had accepted that he had a substance abuse problem and that he would completely stop drinking for the sake of his family. However, his recent drinking activity belies these stated intentions.

Respondent mother argues that the trial court should have given respondent a few additional months to allow the couples domestic violence counseling to work. However, given respondents' history, there is no evidence that a few additional months would make any difference. At the time of the termination hearing, the two older children had already been in the foster home for almost three years. Both of them were progressing well, and their foster parents had expressed a desire to adopt them. The youngest child had been in foster care since she was a few days old and was also doing well. Therefore, the trial court did not clearly err by finding that the children needed permanency, and we affirm the decision that termination would be in the best interests of the children.

For the reasons stated above, we affirm the trial court's determination that MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(g) provide statutory grounds for the termination of respondents' parental rights, and that termination is in the best interests of the minor children.

/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause