

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BROWN/ALFORD/EUBANKS,
Minors.

UNPUBLISHED
July 22, 2014

No. 319728
Wayne Circuit Court
Family Division
LC No. 13-513931

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Respondent appeals by right the trial court order terminating her parental rights to the three minor children under MCL 712A.19b(3)(b)(i), (g), (j), and (k)(v). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Petitioner Department of Human Services (DHS) petitioned the trial court for permanent custody of respondent's three minor children, AB (born August 30, 2000), JA (born October 31, 2002) and ZE (born August 16, 2011). The petition alleged abandonment based on failure to provide financial and material support for the children, and physical abuse, based on evidence of a spiral fracture of ZE's left humerus, which the doctors reported as not accidental, on July 10, 2013. Other unexplained bruises were found on ZE's intestines, abdomen, and liver when she was admitted for pancreatic surgery in May 2013. When admitted for her broken arm, ZE was "substantially underweight" and there was a delay in seeking medical attention. Respondent had explained that ZE had fallen off the last stair of the porch, "which was not consistent with the type of injury." Respondent had a prior history with Children's Protective Services (CPS).

A preliminary hearing was held on August 6, 2013. The court authorized the petition. ZE was placed with her paternal grandmother, Adrian Eubanks, AB was with his maternal aunt, Catherine Martin, where he had been since birth, and JA was with his father. Petitioner sought termination of respondent's parental rights. The trial court granted supervised visitation in the interim and set the matter for pretrial.

A pretrial hearing was held on August 21, 2013. Respondent reported that she had not been provided with her supervised visitation, and the court ordered that visitation be set up and that the agency must provide "makeup visits" for the ones that were missed. The lawyer guardian ad litem (LGAL) reported that respondent had been in violation of the court's order not to have contact with her children outside of the agency by going to their placement homes. A second pretrial hearing was held on August 26, 2013. Respondent complained that she had not

yet been able to visit. It was reported that the foster care worker had just received notice that visits were to be set up.

The adjudication was held on October 9, October 25, and November 25, 2013. Adrienne Eubanks, ZE's paternal grandmother, testified that ZE's father was currently incarcerated for aiding and abetting the distribution of an illegal substance. Respondent and ZE moved in with Eubanks and her son (ZE's father) in June 2009. JA lived with his father from 2009 until June 2011. He then moved into Eubanks's house with respondent, ZE, and ZE's father. She had never met AB, who had lived with his aunt since he was born. Respondent and the children lived in the upstairs apartment. Eubanks characterized respondent's parenting skills as "poor to none." She had observed respondent hitting JA in the face and head with ZE's shoe because "he said something out of line to her."

On December 7, 2012, there was an argument between respondent and ZE's father. Respondent had been drinking. It was two or three in the morning when respondent came in and woke Eubanks up. ZE's father was sleeping because he had to go to work. Within ten minutes the fight started. Eubanks heard respondent tell the baby to "shut up." This woke up ZE's father, and the fight started. Eubanks called the police. When the police arrived, respondent told them, "I will throw this baby down these stairs at you." The children could hear the fighting. There were other occasions when JA brought ZE down to Eubanks because of the fighting. Respondent threw Eubanks's furniture and broke things.

ZE's father left the home in July 2012 to work in Ohio. Respondent and the two children remained. Eubanks started eviction proceedings in January, and respondent was evicted on March 1, 2013. Between July 2012 and December 2012, Eubanks stated that "it was just nonstop, her going out. She would come back and she would be drunk . . . stumbling and falling, and talking crazy." Respondent would sleep all day. Two or three times a week, JA would have to miss school and stay home and watch ZE. After they were evicted, respondent called her constantly asking for diapers and other things. Respondent lived in several different places that Eubanks did not think were suitable. Eubanks did not know where respondent currently lived. After the eviction, JA stayed with Eubanks.

During a visit in May 2013, Eubanks noticed that ZE wasn't eating or excreting. Eubanks said she refused to eat or drink and "she just was lying there sleeping." On a Monday, after work, Eubanks picked up respondent and ZE and took them to the hospital. The emergency room doctor examined her and asked some questions, but ZE was only a little feverish and was sent home with some graham crackers. Respondent was told to follow up with ZE's primary care physician. Eubanks asked respondent several times in the next two weeks if she had followed up, but respondent did not take ZE to her doctor.

Two weeks later, ZE was hospitalized for removal of an abscess caused by an *e.coli* infection. Respondent called Eubanks and told her she was at the hospital but was leaving.

On July 10, 2013, respondent called Eubanks at work and told her that ZE had to go to the hospital because something was wrong with her arm. When Eubanks arrived to take them to the hospital, respondent was not there. A woman at the house let Eubanks into ZE's room. Eubanks stated that ZE was crying, emaciated, and had a swollen left arm. Eubanks decided to take ZE to the hospital and not wait for respondent. X-rays revealed a fractured left arm.

Respondent did not arrive at the hospital until the next day. That day, respondent called Eubanks and told her that the baby fell. Eubanks testified that respondent was “belligerent and ignorant.” Eubanks did not believe the children should be returned to respondent, and believed that the children were not bonded with her.

Jennifer Mullis, a pediatric nurse at William Beaumont Hospital, was with the Child Protection Team [CPT] and consulted on ZE’s case on July 11, 2013. The CPT worked on child abuse and neglect cases that came into the hospital. Mullis reviewed the chart, spoke to one of the admitting nurses, and did a complete examination of ZE and her broken left arm. There was no history regarding how the arm became broken. Mullis attempted to contact respondent, but the phone number she had been given was disconnected. CPS had been notified and was already involved in the case when Mullis did her consult. The history that Mullis reviewed included information that the grandmother had brought the child into the ER; the mother was not present. JA had reported that the arm had been swollen for at least a day — maybe three days — before ZE was brought in. The ER physician was concerned that ZE was failing to gain weight properly, and JA told them that ZE was “not often offered solid foods but given milk and water.” One of the ZE’s diagnoses was “failure to thrive.” Her chart showed that ZE had not gained any weight between May and July 2013, and her weight was less than the fifth percentile for a child her age, which was at the lowest end. ZE had several bruises which could have been caused non-accidentally. Mullis concluded that the broken arm was from a non-accidental cause and “possible abuse.” Despite several attempts, Mullis was never able to contact the mother.

Dr. Mary Lu Angelilli, a child abuse pediatrician, member of CPT and Chief of Staff at Children’s Hospital of Michigan, testified as an expert witness in child abuse pediatrics. Angelilli was brought into the case following a telephone call from Amber Harbert from DHS asking her to provide an opinion. Angelilli did not examine ZE, but she examined the record and consulted with Mullis. An examination of the records revealed two admissions: one from May 27 to June 2, 2013, and another from July 10 through July 12, 2013. During the first hospitalization, ZE had lower abdominal surgery after it was discovered that she had a mass in her lower abdomen which, upon testing, proved to be infected. There was also bruising on her colon and the lining of the abdomen. There was no concern about child abuse at that time. When Angelilli reviewed the CT scan from the July hospitalization with Dr. Jeffrey Zerlin, they discovered a laceration on the liver that had not been noticed before. The most common cause of such a laceration is by a blow to the upper abdomen, which could occur if the child fell off a bike and the handlebars hit that area or by seatbelts from a sudden stop in a car. It could also be caused by a punch, a fist, or some other object. Because there had been no reported history of an accidental injury to that area, Angelilli became concerned enough about abuse to report it as a “mandated reporter.”

ZE’s broken arm was an oblique fracture to the upper left humerus, near the shoulder. There were many ways the fracture could occur, but all would require a lot of force. The mother’s explanation of a fall off the porch was “not likely” because “most times you would put your arms out to break your fall. And . . . the most likely fracture would be a wrist fracture.” A fall would not cause the liver laceration or bruises to the abdomen unless it was “a very rapid fall onto an object that pressed inside the abdomen.” The radiologist had opined that the injury was at least seven days old. There was obviously a delay in seeking medical treatment. Angelilli stated, “A broken arm is extremely painful, and to stay a week without anybody noticing that her

arm was exquisitely tender and she was not using it normally, that would be impossible.” The injury most likely was caused by a yanking and twisting. In addition, there was failure to thrive, which meant that she was not getting enough calories or there was a medical condition. Angelilli opined that the most serious injury was the liver laceration. When the child came back with a second injury, in addition to the failure to thrive, Angelilli believed that she was “not safe” where she was living. Angelilli opined that ZE’s injuries were “highly suspicious” for physical abuse.

Harbert reported that AB had been living with his maternal aunt, Katherine Martin, his legal guardian, since he was one month old. She was the only mother he had ever known, and he called her “mom.” Harbert investigated the complaint when it came in on July 11, 2013. She interviewed respondent at the hospital on July 11. Respondent stated that, on July 6, ZE had followed her out of the house and fell from the bottom stair on the porch onto the concrete. Later, Harbert went out to respondent’s home to see JA and interview respondent, but respondent was not there. ZE had been placed with Eubanks. Respondent denied any substance abuse problems. Harbert had not entered respondent’s home because she had been informed by respondent’s roommate that it was infested with bedbugs.

Harbert requested termination of respondent’s parental rights to AB because she had never provided any care or support for him, and he indicated that he did not know his mother. Harbert requested termination of respondent’s parental rights to JA and ZE because of ZE’s injuries. Harbert believed that termination of respondent’s parental rights was in the best interests of the children. From what she had observed, Harbert did not believe that respondent was bonded with ZE. Respondent had only attended one out of seven scheduled parenting time visits. JA told Harbert that respondent had contacted him and told him this whole situation was his fault, and he told Harbert that he did not want to see respondent any more.

The termination hearing continued on October 24, 2013. Dr. Zerin, a radiologist, examined the radiology reports on ZE in May. He testified that a liver laceration is usually caused by a direct blow of any kind. A severe injury to the liver could cause bleeding and even death. The injury to the humerus was an oblique fracture, which can occur with a direct blow, as opposed to a spiral fracture, which is caused by twisting. The humerus is a fairly strong bone. The broken bone would have been apparently observable because of the deformity of the arm.

Respondent testified that she gave birth to AB at the age of 17. She agreed to let her Aunt Kathy have guardianship over him. She had very little contact with him since then. JA lived with her until the incident with ZE. He now lived with his father. Respondent took ZE to the hospital in May because she stopped eating and could not walk. Her abdominal area was hurting. She was in the hospital for about a week. Respondent testified that she was there “mostly every day, me and her grandmother.” ZE was released from the hospital in respondent’s care. Respondent testified that ZE fell on her arm on the concrete. Respondent saw that her arm was very swollen, so she called Eubanks to take ZE to the hospital. Eubanks took ZE to the hospital because respondent was at the grocery store. Respondent stated that the fall happened on the July 8 and they took her to the hospital on July 10. Respondent described the accident as follows:

I was putting something in the can [sic] across the street Yea, as soon as I got the stuff in the van and tried to hurry up and run over th [sic] and

catch her. My son was putting stuff in the van and my old friend was putting stuff in the van, and he seen her fall too.

Respondent stated that ZE did not appear to be injured at first. She testified that she called Eubanks when ZE's arm started to swell. Respondent did not get to the hospital until the next day because she did not have a ride until then. At the hospital, respondent talked with Harbert, the CPS worker. Respondent denied ever striking ZE. Respondent reported her eviction from Eubanks's home. Respondent admitted that she would go out at night and drink alcohol and come back about three in the morning, but she had her own key. She agreed that she would sleep in late and not get up to take JA to school, but it was "no big deal," because "Ms Eubanks always was like, just come on and I'll drop you off at school." Respondent admitted striking JA with her hand or a belt if he was doing something bad. She denied telling the police that she would "throw this baby down the steps." She accused Eubanks of lying.

Respondent said that ZE appeared thin because she had an abscess in her stomach and had lost weight from the abscess. Respondent said that she fed ZE adequately. Respondent agreed that, since the children were removed, she had visited them only once, because she had to go to work, or she did not have any bus fare. She cancelled the last visit because she had "something else important to do." She had to get the rest of her clothes from her friend's house "so I can get my baby's stuff because stuff is put up right now so I can move into my own place." Respondent testified that her aunt told her that AB had "special needs," but respondent did not know what they were. She let JA watch ZE if she went to the store "or something like that," because he was 10 years old, and "the grandma is downstairs."

The trial court took jurisdiction over the children. The court found by a preponderance of the evidence that the children were at a substantial risk of harm to their physical and mental well-being and that the parental home was an unfit environment for the children. The court based these findings on evidence of improper supervision, medical and environmental neglect, domestic violence, respondent's drunkenness, criminality, a general pattern of neglect and criminality to the children, and physical abuse by respondent to JA and ZE. The court then stated that it would "hold in abeyance" its ruling on whether there was clear and convincing evidence to terminate parental rights and whether termination was in the children's best interests until after respondent and the children participated in a full psychological evaluation.

The matter continued on November 25, 2013. The result of a drug screen taken just before the hearing was admitted. It showed respondent was positive for alcohol. The Clinic for Child Study psychological evaluation was admitted into evidence. The psychologist, Gail A. Mills, reported that AB and JA were very reluctant to be in the same room with respondent. Mills reported that respondent "approached the Clinic assessment with a defiant and mostly uncooperative demeanor." Respondent "demonstrated poor verbal and operational judgment. Overall, her demeanor suggested a very immature and dependent individual who lacks empathy and puts her own desires before the needs of her children" Mills concluded:

[Respondent] was referred to the Clinic for Child Study in order to aid the Court in determining her capabilities of providing [JA] and [ZE] with an environment that is free of physical abuse and neglect and what is in the best interest of the children.

[Respondent] presented as a very immature, dependent individual who is currently not focusing on the needs of her children, but only on her own self-gratification.

[Respondent] takes no responsibility for the children being in care. She argues excessively concerning the possibility that her child, [ZE] was being neglected and possibly abused. She stands firm that she will continue to physically discipline her children despite whether this discipline could be viewed as abusive.

Of equal concern is [Respondent]'s cavalier attitude towards her drinking alcohol, which most likely seriously impacts her ability to function adequately.

Unless [Respondent] is willing to seek out substance abuse assessment and treatment, most likely this will continue to impact her life personally as well as her future parenting abilities. The prognosis for these children ever returning to [Respondent] as she presents herself currently is poor at best and permanent custody would most likely be in the children's best interest. This clinician does not feel that [Respondent] would be able to "put her life together" in a timely manner in order to become a more empathetic and concerned parent.

The court stated its opinion on the record and terminated respondent's parental rights to the minor children. A written order and opinion were filed on December 5, 2013. This appeal followed.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent first contends that the trial court clearly erred in finding clear and convincing evidence to support the statutory grounds for termination. We review the trial court's findings for clear error. MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appear before it. MCR 2.613(C); MCR 3.902(A); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We disagree.

The evidence was clear that ZE, less than two years old, sustained a life-threatening laceration to her liver, as well as bruising on her colon, the lining of her abdomen, her hip, pubic area, and upper right arm, and a fractured humerus. Respondent's explanations were not consistent with the child's injuries. Given ZE's age, accidental injuries were ruled out. Further, it was clear that the humerus fracture had occurred approximately seven days before ZE was brought into the hospital, and the medical expert stated that it would be very painful and would have been "impossible" for respondent not to notice it. ZE was also diagnosed with "failure to thrive" because she had not gained any weight in the preceding two months, and her weight was less than the fifth percentile for a child her age. JA reported that his sister was not often offered solid foods but was fed milk and water. Moreover, ZE was brought into the hospital by her paternal grandmother, and the nurse was unable to locate respondent. Respondent testified that she was the sole care-giver for ZE and she "was always with her." All the experts agreed that the

child's injuries were the result of physical abuse. Thus, the trial court did not err in concluding that there was clear and convincing evidence that the child's injuries were caused by respondent.

During the termination hearing, respondent testified and acknowledged her alcohol abuse, corroborating the testimony of Eubanks that respondent often went out at night and came back drunk at 3:00 a.m., after which respondent would sleep in late and not get up in the morning to make breakfast for JA and get him off to school. Respondent thought this was "no big deal" because the paternal grandmother was there to do it. She also left JA to watch his little sister quite often. She admitted that she whipped JA with a belt or with her hands, and she told the psychologist that she would continue to discipline her children as she had in the past. In addition, respondent told JA that it was his fault that he and ZE were removed from respondent's care. Years earlier, respondent had given AB to an aunt when he was only one month old and had virtually abandoned him. She rarely saw him and provided no financial support. That child had been raised by the aunt, who was his guardian. He looked to the aunt as his mother and caregiver, and did not want to even be in the same room with respondent. After the two younger children were removed, respondent was given at least seven opportunities to visit her children. However, she appeared for only one visit and explained that getting her clothes out of her friend's house was more important than visiting her children.

The evaluating psychologist found respondent to be defiant and uncooperative, immature, lacking in empathy, and a person who put her own needs before those of her children. She was focused on her own self-gratification and exhibited a "cavalier attitude towards her drinking which most likely seriously impacts her ability to function adequately." Respondent demonstrated these traits in open court, often displaying severe anger, open hostility, and abrasiveness toward others. Several witnesses also testified about respondent's extremely troubling behaviors, personality traits, and alcohol abuse. Respondent tested positive for alcohol on the morning of the commencement of the termination hearing. After Eubanks was forced to evict respondent from her home because of her violent and drunken behavior, respondent moved from place to place without providing an address and did not have a stable home for her children. The psychologist concluded that the prognosis for reunification was "poor at best and permanent custody would most likely be in the children's best interest."

We find that the facts clearly support the trial court's findings. There was clear and convincing evidence that respondent's acts caused the life-threatening physical injuries to the youngest child. Respondent's conduct and attitude demonstrated that there was a reasonable likelihood that her children would suffer from injury in the foreseeable future if returned to respondent. Thus, there was clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(b)(i) and (k)(v). In addition, the facts supported the trial court's finding that respondent had failed to provide proper care or custody for her children and there was no reasonable likelihood that she would be able to do so within a reasonable time considering their ages. MCL 712A.19b(3)(g). Finally, the facts further support that there was a reasonable likelihood, based on respondent's conduct, that her children would be harmed if they were returned to respondent. MCL 712A.19b(3)(g). Accordingly, we conclude that the trial court did not clearly err in finding clear and convincing evidence to support the statutory grounds for termination of respondent's parental rights.

III. BEST INTEREST DETERMINATION

Next, respondent contends that the trial court clearly erred in finding that termination of respondent's parental rights was in the best interests of the children. We review the trial court's decision regarding the best interest of the children for clear error. *In re Trejo*, 462 Mich 341, 356-367; 612 NW2d 407 (2000). The court must weigh all evidence in the whole record to determine whether termination of parental rights is in the best interests of the children. *Id.* at 354-355. The preponderance of the evidence standard applies to the best interest determination. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court has a "duty to decide the best interests of each child individually." The court should consider the parent's capacity to care for children, as well as the children's "need for permanency, stability, and finality." *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012).

Respondent contends that the trial court did not explicitly address whether termination was appropriate in light of the children's placement with relatives, as required by *Olive/Metts*, 297 Mich App at 42. Upon review of the findings of the court, it is clear that the trial court viewed each child individually and explicitly addressed the fact that each child was placed with a relative. The trial court's findings reflected the evidence in the record. The court considered each child's lack of bonding with respondent and that each child was doing well in his or her placement, that the two older children expressed a desire not to be returned to respondent, and that ZE had been physically abused to the extent that she suffered a life-threatening injury and demonstrated fear of respondent. The court also noted that respondent had failed to visit the children when given the opportunity and intended to continue her abuse of alcohol and her inappropriate corporal punishment of the children. Each child needed permanency, stability, and safety. It was clear that respondent could not provide them with proper care or custody. The facts showed that the children had been subjected to violence, substance abuse, physical and emotional harm, and neglect. The trial court did not clearly err in finding that termination of respondent's parental rights was in the best interests of the children.

Further, respondent's reliance on MCL 712A.19a(6)(a) and MCL 712A.19a(2)(a) for the proposition that she should have been offered a treatment plan and services is misplaced. Petitioner was required to file an initial petition for termination of respondent's parental rights because of the injuries that she had inflicted upon the youngest child. MCL 722.638(1)(a)(v). Thus, the trial court was not required to offer respondent a treatment plan and services, regardless that the children were placed with relatives. Respondent's argument that there were no "aggravating circumstances" present in this case is without merit. Under MCL 712A.19a(2)(a), the "aggravating circumstances" which preclude the offering of reasonable efforts for reunification include those that have been provided in MCL 722.638. MCL 722.638(1)(a)(v) and (2) require petitioner to submit an original petition for termination when it determines that a parent abused a child with a life threatening injury. That is exactly what occurred in this case. Therefore, respondent had no basis upon which to request reasonable efforts toward reunification. We conclude that the trial court did not clearly err in finding that termination of respondent's parental rights was in the best interest of each child.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto