STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JOHNSON/STALLING, Minors.

UNPUBLISHED
August 28, 2014

No. 319870
Wayne Circuit Court
Family Division
LC No. 13-514591-NA

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court's order terminating her parental rights to her two minor children. Respondent-mother's rights were terminated pursuant to MCL 712A.19b(3)(b)(*i*) (parent's act caused the physical injury to a sibling of the child), (3)(g) (without regard to intent, failure to provide proper care or custody), (3)(j) (reasonable likelihood that child will be harmed if returned to parent), and (3)(k)(*vi*) (parent abused a sibling of the child and the abuse included murder or attempted murder). There was evidence that respondent-mother's third child, a daughter who was only a few weeks old, suffered significant blunt-force trauma while in respondent-mother's care and died shortly after being admitted to the hospital, leading to respondent-mother's arrest and the pursuit of criminal charges in connection with the child's death. We affirm.

I. MOTION FOR CONTINUANCE

Respondent-mother first claims that the trial court violated her Fifth Amendment rights by denying her motion for a continuance, given that her pending criminal charges in relationship to the termination proceedings precluded her from testifying in her defense against termination. We disagree.

"[T]his Court reviews a ruling on a motion for a continuance for an abuse of discretion." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "An abuse of discretion occurs when the trial court chooses an outcome that falls 'outside the range of principled outcomes.'" *Id*. at 15 (citation omitted). Issues involving the interpretation of a court rule are reviewed de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). Constitutional issues are also reviewed de novo on appeal. *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999).

MCR 3.972 provides, in pertinent part:

(A) If the child is not in placement, the trial must be held within 6 months after the filing of the petition unless adjourned for good cause under MCR 3.923(G). If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:

(1) on stipulation of the parties for good cause;

(2) because process cannot be completed; or

(3) because the court finds that the testimony of a presently unavailable witness is needed.

MCR 3.923(G) provides:

Adjournments of trials or hearings in child protective proceedings should be granted *only*

(1) for good cause,

(2) after taking into consideration the best interests of the child, and

(3) for as short a period of time as necessary. [Emphasis added.]

"Good cause" means "a legally sufficient or substantial reason." *In re Utrera*, 281 Mich App at 11 (internal quotation marks and citation omitted).

Respondent-mother requested a continuation of the proceedings until the resolution of her criminal trial. On appeal, respondent-mother contends that the court should have granted the motion because pending criminal charges precluded her from testifying in her defense without waiving her Fifth Amendment right against self-incrimination, which quandary constituted good cause as necessary for a continuance. However, a comparable Fifth Amendment argument was rejected by this Court in *In re Stricklin*, 148 Mich App 659, 663-666; 384 NW2d 833 (1986), wherein the panel observed:

Neither the fact that appellants did not testify in the probate proceeding nor the fact that the probate proceeding was a civil proceeding is dispositive with respect to appellants' self-incrimination claim. If a penalty was exacted upon appellants' refusal to testify, relief is possible despite the fact that there was no testimony. The privilege against self-incrimination applies to a civil proceeding at which evidence is sought which might subject the witness to criminal prosecution. Therefore, the resolution of appellants' claim in the case at bar turns on whether a penalty was exacted for appellants' refusal to testify, sufficient to amount to the kind of compulsion contemplated by the Fifth Amendment. In this Court's opinion, whatever compulsion was present was insufficient to have amounted to a breach of appellants' rights to be free from compelled self-incrimination.

. . .

> In summary, accepting appellants' premise that the increased risk of loss of parental rights was the penalty imposed upon them for their refusal to testify, it must be concluded that the testimony sought through such compulsion would have been nonincriminating. The compulsion of nonincriminating testimony is not the sort of compulsion contemplated by the Fifth Amendment. Any adverse consequences resulting from appellants' failure to testify cannot be said to have been created by the state. Any penalty resulting from appellants' failure to testify was no more than the "penalty" that any party suffers when he decides not to testify in his own defense. Appellants retained the unfettered discretion to testify or not to testify; had they chosen to testify, it would have been because their testimony would have increased their chances of retaining their parental rights, and not because of a penalty imposed by the state upon their refusal to testify. The choice not to testify was no more than appellants' tactical decision as to the best course to follow through the probate and criminal proceedings. [Citations omitted.]

Here, respondent-mother ignores the ruling in *Stricklin*, making no effort to distinguish, limit, or undermine *Stricklin* in relationship to her continuance argument. Because her pending criminal charges did not preclude her from testifying in the child protective proceedings, respondent-mother was unable to show the requisite "good cause," MCR 3.923(G)(1), and the court did not abuse its discretion in denying respondent-mother's motion for a continuance. Respondent-mother was present by telephone for all of the proceedings, and she has presented no other evidence that would establish good cause for a continuance under MCR 3.923(G). Therefore, the court properly denied respondent-mother's request for a continuance and followed the requirements of MCR 3.972 with respect to the date of trial.

II. BEST INTERESTS

Respondent-mother next contends that even if the court properly found that there was adequate evidence of a statutory ground for terminating her parental rights, termination was not in the minor children's best interests. We disagree.

This Court reviews for clear error the trial court's decision that termination of parental rights was in a child's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "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." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011), citing *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

If a statutory ground for termination of parental rights is proven by clear and convincing evidence, the court must still determine if termination is in a child's best interests. *In re Olive/Metts Minors*, 297 Mich App at 42. MCL 712A.19b(5) provides:

> 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.

The state must prove by a preponderance of the evidence that termination is in a child's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

"In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App at 41-42 (citations omitted). Further, this Court has held that how a parent treats one child is probative of how that parent may treat other children. *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). "[A] child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), which expressly establishes that, although grounds allowing the initiation of termination proceedings are present, initiation of termination proceedings is not required when the children are 'being cared for by relatives.'" *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010).

Respondent-mother claims that the court erred because she was never given the opportunity to demonstrate her ability to care for the children. However, the petition for termination stated that she was offered parenting classes, which she refused.[1] The referee also determined that termination was in the children's best interests because respondent-mother had a history of physical abuse against the two children, the newborn was killed while in respondent-mother's care, and because placement with respondent-mother would put the children at risk of harm. Additionally, both children stated that they did not feel safe with respondent-mother and would prefer to remain with their grandparents. Thus, the court took into account respondent-mother's lack of parenting ability, evidenced by her history of resorting to violence in raising her children. Further, though respondent-mother claims that she had a bond with her children, a protective services worker testified that both children were fearful of respondent-mother and did not wish to return to her care.

Finally, though placement with grandparents weighs against termination, *In re Mason*, 486 Mich at 164, it is but one factor the court could consider. The maternal grandmother testified that respondent-mother had prior, frequent access to both children while they were living with their grandparents. The court did not clearly err in determining that it was in the children's best interests to terminate respondent-mother's parental rights while the children lived with their grandparents because respondent-mother, who had a history of abuse, had prior access to those children at the grandparents' houses, which placed them at risk. Taking all factors into account, the trial court did not clearly err in finding that it was in the children's best interests to

[1] Respondent-mother complains that "[a] parent agency agreement was never implemented despite [her] willingness to participate." DHS must make reasonable efforts to reunify a child with the child's family in all cases, except where aggravated circumstances are present. MCL 712A.19a(2); *In re Mason*, 486 Mich at 152 ("In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights."). Here, aggravated circumstances were present given the horrific death of respondent-mother's youngest child, MCL 712A.19a(2)(a) and MCL 722.638(1)(a)(*iii*) and (*vi*); therefore, it was not necessary to engage in a parent-agency agreement for purposes of reunification.

terminate respondent-mother's parental rights, especially when the court found sufficient evidence that she had murdered her youngest daughter.

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot