STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 14, 2010

In the Matter of BERRY/SPENCER, Minors.

No. 296413
Oakland Circuit Court
Family Division
LC No. 05-703871-NA

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

PER CURIAM.

Respondent-mother P. M. Berry appeals as of right from the trial court's orders[1] terminating her parental rights to the minor children at the initial dispositional hearing.[2] We affirm.

I. BASIC FACTS

P. M. Berry is the mother of six children, four of whom are the subject of this appeal.[3] G. Ort is the father of the oldest child, R. W. Berry. C. L. Spencer is the father of the three other children at issue in this appeal, C. Spencer, J. D. Spencer, and J. E. Spencer.

P. M. Berry and C. L. Spencer married in September 2006, but had been residing together since 1999. Pursuant to a complaint filed in September 2008, Heather Mauk, a protective

[1] The trial court entered two separate termination orders, one for the older child, R. W. Berry, whose father is G. Ort, and one for the other three children, whose father is C. L. Spencer.

[2] MCL 712A.19b(3)(b)(*i*) (physical or sexual abuse by the parent); (b)(*ii*) (failure to protect child from physical injury or abuse); (c)(*i*) (conditions of adjudication continue to exist);* (g) (failure to provide proper care or custody); and (j) (reasonable likelihood of harm if child is returned to parent).

*With respect to MCL 712A.19b(3)(c)(*i*), the trial court referred to MCL 712A.19b(3)(c)(*ii*) (other conditions that would bring the child within the court's jurisdiction are not rectified) in its decision from the bench, but it later specified MCL 712A.19b(3)(c)(*i*) in its Order of Adjudication.

[3] A fifth child, G. Ort, Jr., died in 2000. A sixth child, A. Spencer, who is apparently G. Ort's child, was placed for adoption when he was approximately one year old.

services worker, requested that the trial court take custody of the four children and authorize a petition to terminate P. M. Berry's and C. L. Spencer's parental rights based on allegations that (1) they had an extensive protective services history involving physical abuse and environmental neglect, and (2) C. L. Spencer physically abused C. Spencer by hitting him with a belt on one occasion and throwing him down some stairs on another occasion in September 2008. In addition to allegations of physical abuse, there were allegations that the children, including R. W. Berry in particular, were humiliated by being forced to wear diapers. Termination of G. Ort's parental rights was sought in October 2008.

At the adjudicative bench trial, Mauk testified that P. M. Berry's history with protective services began in 1998, but that not all prior referrals were substantiated. Joy Howard, a protective services worker, testified that she became involved with the children in 2004 when R. W. Berry was placed with P. M. Berry after his paternal grandmother's guardianship was terminated. P. M. Berry then lived with C. L. Spencer, as well as her two other sons, C. Spencer and J. D. Spencer. In October 2004, Howard received a referral based on environmental neglect, as well as claims that C. L. Spencer had physically abused R. W. Berry and engaged in domestic violence with P. M. Berry. Howard determined that there was no heat in the trailer home. Howard then made a referral for in-home services with Families First.

In February 2005, Howard received another referral alleging that R. W. Berry was forced to wear a diaper. During Howard's investigation, she learned that R. W. Berry, C. Spencer, and J. D. Spencer had all been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Howard confirmed that P. M. Berry was present when C. L. Spencer made R. W. Berry wear a diaper in the presence of friends in the home. P. M. Berry also acknowledged that C. L. Spencer had physically punished R. W. Berry, although a physical examination of R. W. Berry did not reveal any marks. P. M. Berry admitted that she spanked the children as discipline. She also admitted that she also had made R. W. Berry wear a diaper as discipline and that she was aware that C. L. Spencer used drugs. C. L. Spencer admitted that he used marijuana and cocaine.

In-home services were still in place in February 2005, when Howard petitioned for the court to take jurisdiction over R. W. Berry, J. D. Spencer, and C. Spencer. Howard's involvement in the case ended when P. M. Berry and C. L. Spencer pleaded no contest to allegations in the petition. R. W. Berry, C. Spencer, and J. D. Spencer were then made temporary court wards. And Mauk testified that R. W. Berry, C. Spencer, and J. D. Spencer were placed in foster care in 2005 based on allegations of physical neglect. Families First services were provided after the children were returned home in 2006. J. E. Spencer was born shortly after her siblings returned home.

Mauk testified that child protective services received five referrals, including the instant case, after the children were returned home. An initial referral pertained to J. D. Spencer and C. Spencer "acting out" because of a situation involving sexual abuse that occurred while they were in foster care. The children received services through Care House regarding that matter.

Protective services worker, Eliza Burlingame, testified that she investigated a referral that she received in November 2007 involving allegations of physical abuse of R. W. Berry, but that her participation in the investigation lasted only a few hours. During this investigation, Burlingame saw bruises on C. Spencer and J. D. Spencer. Burlingame also learned that both C. L. Spencer and P. M. Berry maintained MySpace websites on the Internet. C. L. Spencer's

website included several photographs of C. L. Spencer wearing diapers accompanied by such comments as "cute girl outfit" and "he's a baby girl." Wraparound program services that were thereafter provided to the family ended on September 26, 2008.

With respect to the instant case, the trial court allowed Mauk to testify, pursuant to MCR 3.972(C)(2),[4] regarding certain statements that C. Spencer made to her when he was seven years old. After Mauk received a referral on September 29, 2008, regarding an allegation that C. Spencer was injured because of physical discipline, she personally observed a red mark on C. Spencer's thigh and an abrasion on his back when she interviewed him at his school. C. Spencer told Mauk that C. L. Spencer struck him on the leg with a belt the previous night, after he wet his bed, and that he was only wearing his "pull up" when he was hit. The next morning, C. L. Spencer reportedly grabbed C. Spencer's arm in such a manner that he was thrown down and hit his back on the front porch steps. C. L. Spencer reportedly said to C. Spencer, "You better listen or I'm going to be hurting you." C. Spencer told Mauk that he told P. M. Berry about the belt incident.

Mauk testified that she spoke with P. M. Berry at the school after her interview. At first, P. M. Berry denied being aware of the incidents between C. L. Spencer and C. Spencer. However, during a later interview, P. M. Berry admitted being aware that C. L. Spencer had struck J. D. Spencer and C. Spencer with a belt as discipline, and she claimed that she argued with C. L. Spencer about his use of the belt. C. L. Spencer admitted that he used a belt to discipline the boys, although he claimed that the belt struck C. Spencer's leg because he turned and that he was wearing pajamas over a "pull up." C. L. Spencer attributed C. Spencer's back injury to C. Spencer tripping or falling on the stairs.

P. M. Berry admitted at trial that she was aware that C. L. Spencer wore diapers. She attributed his initial use of the diapers to epileptic seizures that he was suffering in 2000. However, she conceded that he continued to wear diapers after the seizures stopped. She denied knowledge of the MySpace pictures of C. L. Spencer wearing diapers. She now denied making R. W. Berry wear a diaper as a form of discipline.

P. M. Berry denied that C. L. Spencer ever physically abused her. P. M. Berry also denied that C. L. Spencer physically abused the children after the child protection proceedings ended in 2006. She did not have concerns until 2007, when C. L. Spencer pulled out a paddle to "whoop" the children for fighting. P. M. Berry testified that she stopped C. L. Spencer by taking

[4] MCR 3.972(C)(2) states:

> Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(21) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

the paddle away from him. After the Department of Human Services (DHS) became involved, C. L. Spencer was forced to leave the home for approximately one month.

With regard to the September 2008, incident, P. M. Berry testified that C. Spencer was wearing "pull-ups" because he was wetting the bed. She did not learn that C. L. Spencer had used a belt to spank C. Spencer and his brother until the next morning when, after she asked C. Spencer about a mark on his leg that looked like a bruise, C. Spencer told her about the incident. P. M. Berry addressed the matter with C. L. Spencer and made plans to leave the house by phoning her mother. Later that day, Mauk confronted P. M. Berry when she went to the school to pick up C. Spencer and J. D. Spencer. She learned at that time about the incident involving C. Spencer falling down the stairs.

With regard to the use of diapers, C. L. Spencer testified that he personally found diapers comfortable to wear. He also used a pacifier. He admitted posting pictures in which he wears "childish" outfits on his MySpace website. He did so to be "silly." He did not tell P. M. Berry about the website.

In October 2009, the trial court found that it had jurisdiction over each of the four children and that there were statutory grounds for terminating the parental rights of P. M. Berry, C. L. Spencer, and G. Ort. The trial court later entered an adjudicative order based on the opinion.

The trial court then conducted a best interests hearing with respect to the parental rights of P. M. Berry and C. L. Spencer. With respect to P. M. Berry, J. Scott Allen, Jr., a senior psychologist at the Oakland County Psychological Clinic, testified that P. M. Berry had been engaged in a cycle in which C. L. Spencer would hit the children, they would tell her, she would threaten to kick C. L. Spencer out, and C. L. Spencer would stop for a month and then resume hitting the children. P. M. Berry acknowledged to Allen that there were times when the children were hurt. P. M. Berry told Allen that she had threatened to leave C. L. Spencer seven or eight times between July 2006 and September 2008. P. M. Berry reportedly moved into a house owned by her mother in October 2008, but did not formally separate from C. L. Spencer until May 2009, when she learned that C. L. Spencer was dating another woman.

With respect to the children, Allen found that R. W. Berry loved P. M. Berry and hoped to reunite with her one day. R. W. Berry told Allen that P. M. Berry was unable to successfully intervene to protect him because C. L. Spencer was going to hit her. But she occasionally took him to his maternal grandmother's home until C. L. Spencer calmed down. R. W. Berry's principal concern regarding P. M. Berry was her financial ability to take care of him. He was also concerned that C. L. Spencer or another man whom P. M. Berry became involved with would hit him. C. Spencer told Allen about being hit by C. L. Spencer with a belt, paddle, and his "big old fist." He also described physical violence that C. L. Spencer perpetrated on P. M. Berry, which was corroborated by R. W. Berry, although Allen was not sure that such violence actually occurred. C. Spencer also stated that P. M. Berry struck C. L. Spencer. J. D. Spencer expressed fear of being hit again by C. L. Spencer.

According to Allen, C. Spencer and J. D. Spencer, like R. W. Berry, had some issues with aggressive behavior. All three boys were taking psychotropic medication. R. W. Berry, in particular, was in a special education program because he is emotionally impaired. Allen opined

that P. M. Berry presently could not meet the boys' special needs. He was not sure what would happen if appropriate services were again attempted, but found several reasons to be pessimistic.

Kari Guttman, a child and family worker for Orchard Children's Services, testified that she supervised P. M. Berry's parenting time with J. E. Spencer. J. E. Spencer was excited to see P. M. Berry. Guttman observed a bond between P. M. Berry and J. E. Spencer during the eight visits that she supervised. Guttman testified that she was also responsible for making monthly visits to J. E. Spencer's foster home. She found that J. E. Spencer, who was three years old, was doing excellently. She had no special needs. She had learned a lot in the foster home, including her ABCs and how to count.

Molly Thiry, a foster care worker, opined that all four children are experiencing confusion because they do not know what is happening and were in out-of-home care for a long time. The children were very close. They were happy to see other during monthly sibling visitation. And while the children love "mom and dad," Thiry opined that it was in their best interests not to return home.

During closing arguments, the children's lawyer-guardian ad litem conveyed the boys' wishes to the trial court. He expressed that "all three boys want to live with their mother." He opined that J. E. Spencer enjoys visits with P. M. Berry, but that she did not have a significant bond with her. He argued that P. M. Berry's parental rights should be terminated.

Ultimately, the trial court determined that P. M. Berry's and C. L. Spencer's parental rights should be terminated.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence.[5] We review for clear error a trial court's decision terminating parental rights.[6] A finding 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.[7] Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.[8]

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

[5] MCL 712A.19b(3); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999); *In re Utrera*, 281 Mich App 1, 16-18; 761 NW2d 253 (2008).

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

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

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

Although P. M. Berry argues that the trial court erred in finding that a statutory ground for termination was established by clear and convincing evidence, she fails to address two of the statutory grounds on which the trial court relied to terminate her parental rights, those being §§ 19b(3)(b)(*i*) and (c)(*i*). Because only one statutory ground is required to terminate parental rights[9] and unchallenged grounds for termination are deemed established,[10] P. M. Berry's failure to address §§ 19b(3)(b)(*i*) and (c)(*i*) could alone preclude appellate relief. In the interests of justice, however, we will consider whether termination was appropriate under those grounds.[11] And, in doing so, we conclude that the trial court clearly erred to the extent that it found that §§ 19b(3)(b)(*i*) and (c)(*i*) were both proven by clear and convincing evidence with respect to P. M. Berry. Termination was inappropriate under § 19b(3)(b)(*i*) because the trial court did not find that P. M. Berry physically or sexually abused the children. Further, § 19b(3)(c)(*i*), by its plain language, applies only when 182 or more days have elapsed since issuance of an initial dispositional order. Because P. M. Berry's parental rights were terminated at the initial dispositional hearing, § 19b(3)(c)(*i*) was not applicable.

C. MCL 712A.19b(3)(b)(*ii*), (g), AND (j)

The trial court's findings established P. M. Berry's failure to take appropriate action after she learned that C. L. Spencer struck C. Spencer with a belt; her history of poor judgment, such as allowing a convicted felon to have unsupervised access to the children; her failure to recognize or investigate the potential emotional harm to the children associated with C. L. Spencer's habit of wearing diapers and inappropriately requiring some of the children to wear diapers as a form of discipline; her claimed ignorance of what happens in her own household; and her failure to benefit from past services. We disagree with P. M. Berry's argument that termination was inappropriate because she had filed a divorce action against C. L. Spencer after the termination petition was authorized. The trial court's findings regarding P. M. Berry's parental deficiencies and the risk of harm to the children were broader than the risk of physical injury posed by C. L. Spencer.

In addition, although DHS is generally required to prepare a case services plan and offer services deemed necessary for the safe return of a child to his or her home,[12] services are not required in all situations.[13] The reasonableness of services offered to a respondent generally affects the sufficiency of the evidence with respect to whether there is a reasonable expectation that a parent will be able to provide proper care and custody for a child in the future.[14] Whether a respondent has benefited from past services is also relevant in assessing whether a child will be

[9] MCL 712A.19b(3); *Sours*, 459 Mich at 632; *Utrera*, 281 Mich App at 16-18.

[10] See *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998).

[11] *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004).

[12] *In re Rood*, 483 Mich 73, 105; 763 NW2d 587 (2009) (opinion by CORRIGAN, J. D.).

[13] See *In re Terry*, 240 Mich App 14, 25 n 4; 610 NW2d 563 (2000); see also MCL 712.18f(1)(b).

[14] See *In re Fried*, 266 Mich App 535, 540; 702 NW2d 192 (2005).

at risk if placed in the parent's home.[15] In this case, because there had been a history of prior child protective proceedings in which services were offered to P. M. Berry, DHS was justified in requesting termination of P. M. Berry's parental rights at the initial dispositional hearing without offering further services. Accordingly, we conclude that the trial court did not clearly err in finding that §§ 19b(3)(b)(*ii*), (g), and (j) were all established by clear and convincing evidence.

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

Once the DHS 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.[16] 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.[17] We review the trial court's decision regarding the child's best interests for clear error.[18]

B. ANALYSIS

The evidence presented at the best interests hearing showed that P. M. Berry was unemployed and incapable of providing for her own needs, let alone the needs of her children. Further, a psychologist who evaluated P. M. Berry and the three older children, each of whom had special needs, agreed that P. M. Berry was not likely to benefit from additional services. The trial court appropriately considered the children's need for permanency, and appropriately considered the youngest child's positive placement in foster care in evaluating her best interests.[19] Accordingly, we conclude that the trial court did not clearly err in finding that termination of P. M. Berry's parental rights was in the children's best interests.

We affirm.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen Fort Hood

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[15] *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005).

[16] MCL 712A.19b(5); *JK*, 468 Mich at 209; *Trejo*, 462 Mich at 350; *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

[17] *Trejo*, 462 Mich at 354.

[18] *Id.* at 356-357.

[19] *In re Foster*, 285 Mich App 630, 635; 776 NW2d 415 (2009).