STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
October 7, 2010

In the Matter of FRYMAN Minors.

No. 296253
Ionia Circuit Court
Family Division
LC No. 2009-000462-NA

Before: GLEICHER, P.J., and ZAHRA and KELLY, JJ.

PER CURIAM.

Respondent, the mother of the two involved minor children, appeals as of right from an order terminating her parental rights pursuant to MCL 712A.19b(3)(b)(*i*) and (*ii*), and (k)(*ii*). We affirm, and decide this appeal without oral argument in conformity with MCR 7.214(E).

In November 2009, the Department of Human Services (DHS) filed a petition requesting the termination of respondent and her husband's parental rights to their two very young sons. The petition alleged that the children's father had admitted to repeatedly sexually molesting both children, and that the father accused respondent of participating in the acts of molestation. According to the petition, the father also recounted that he and respondent "have downloaded and viewed child pornography on their computers." The circuit court exercised jurisdiction over the children in December 2009 on the basis of a plea by the father.[1] A hearing to terminate respondent's parental rights occurred in January 2010, after which the circuit court found clear and convincing evidence to justify termination.

Respondent disputes the circuit court's finding of a statutory basis supporting the termination of her parental rights. A circuit court may terminate a respondent's parental rights if clear and convincing evidence supports one or more of the statutory grounds listed in MCL 712A.19b(3). "We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest" under MCL 712A.19b(5). *In re Trejo*, 462 Mich 341, 356-367; 612 NW2d 407 (1999); see also MCR 3.977(K). "A finding is 'clearly erroneous' if although there is evidence to support it, the reviewing court on the entire evidence is left with the

[1] The father voluntarily relinquished his parental rights to the children and is not a party to this appeal.

definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation omitted).

The circuit court initially found clear and convincing evidence establishing the ground for termination in MCL 712A.19(b)(3)(b)(ii):

> The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

The circuit court invoked respondent's own admissions, about multiple instances of the father's disturbing comments and conduct relating to sexual arousal from sexual abuse of young children, in support of its finding that respondent failed to protect the children from the father's abuse. Respondent testified that the father had commented on the erectness of the older child's penis; that he told her "he wanted to suck on [the child's] penis and play with his butt"; that she observed child pornography on the computer that involved incest and children between the ages of four and 11; that the father told her he wanted a daughter so that he could have sexual intercourse with her; that he spoke about the children having intercourse with each other, as well as intercourse with the father and respondent; and that the father told respondent that he would ask for her permission before he sexually abused the children.

Respondent essentially argues that she cannot be charged with failing to protect her sons because she relied on the father's representation that he would not act on his molestation fantasies. However, the father's statement that he would seek permission before abusing the children itself should have sufficed to place respondent on notice of a need to protect the children. In any event, overwhelming evidence established that respondent neglected to shield the children from sexual abuse, even after receiving multiple and substantial warnings that sexual abuse by the father might occur.

Respondent further suggests that the record did not substantiate that the children would endure abuse in the foreseeable future if placed in her home, given that she had received counseling and initiated a divorce from the father. But, as the circuit court found, (1) respondent had not substantiated the extent of her participation in the counseling she purportedly attended; and (2) respondent's history of emotional abuse by her mother, physical, sexual and emotional abuse by a boyfriend, emotional abuse by the father, and possible diagnoses of depression and posttraumatic stress disorder would take months if not years to address. We detect no clear error in the circuit court's conclusion that a reasonable likelihood existed that, if returned to respondent's custody, the children would suffer abuse or injury in the foreseeable future, either at the hands of respondent or those with whom she associates. In summary, the circuit court correctly found clear and convincing evidence supporting termination under MCL 712A.19b(3)(b)(*ii*).

The circuit court also premised termination on MCL 712A.19b(3)(b)(*i*)[2] and MCL 712A.19b(3)(k)(*ii*).[3] The father testified that he witnessed respondent massage her sons' penises to erection with the webbing between her fingers, and that he saw her perform fellatio on the oldest child. The circuit court expressly found the father's testimony in this regard credible. To the extent that respondent challenges the circuit court's credibility determination by offering reasons for questioning the father's veracity, we detect no basis for revisiting the court's special opportunity to judge the credibility of the witnesses. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Because the circuit court properly credited the father's testimony about respondent's abuse, clear and convincing evidence warranted the court's invocation of subsections (b)(*i*) and (k)(*ii*) in support of terminating respondent's parental rights.

Respondent next complains that the circuit court erred in allowing the protective services investigator to offer her opinion that the children would likely suffer abuse or injury if returned to respondent's care. We review for an abuse of discretion the circuit court's evidentiary rulings. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). Michigan Rule of Evidence 701 envisions as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The investigator rationally rested on her perceptions her opinion that "there is a great risk of harm to these children if they're returned to the care of [respondent], not only cause [sic] we have not dealt with and/or addressed the issue at hand," but because respondent displayed a pattern of associating with harmful individuals. The record made evident that respondent allowed people in her life who posed a risk of harm to her children and that the underlying issues in this case had not yet been sufficiently addressed. Nonetheless, the investigator's opinion arguably proved helpful to the circuit court's determination of a fact at issue in the case, specifically the court's ascertainment of the children's best interests and whether the children remained at risk in respondent's care. We find no abuse of discretion in the circuit court's admission of the investigator's opinion testimony.

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[2] Pursuant to MCL 712A.19b(3)(b)(*i*), termination may occur when

> [t]he child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

[3] MCL 712A.19b(3)(k)(*ii*) permits termination if "[t]he parent abused the child or a sibling of the child and the abuse included 1 or more of the following: . . . Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate."

Respondent lastly argues that the circuit court erred when it admitted double hearsay, in the form of the father's recitations of statements by respondent. Respondent entered an ongoing hearsay objection to the father's testimony about respondent's statements to him. However, the circuit court correctly admitted these statements, which were admissible as the statements of a party opponent under MRE 801(d)(2). Respondent did not object at the hearing on double hearsay grounds. We thus review this issue only for any plain error that affected respondent's substantial rights. MRE 103(d). After reviewing the few pages cited by respondent on appeal in light of the entire record, we conclude that even assuming the circuit court did erroneously admit two instances of double hearsay in the form of third persons' testimony of the father's repetition of statements by respondent, any error had no effect on respondent's substantial rights in light of the abundant, properly admitted evidence warranting termination of her parental rights.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly