

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DARKINS, Minors.

UNPUBLISHED
January 28, 2014

No. 316907
Oakland Circuit Court
Family Division
LC No. 13-804466-NA

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating his parental rights to his minor children pursuant to MCL 712A.19b(3)(b)(ii), (g), (j), and (k). We affirm.

I. BASIC FACTS

On December 19, 2012, SMRD's mother brought SMRD, who was only two months old, to the hospital with a large bruise on the left side of her abdomen. On January 9, 2013, after further testing by a child abuse specialist, it was determined that SMRD had rib fractures to the seventh and eight anterior ribs, that these fractures were at least 14 days old and that the injuries were indicative of child abuse. At the time of the injuries, SMRD was in the care of her mother and respondent. SMRD had spent several hours with a maternal aunt near the time the injuries were inflicted, but there was never a satisfactory explanation as to how SMRD was injured. Nothing suggested that SMRD had an inherited disorder; there was no medical explanation for the rib fractures. The child abuse specialist opined that the injuries were the result of someone forcefully punching or "stomping" the child.

The Department of Human Services (DHS) sought termination of parental rights as to SMRD and her older sister. At the hearing, the mother testified that SMRD spent a number of hours at her sister's house. The child was unusually fussy after returning from her sister's house, which the mother attributed to gas. The following morning, the mother noticed a bruise on SMRD's side. The mother called her mother and her sister and decided to take the baby to the hospital. The mother testified that she did not know how SMRD sustained her injuries.

Respondent testified that he was at the mother's house when they noticed SMRD's injuries. Respondent denied hurting SMRD accidentally or on purpose. He stayed at home

while the mother took SMRD to the hospital. Respondent became incarcerated on January 4, 2013.¹ He admitted to one prior instance of domestic violence involving the mother.

The trial court found statutory grounds to terminate respondent's parental rights under MCL 712A.19b(3)(b)(ii), (g), (j), and (k). The court noted that SMRD suffered substantial harm while in her parents' care and that SMRD was at high risk for child abuse, given that she was pre-ambulatory at the time of injury and there were broken bones with no explanation. The trial court pointed to respondent's criminal history and at least one incident of domestic violence. Respondent also appeared withdrawn and disinterested when interviewed at the hospital by the protective services worker. The trial court found that there was no evidence that the child was injured at the aunt's house and suspected that the mother was covering for respondent.

A best-interest hearing was held on May 30, 2013. Clinical psychologist Douglas Park testified that it was in the children's best interests to terminate the parental rights of both parents due to the children's ages, the severity of injury to SMRD, and the fact that they did not know who committed the injury. Park did not believe that respondent was fully honest with him during the psychological evaluation. He believed respondent knew more about the child's injuries than he was admitting. Respondent initially denied that there was domestic violence but then admitted to an incident in the mall where he had slapped the mother's hand. The mother described the incident differently, indicating that respondent punched her in the face while holding the baby. Additionally, while respondent denied any drug use, the mother told Park that respondent smoked marijuana almost every day. Park was concerned about respondent's personality characteristics. If respondent's need for attention was not met, he was likely to act out in some way.

Keisha Black, the children's maternal grandmother, testified that the children were placed with her after being removed from their parents' care. Black testified that respondent was an involved parent and that she never saw him act inappropriately toward either child. Black then admitted that she saw respondent "tussling" with the mother in an altercation in a parking lot. Black acknowledged that respondent and the mother both had a history of violence but did not believe either of them would hurt their children. Black was not "a fan" of respondent, and her husband did not let him in their house. Nevertheless, she trusted her grandchildren with respondent and believed they were safe with him. She did not believe he did anything wrong. Black believed the aunt perpetrated the abuse on the baby.

The mother testified that she was no longer in a relationship with respondent. She described respondent as being "soft" with the girls. Respondent called the mother frequently from jail to inquire about the children. The mother repeatedly denied that there was more than

¹ According to the Michigan Department of Corrections' Offender Tracking Information System (OTIS), respondent is no longer incarcerated. He is on probation and he will not be discharged from probation until November 20, 2014. He pleaded guilty to identity theft, MCL 445.65, illegal sale or use of a financial transaction device, MCL 750.157q, and possession of fraudulent transaction device, MCL 750.157n.

one instance of domestic violence between her and respondent, even in the face of police reports to the contrary.

Respondent confirmed that he and the mother were no longer in a relationship, but he testified that, prior to his incarceration, he saw the children three or four times a week. He would either come see the children or Black would bring the children to respondent's mother's house. During their time together he took them outside, talked to them and read to them. Respondent planned to attend counseling sessions, parenting classes, and domestic violence classes. He also planned to get another job and had already spoken to his supervisor at UPS. Respondent lamented that he was unable to prove himself because he was incarcerated but he could guarantee that he would make improvements once he got out of jail.

In its oral findings on the record, the trial court stated that the problem was that there was no one to protect the children from the perpetrator of the abuse because no one knew who did it and everyone involved was making excuses. The trial court did not believe the aunt perpetrated the abuse. The trial court was especially concerned with the domestic abuse between the parties and their inability to admit to the extent of the problem. A Southfield police report showed that respondent struck the mother in the face with a fist while holding his six-week-old baby. There was also a police report from Detroit where respondent choked the mother but the mother claimed not to remember the incident. The trial court also pointed to respondent's criminal history and the fact that he smoked marijuana daily. The judge referred to respondent as "a thief." The trial court noted Dr. Park's concerns that respondent was very defensive in his psychological evaluation, understating the domestic violence and his drug use. Although the trial court took only temporary jurisdiction of the children with regard to the mother, it concluded that respondent's assaultive history against the mother, history of drug use, criminal behavior and lack of credibility rendered him unfit to parent. The trial court terminated respondent's parental rights. He now appeals as of right, contesting only the trial court's best interests determination.

II. ANALYSIS

A. STANDARD OF REVIEW

On appeal, respondent concedes that there were statutory grounds to support the termination of his parental rights. He argues, however, that the trial court erred in concluding that termination of his parental rights was in the children's best interests.

"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, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). In deciding whether termination is in a child's best interests, a trial court may consider all of the evidence introduced by any of the parties and there is no specific burden on any one party. *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000). "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). We review for clear error a court's decision regarding a child's best interests. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012); MCR 3.977(K). "A trial court's decision 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.” *Id.* (internal quotation marks and citation omitted).

B. BEST INTEREST FACTORS

Respondent’s approach to the best interests analysis is deeply flawed. Respondent’s primary argument is that the trial court “evaluated the facts and unfairly applied factors more negatively to Father when Mother was equally at fault” and that “taking each issue and comparing Mother and Father, the Court should have arrived at the same conclusion for both parents and reverted Father’s termination to a temporary war[d]ship.” We take this opportunity to emphasize that, in a juvenile proceeding, the relevant inquiry is not the comparative fitness of the parents, but the safety and well-being of the child.

“The purpose of child protective proceedings is the protection of the child” and the Juvenile Code, MCL 712A.1 et seq., “is intended to protect children from unfit homes.” *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993). “[T]he child’s welfare is primary in child protective proceedings.” *Id.* at 115. Comparative fault or unfitness of the parents is not at issue, as can be seen in our treatment of cases such as the one before us where there is no definitive explanation for injuries to a young child. In *In re Ellis*, 294 Mich App 30; 817 NW2d 111 (2011), this Court held “that termination of parental rights under MCL 712A.19b(3)(b)(i), (b)(ii), (j), and (k)(iii) is permissible even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child’s injuries.” *Id.* at 35-36. Similarly, in *In re VanDalen*, 293 Mich App 120; 809 NW2d 412 (2011), this Court held “that termination of parental rights under MCL 712A.19b(3)(j) and MCL 712A.19b(3)(g) is permissible even in the absence of determinative evidence regarding the identity of the perpetrator when the evidence shows that the respondents must have either caused the intentional injuries or failed to safeguard the children from injury.” *Id.* at 141. As applied to the children’s best interest in that case, we concluded that “[g]iven that the children’s safety and well-being could not reasonably be assured in light of the past severe abuse of the children while in respondents’ care, which remained unresolved, and that the children were thriving in the care of their foster parents, the court did not clearly err by finding that termination of respondents’ parental rights was in the children’s best interests.” *Id.* at 142. In neither of these two cases did we concern ourselves with exactly who perpetrated the abuse; instead, the focus was on whether the children would be safe if returned to their parents’ care.

A child’s physical safety is, obviously, the most basic factor to consider. But that does not end a trial court’s inquiry. There are a number of factors that a trial court should consider before deciding whether to terminate parental rights. While in no way exhaustive, we hope to summarize the factors to be considered in deciding whether to terminate a parent’s parental rights.

In deciding whether to terminate parental rights, a trial court should consider: a parent’s history, a parent’s ability to parent, the child’s age, and continued involvement in domestic violence. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). A trial court should also consider the strength of the bond between the parent and child, the visitation history, the parent’s engaging in questionable relationships, the parent’s compliance with treatment plans, the child’s

well-being while in care, and the possibility of adoption. *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 trial court should consider a child's need for permanence, stability and finality. *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992); *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991). Thus, in considering whether further attempts at reunification would be justified, a trial court should consider the length of time the child may be required to wait for the parent to rectify the conditions at issue, which necessarily includes consideration of the child's age and particular or special needs. *McIntyre*, 192 Mich App at 52-53. A trial court may consider the advantages of a foster home over the parent's home. *In re Foster*, 285 Mich App 630, 634-635; 776 NW2d 415 (2009). And, if the children are placed with relatives at the time of the termination hearing, a trial court must explicitly consider that factor prior to deciding whether to terminate parental rights. *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). When multiple children are involved, a trial court has the duty to decide the best interests of each child individually. *Olive/Metts*, 297 Mich App at 42.

Again, contrary to respondent's assertions, none of these factors entail a comparison between parents; instead, each of the factors is to be applied to each parent. Thus, as is the case here, it is possible to have different results for each parent.

C. RESPONDENT'S ARGUMENTS

Here, the trial court did not err in finding that it was in the children's best interests to terminate respondent's parental rights.

First and foremost, the trial court was concerned about the children's safety. Respondent's inability to provide an explanation for his infant daughter's injuries suggests that he either failed to adequately supervise and protect her or that he harmed her himself. Given SMRD's young age at the time of her injuries, the severity of her injuries, and respondent's failure to understand the seriousness of the injuries, the trial court properly concluded that she and her sister would be at risk in respondent's care. Respondent's defensiveness during his psychological evaluation and at the time he was interviewed by the protective services worker demonstrated his lack of insight. Moreover, respondent has a criminal history involving assault and theft. Respondent minimized his acts of domestic violence and failed to benefit from previously received anger management services. Thus, it was unlikely that additional services would have created a safe environment for the children.

Respondent argues that the trial court erred in its best-interest determination because he was bonded with his two young children at the beginning of their lives. He claims that the trial court was unwilling to give weight to his significant attempts to remain connected with his children while incarcerated. Although bonding between a parent and children is a factor the trial court can consider in making its best-interest determination, it does not take priority over the children's safety and well-being. Any efforts made by respondent to maintain a relationship with his children while incarcerated were not sufficient to overcome the children's need for protection from a violent environment and physical harm. Thus, although a trial court may consider a child's bond with her parent, it must also consider the child's safety and well-being.

Respondent further argues that despite his concern for SMRD's bruise, he was penalized for not driving or accompanying the mother to the hospital when the injury was discovered. Respondent argues that unfair, negative weight was placed on this one action to show that he was uncaring. Contrary to respondent's claim, his reaction to his daughter's injuries is a clear reflection of his parental fitness. Respondent failed to provide a convincing explanation for his lack of involvement after SMRD's injury was discovered. He failed to bring his injured child to the hospital, promptly visit her, or inquire about her health, suggesting a lackadaisical attitude or an attempt at avoiding questioning during the investigation. Further, despite respondent's suggestion to the contrary, his reaction to his daughter's abdominal bruising was not the sole factor considered by the trial court in its best-interest determination.

Respondent further argues that the caseworker showed bias against him by testifying that he was withdrawn when she interviewed him. Respondent argues that she never initiated contact with him and made no efforts to plan with him. Contrary to respondent's claim, there is no evidence that the caseworker was biased against respondent. The caseworker testified regarding her observations of respondent's conduct when she interviewed him and noted them to be inappropriate. He was neither engaged nor fully cooperative with her. Respondent was using his phone while the caseworker interviewed him instead of helping her try to determine who injured his daughter. Moreover, petitioner is not obligated to provide services once a termination petition has been filed. Services need not be provided where reunification is not intended, *In re LE*, 278 Mich App 1, 21; 747 NW2d 883 (2008), and DHS was not required to provide services once a petition for permanent custody had been filed, MCL 712A.18f(1)(b); MCR 3.977(E).

Additionally, because respondent was incarcerated, he would not have been able to participate in many services. There is nothing to support respondent's claim that the mother was offered services because she "made up more stories." Likewise, respondent's argument that the trial court's decision to terminate parental rights was improperly based on respondent's short-term incarceration is without merit. As respondent admits, he will have pending criminal issues to deal with upon his release from jail.

Respondent claims that the trial court erred when it accepted testimony that he was a drug user. He contends that, although his criminal record included a charge involving marijuana possession, this did not mean he used drugs or had an alcohol problem. He insists that a drug-related concern is not reason to terminate parental rights. Contrary to respondent's claim, there was testimony on the record that respondent was a regular marijuana user. And, although drug use was one of many factors considered by the trial court, it was not the sole basis on which the trial court relied in its best-interest findings.

Respondent also argues that the trial court unfairly considered his criminal history against him when evaluating his employment prospects. Respondent's contention is unpersuasive. Criminal history is a standard consideration for employers when they are making hiring decisions. Respondent's ability to obtain and maintain employment must be considered when evaluating the children's best interests because their best interests are affected by whether their caregiver can meet their needs for food, clothing, and housing.

Respondent also argues that he was not a habitual domestic abuser and did not have convictions of an assaultive nature on the record. Despite this assertion, the record shows that

respondent had a history of violence and aggression. The police were called to respondent's mother's house on January 2, 2012, due to complaints of violent behavior. Before that incident, on September 2, 2011, respondent was arrested and criminally charged after he assaulted the mother. He later pleaded to disorderly conduct. Respondent minimizes the fact that he perpetrated these assaults against the children's mother, but this propensity toward violence puts his children at risk of harm.

Finally, respondent argues that the trial court gave preferential treatment to the mother because her parental rights were not terminated even though he and the mother had the same credibility issues surrounding SMRD's injuries. 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); MCR 3.902(A); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) ("In contrast to the reviewing court, the trier of fact has the advantage of being able to consider the demeanor of the witnesses in determining how much weight and credibility to accord their testimony.") Respondent's credibility was called into question by conflicting testimony and from the testimony of witnesses who observed his behavior. Contrary to respondent's assertion, the mother's credibility was a separate concern from his. And, whether or to what extent his credibility was different than the mother's is not relevant in determining whether termination of parental rights was in the children's best interests.

Affirmed.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly