STATE OF MICHIGAN

COURT OF APPEALS

In re J. M. HUBBARD, Minor.

UNPUBLISHED
July 19, 2016

No. 329867
Oakland Circuit Court
Family Division
LC No. 14-823444-NA

Before: WILDER, P.J., and MURPHY and O'CONNELL, JJ.

PER CURIAM.

Respondent-mother, C. Hubbard, appeals as of right the trial court's order terminating her parental rights to her minor child under MCL 712A.19b(3)(b)(*i*) and (*ii*) (parent caused or failed to protect child from severe physical abuse), (g) (failure to provide proper care and custody), (k)(*iii*), (*iv*), and (*v*) (severe physical abuse involving battery, serious impairment of an organ, and life-threatening injury). We affirm.

I. FACTUAL BACKGROUND

On an afternoon in August 2014, the three-month-old infant's father found her choking on the couch. The infant was suffering severe respiratory distress, and the father called for an ambulance. At the hospital, physicians discovered that the infant had two skull fractures, fractured ribs, a fractured tibia, and bleeding in the brain. Dr. Mary Elizabeth Smyth, an expert in pediatrics and abusive pediatric injuries, determined from the characteristics of the injuries that the infant suffered at least two separate incidents of violent abuse. The child's foster care worker testified that the child suffered visual impairments and delayed neurological development as a result of the injuries.

Another of Hubbard's children previously died of smothering while in her care. The Department of Health and Human Services (DHHS) sought to terminate Hubbard's parental rights at the initial dispositional hearing. At the adjudicative trial, Hubbard and the child's father testified that Hubbard was the child's primary caregiver, though the father sometimes provided care when Hubbard was away from home. Hubbard argued that her rights should not be terminated because three teenage boys, including the infant's two brothers and a neighborhood

child, had opportunities to harm the infant. The trial court terminated both parents' parental rights, and Hubbard now appeals.[1]

II. STANDARDS OF REVIEW

This Court reviews de novo whether the trial court afforded a respondent constitutional due process. *In re HRC,* 286 Mich App 444, 462; 781 NW2d 105 (2009). We review for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). We also review for clear error the trial court's determination regarding the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The trial court has clearly erred if we are definitely and firmly convinced that it made a mistake. *Mason*, 486 Mich at 152.

III. DUE PROCESS

Hubbard contends that the trial court deprived her of due process in a variety of ways. We conclude that none of these alleged failures denied Hubbard due process or otherwise warrant refusal.

A parent has a fundamental liberty interest in the care and custody of his or her children under the Fourteenth Amendment of the United States Constitution. *In re JK,* 468 Mich 202, 210; 661 NW2d 216 (2003). Both the United States and Michigan constitutions provide that a state may not deprive a person of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. The United State Supreme Court's decision in *Mathews v Eldridge*, 424 US 319, 323-324; 96 S Ct 893; 47 L Ed 2d 18 (1976), provides the three-factor procedural framework under which this Court analyses claims that the trial court deprived a respondent parent of due process. *In re Yarbrough*, ___ Mich App ___; ___ NW2d ___ (2016), (Docket Nos. 326170 & 326171), slip op at 7.

As an initial matter, Hubbard does not discuss any of these issues within a due process framework. Instead, Hubbard merely argues that the trial court erred by terminating her parental rights when such irregularities were present in the case. We conclude that these arguments are more properly characterized as concerning nonconstitutional evidentiary error. Accordingly, we will not reverse unless it appears more probable than not that these errors were outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

First, Hubbard asserts that the DHHS failed to notify her attorney of a family team meeting on September 8, 2014, at which plans for the child's welfare were made. The purpose of a family team meeting is to provide a forum for families to participate in planning for the well-being of their children while in foster care. Michigan Family Team Meeting Protocol, <http://www.michigan.gov/documents/dhs/Family_Team_Meeting_Protocol_419823_7.pdf> (accessed June 27, 2016). There is no indication that parental rights are addressed or decided at such meetings, and DHHS policy does not require attorneys to be present at such informal

[1] The child's father has not appealed the termination of his parental rights.

meetings. Additionally, Hubbard was notified of, and present at the meeting, and she could have notified her attorney herself if she wished counsel to attend. Hubbard did not do so. We conclude that this alleged failure did not affect the outcome of Hubbard's proceedings.

Next, Hubbard argues that the trial court erred by failing to sanction DHHS for destroying or failing to provide handwritten notes during discovery. We disagree.

Discovery rules require DHHS to provide a party with all written or recorded statements or notes if a party requests such materials no later than 21 days before trial. MCR 3.922(A)(1). Failure to comply with discovery rules may result in sanctions. MCR 3.922(A)(4).

In this case, there is no indication in the record that Hubbard timely requested the handwritten notes at issue. Additionally, at the termination hearing, the case worker testified that all of her handwritten notes were typed into the report that was later provided to Hubbard. We conclude that any error did not affect the outcome of Hubbard's proceedings.

Hubbard also contends that DHHS failed to interview the teenage boys as witnesses and possible perpetrators of the abuse. We conclude that this error was not outcome determinative.

Exactly who injured the infant was an evidentiary issue, not a process issue. Two of these witnesses were available to answer Hubbard's questions. The third did not respond to a summons. Regardless of which household member injured the infant, Hubbard's rights could be terminated for repeatedly failing to protect the child from the physical abuse. See MCL 712A.19b(3)(b)(*ii*) and (b)(*iii*); *In re Ellis*, 294 Mich App 30, 35; 817 NW2d 111, 114 (2011). Again, there is no indication that DHHS's alleged investigatory failure had any effect on the outcome of Hubbard's proceedings.

Finally, despite the fact that Hubbard did not raise it in her statement of issues presented, Hubbard contends that the trial court erred by failing to grant a mistrial when the child's father referred to a polygraph test he had taken. We disagree.

"[I]t is a bright-line rule that reference to taking or passing a polygraph test is error." *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). But a reference to a polygraph that is "inadvertent and isolated" may not constitute reversible error. *Id.* (citation and quotation marks omitted). The trial court should consider a variety of factors to determine whether reference to a polygraph test requires reversal:

> (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id.* (citation and quotation marks omitted).]

In this case, the father's reference to his polygraph test was inadvertent, not an elicited response. Hubbard's counsel promptly objected, and the trial court addressed the issue. The reference was not repeated, and the father did not disclose the results of the test. We conclude that any error did not warrant a mistrial.

IV. STATUTORY GROUNDS

Hubbard contends that the trial court clearly erred in terminating her parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (k)(*iii*), (k)(*iv*), and (k)(*v*) because no clear and convincing evidence existed that the child's injuries were abusive and that Hubbard caused the abuse. We disagree.

The Department has the burden to prove the existence of a statutory ground by clear and convincing evidence. MCL 712A.19b(3); *Mason*, 486 Mich at 166. Clear and convincing evidence is "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (quotation marks and citation omitted, alteration in original). MCL 712A.19b permits the trial court to terminate a parent's rights under the following circumstances:

> (b) The 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.
>
> (*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.
>
> (*iii*) A nonparent adult'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 by the nonparent adult in the foreseeable future if placed in the parent's home.
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> * * *
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> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *
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> (k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:
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> * * *
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> (*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life-threatening injury.

Termination under MCL 712A.19b(3)(b)(*i*) and (b)(*ii*) is appropriate in cases of recurrent abuse when "at least one of [the parents] had perpetrated the abuse and at least one of them had failed to prevent it[.]" *Ellis*, 294 Mich App at 35. In this case, Dr. Smyth testified that the child's injuries were in various states of healing, indicating more than one incident of abuse. Dr. Smyth testified that the infant's injuries required violent force, and the mechanism of her injuries were forceful impacts, forceful fractures from squeezing, and rapid shearing forces. The infant suffered a serious traumatic brain injury as a result of the abuse, leading to vision and development difficulties.

Various witnesses testified that Hubbard was the child's primary caretaker. Regardless of whether Hubbard perpetrated the abuse, the infant was abused multiple times, and Hubbard failed to prevent it. While Hubbard contends that people other than she or the infant's father could have abused the infant, the trial court explicitly found that it was unlikely this was the case.[2] After reviewing the record, we are not definitely and firmly convinced that the trial court made a mistake in its findings.

We conclude that the trial court properly terminated Hubbard's parental rights under MCL 712A.19b(3)(b)(*i*) and (b)(*ii*). Because the trial court need only have one statutory ground to terminate a parent's parental rights, see *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012), we need not analyze the remainder of the statutory grounds in this case.

V. BEST INTERESTS

Hubbard next contends that the trial court erred when it found that termination was in the child's best interests without considering her placement with relatives. We disagree.

The trial court must order the parent's rights terminated if it finds from a preponderance of evidence that termination is in the children's best interests. *Olive/Metts*, 297 Mich App at 40; *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). The trial court weighs a variety of factors to determine the child's best interests. See *White*, 303 Mich App at 714. However, the trial court's factual findings concerning the child's best interests are factually inadequate if the child is placed with a relative, but the trial court does not consider that factor when considering the child's best interests. *In re Mays*, 490 Mich 993, 994; 807 NW2d 307 (2012); *Mason*, 486 Mich at 163-164. Under such circumstances, this Court should vacate the trial court's best interests determination and remand. *Olive/Metts*, 297 Mich App at 44. However, "an error or defect in anything done or omitted by the trial court . . . is not ground for . . . disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A).

[2] The trial court expressly found to the contrary—had the teenage son who testified at trial knew that the infant was being abused, he would have actively sought to protect his sister.

In this case, the infant was placed with her paternal aunt, but the trial court failed to address the infant's placement with a relative. The trial court clearly erred by failing to do so, and its best interests determination was factually inadequate in this regard. However, even a brief review of the trial court's findings indicate that it found the best interests factors overwhelmingly tilted in favor of termination. Given the extreme circumstances of this case, which involves an alcoholic mother who had a previous child die in her care and this infant's serious abuse, we are not convinced that any amount of positive weight from the child's placement with relatives would tip the balance of this child's best interests. We conclude that disturbing the trial court's order under the circumstances presented in this case would not be consistent with substantial justice.

We affirm.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Peter D. O'Connell