

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of SHANA BRAE MURPHY and
GARRIS AUSTIN MURPHY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ORLINDA FREIBURGER-FALCON,

Respondent-Appellant.

UNPUBLISHED

April 13, 2010

No. 293085

Genesee Circuit Court

Family Division

LC No. 05-120493-NA

In the Matter of DEVON SCOTT BREWER,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

RICHARD FALCON,

Respondent-Appellant.

No. 293091

Genesee Circuit Court

Family Division

LC No. 06-121498-NA

In the Matter of CHEVELLE MICHAEL
FALCON, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

No. 293092

Genesee Circuit Court

RICHARD FALCON,

Respondent-Appellant.

Family Division

LC No. 99-111897-NA

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, respondents Orlinda Freiburger-Falcon and Richard Falcon appeal as of right from the trial court orders that terminated their parental rights to the minor children.¹ We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Freiburger-Falcon and Falcon were married in October 2005. Freiburger-Falcon had two children from a prior relationship, S.M. and G.M. S.M.'s and G.M.'s father was Jerry Murphy. Falcon obtained custody of his child from a prior relationship, C.F., sometime around his marriage to Freiburger-Falcon. C.F.'s mother was Cassandra Fisher. Falcon also obtained custody of his other child, D.B., in January or February 2006. D.B.'s mother was Sherri Brewer. Murphy's, Fisher's, and Brewer's parental rights were all terminated in April 2009.

In November 2005, S.M. and G.M. were removed from Freiburger-Falcon's care after Children's Protective Services responded to a complaint and observed the family home to be in deplorable condition. The petition seeking the children's removal alleged unstable housing, educational neglect, and failure to comply with Children's Protective Services intervention. After four to five months of services, including a Family Reunification Program, S.M. and G.M. were returned to Freiburger-Falcon's care.

Freiburger-Falcon enrolled G.M. and C.F. into a school that provided services to students with impairments or special needs. G.M. was cognitively impaired (at seven years of age, he was assessed developmentally to be at 27 months) and on a psychiatric medication treatment plan. C.F.'s speech was so impaired that, at six years of age, the Children's Protective Services worker could not understand him. D.B. was also receiving services when he started residing with Freiburger-Falcon and Falcon.

In July 2006, Children's Protective Services observed bruises on C.F., and D.B. reported being bruised when Freiburger-Falcon hit him with a belt. A hospital emergency room issued its diagnoses that C.F. and D.B. had suffered "alleged physical abuse." Petitions seeking the children's removal were authorized, but the trial court released the children to Freiburger-Falcon and Falcon's care with the conditions that Family Reunification Program remain in the home and

¹ MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (c)(ii) (other conditions that would bring the child within the court's jurisdiction are not rectified), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm if child is returned to parent).

that G.M. receive his prescribed psychiatric medications (Freiburger-Falcon opposed the use of medications for G.M. and had not been administering them). After the Family Reunification Program ended, Freiburger-Falcon did not participate with a parent-aide program or Families First, stating she was tired of Children's Protective Services "controlling her life" and that she did not need assistance with homemaking and parenting skills. Meanwhile, more bruises continued to be observed on C.F. The children were removed from Freiburger-Falcon and Falcon's care in January 2007, after the lawyer-guardian ad litem visited the family and found the home in poor environmental condition, and after a team decision meeting was held where Freiburger-Falcon would not state that she was willing to participate in services.

Freiburger-Falcon and Falcon attended supervised parenting times, completed parenting classes and psychological evaluations, and Freiburger-Falcon participated in individual therapy. In March 2007, Freiburger-Falcon reported making several complaints against the caseworker from Consumer Services, Inc. Freiburger-Falcon also encountered problems with the foster care worker from the Department of Human Services and eventually filed a civil lawsuit against her, instigating a change in workers in October 2007.

Meanwhile, the children's placements changed a few times and the extent of their special needs became known. S.M. had emotional issues resulting from sexual abuse perpetrated by her father, was prescribed psychiatric medications after exhibiting aggressive and oppositional behaviors in foster care, and exhibited impulsive behavior and problems with boundaries. G.M. was diagnosed with autism and attention deficit hyperactivity disorder ("ADHD"),² and exhibited very aggressive behavior. D.B. had emotional problems resulting from sexual abuse perpetrated by a family acquaintance; was diagnosed with ADHD and a mood disorder, and was on a medication treatment plan; was cognitively impaired; exhibited aggressive behavior; and had a history of destroying property. C.F. was diagnosed with oppositional defiant disorder and ADHD, was cognitively impaired, had a mild form of cerebral palsy and wore leg braces, and exhibited extremely aggressive behavior. The trial court instructed Freiburger-Falcon and Falcon to be involved in the children's medical, dental, psychological, psychiatric, therapeutic, or other necessary appointments.

However, Freiburger-Falcon and Falcon resisted engaging with the professionals who treated the children and failed to consistently attend the children's appointments. In a June 2008 meeting, Freiburger-Falcon and Falcon demonstrated a lack of understanding about the severity of the children's needs when Freiburger-Falcon focused on her belief that the children should never have been removed in the first place, Falcon described the services he had completed as ridiculous, and the foster care worker received the impression that Freiburger-Falcon believed herself more knowledgeable about the children's needs than the service providers. In July 2008, the foster care worker sent letters to Freiburger-Falcon and Falcon listing each child's therapists and telling them to contact those therapists to learn about the children's therapies.

² G.M.'s medication treatment plan was altered while he was in foster care. Freiburger-Falcon did not see the benefit of prescribing medications and refused to sign the consents for the medications prescribed for G.M. and S.M. while they were in foster care, and Department of Human Services consequently obtained an authorization order from the court.

At the hearing on permanent custody, the foster care worker and the children's therapists testified about how the children needed intense and constant supervision because S.M.'s impulsivity and problems with boundaries, and the boys' significant aggression and other behaviors, posed dangers to themselves and others. The foster care worker spoke of her concern about Falcon's ability to intensely supervise the children on his own should Freiburger-Falcon have to leave the house. Freiburger-Falcon admitted that she did not attend all of the children's appointments, in part because of transportation problems. But the foster care worker testified that she offered transportation to Freiburger-Falcon and Falcon, who only once took her up on that offer. Freiburger-Falcon opined that reunification was in the children's best interests because she knew what each of the children's needs were and had a bond with each of them. Falcon said he had been unaware of a lot of the children's appointments and it was not until the foster care worker gave him the letter listing the children's doctors and therapists that he knew whom to contact. However, Falcon was unable to name all of the children's special needs.

After the trial court made its findings of fact, it found clear and convincing evidence warranted termination of Freiburger-Falcon's and Falcon's rights. The trial court then referred to the best interests statute and found that termination of Freiburger-Falcon's and Falcon's rights was not contrary to the children's best interests. Freiburger-Falcon and Falcon now appeal.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the Department of Human Services has proven at least one of the statutory grounds for termination by clear and convincing evidence.³ We review for clear error a trial court's decision terminating parental rights.⁴ A decision or finding of fact is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made.⁵ We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.⁶ The qualification of a witness as an expert, and the admissibility of his testimony, are in the trial court's discretion, which we will not reverse absent an abuse of that discretion.⁷

B. FINDINGS OF FACT

Freiburger-Falcon argues that the trial court's findings of fact were clearly erroneous and/or compellingly inadequate to warrant the termination of her rights. We disagree. Evidence was presented that Freiburger-Falcon was resistant to services, made the unilateral decision to

³ MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

⁴ MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *Sours*, 459 Mich at 633.

⁵ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁶ MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

⁷ *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

take G.M. off of a medication because she was concerned about its side effects, missed many of her individual counseling sessions, did not participate with Families First, did not comply with the court order to be involved with the children's therapies, received a great deal of guidance from the second Department of Human Services foster care worker, had problems during parenting time adequately addressing all the children's needs, missed appointments (her individual counseling sessions as well as the children's appointments), did not follow through with autism classes that the foster care worker viewed as required, refused entry into the home to workers conducting a home study (although those workers were late and Freiburger-Falcon may have had good cause to refuse entry), and did not have a valid driver's license.

Freiburger-Falcon also argues that it was completely inaccurate for the court to find that the children's medical needs were not met before coming into care. We agree that there is no evidence presented to support this finding. However, the key issue in this case was Freiburger-Falcon's ability to address the children's special needs after those needs became known, and Freiburger-Falcon's alleged efforts, or lack thereof, to get appropriate treatment in the past was not as important as her current ability to work with service providers.

In sum, we cannot conclude that the trial court clearly erred in its findings of fact.

C. PSYCHOLOGIST'S TESTIMONY

Freiburger-Falcon argues that the trial court abused its discretion in allowing the evaluating psychologist to testify about his findings. In making her argument, Freiburger-Falcon relies on the fact that this limited license psychologist cut and pasted computer-generated test results into Freiburger-Falcon and Falcon's evaluation reports and that the State of Michigan later ruled this report preparation methodology improper, which then extended the supervision of the psychologist's reports.

MRE 702 allows a witness qualified as an expert by "knowledge, skill, experience, training, or background" to testify about "scientific, technical, or other specialized knowledge . . . in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case." The psychologist's error involved a shortcut method of preparing reports and did not involve insufficient facts or data, unreliable principles or methods, or the facts of any case but this one. Therefore, we conclude that the trial court did not abuse its discretion when it allowed the psychologist to testify about his findings.

D. MCL 712A.19b(3)(c)(ii) OTHER CONDITIONS THAT WOULD BRING THE CHILD WITHIN THE COURT'S JURISDICTION ARE NOT RECTIFIED

The children were brought into care due to poor environmental conditions in the home, but that concern was supplanted during the proceeding by the concern that Freiburger-Falcon and Falcon were unable to address the children's special needs. The trial court instructed Freiburger-Falcon and Falcon to be involved in the children's appointments, but they failed to do so for the next year and a half. In addition, Freiburger-Falcon frequently challenged the children's treatments and apparently believed herself more knowledgeable about the children's needs than the service providers. S.M.'s therapist testified at the hearing on permanent custody that she met

individually with Freiburger-Falcon on only one occasion, G.M.'s therapist testified that she was not consulted when Freiburger-Falcon took G.M. off of a medication, and Falcon only started to participate in D.B.'s and C.F.'s psychological appointments after the termination petitions were filed. This evidence demonstrated that Freiburger-Falcon and Falcon failed to understand the severity of the children's extraordinary needs and were in denial about their ability to successfully care for the children without help from professionals. Therefore, the trial court did not clearly err when it found that Freiburger-Falcon's and Falcon's inability to address the children's special needs caused the children to come within the trial court's jurisdiction, Freiburger-Falcon and Falcon received recommendations to rectify this "other condition" but failed to do so after being given a reasonable opportunity, and there was no reasonable likelihood that this "other condition" would be rectified within a reasonable time given the children's ages. Therefore, we conclude that termination was warranted under MCL 712A.19b(3)(c)(ii).

E. MCL 712A.19b(3)(g) FAILURE TO PROVIDE PROPER CARE AND CUSTODY, AND (j) REASONABLE LIKELIHOOD OF HARM IF CHILD IS RETURNED TO PARENT

Freiburger-Falcon and Falcon failed in the past to provide proper care or custody for the children when the home's environmental conditions became unsuitable, and there was no reasonable expectation that they would be able to provide proper care and custody within a reasonable time given the children's ages because of their demonstrated resistance to services and advice from the professionals who treated the children. Moreover, the children's behaviors placed themselves and others at risk of harm and necessitated intense supervision, and their special needs necessitated adequate treatment. Freiburger-Falcon and Falcon's resistance to services prevented the adequate provision of this necessary supervision and treatment, and there was a reasonable likelihood that the children would be harmed if returned to their home. 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.⁸ Accordingly, we conclude that the trial court did not clearly err when it based termination on MCL 712A.19b(3)(g) and (j).

F. MCL 712A.19b(3)(c)(i)—CONDITIONS OF ADJUDICATION CONTINUE TO EXIST

The November 22, 2005 petition's allegations concerned unstable housing, educational neglect, and failure to comply with Children's Protective Services intervention. There was no evidence presented at the 2009 termination hearing about educational neglect or any alleged failure by Freiburger-Falcon to comply with Children's Protective Services intervention. (Although there was a great deal of evidence about her resistance to services). Therefore, unstable housing was the only adjudicating condition that could have been implicated in this statutory provision.

There was no question that the family's trailer home in 2005 was in deplorable condition, and the home from which the children were removed in 2005 also displayed poor environmental conditions. It appeared that Freiburger-Falcon continued to struggle with environmental neglect in January 2007, when the lawyer-guardian ad litem visited the family home and found dog feces

⁸ *JK*, 468 Mich at 214; *Trejo*, 462 Mich at 360-363, 361, n 16.

in the boys' bedroom and six broken windows. Then, when Freiburger-Falcon and Falcon purchased a home that needed rehabilitation and a home study was conducted in March 2008, that study concluded the home was unsafe for the children. No other home studies were done once the supplemental termination petition was filed in October 2008. Therefore, the last information obtained by Department of Human Services was that the house was not suitable for the children. However, at the termination hearing, Freiburger-Falcon presented a persuasive argument that the house was almost completely rehabilitated, clean, well stocked, and safe for the children. Her testimony was buttressed by testimony from Falcon and Freiburger-Falcon's parents, and from photos of the house that were admitted into evidence. Petitioner presented no evidence to contradict Freiburger-Falcon's claim except the outdated home study conducted in March 2008. Therefore, we conclude that the trial court clearly erred when it found that the adjudicating condition of unstable housing/environmental neglect was not rectified by the time of the termination hearing. Such error was harmless, however, because the trial court properly based termination on other statutory grounds.⁹

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

Once the Department of Human Services has established a statutory ground for termination by clear and convincing evidence, if the trial court also finds from evidence on the whole record that termination is clearly in the child's best interests, then the trial court shall order termination of parental rights. There is no specific burden on either party to present evidence of the children's best interests; rather, the trial court should weigh all evidence available.¹⁰ We review for clear error the trial court's decision regarding the child's best interests.¹¹

B. ANALYSIS

Although the lawyer-guardian ad litem argued that termination was not in the children's best interests because it was unlikely that the children would be placed into permanent placements, Freiburger-Falcon and Falcon's resistance to services made it clear that the children's special needs would not be addressed if they were returned to their care. Although Freiburger-Falcon and Falcon undoubtedly loved and cared for the children, they did not have the ability and/or desire to work with the professionals whose assistance was indispensable to properly address the children's needs. As such, the children stood a better chance of having their needs met in out-of-home placements. In addition, the lawyer-guardian ad litem stated that S.M. wanted to be returned to Freiburger-Falcon's care. G.M., however, sought in September 2008 to exclude Freiburger-Falcon from his therapy appointments. D.B. had only lived with Falcon for approximately eight months of his 11-year-old life and, although expressing fear that he would

⁹ *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

¹⁰ *Trejo*, 462 Mich at 354.

¹¹ *Id.* at 356-357.

not see Falcon, said that he wanted to stay in his foster care placement. C.F.'s therapist testified that, if C.F. was returned home and it was unsuccessful, there was a very high risk that C.F. would find a way to kill himself or another person (C.F. apparently wanted to go home and was so disappointed when he did not go home after parenting times that he expressed a desire to stab and kill Falcon). Given this evidence from the whole record, the trial court did not clearly err in its best interests determination.

We affirm.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood