STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 20, 2012

In the Matter of AGNEY Minors.

Nos. 309136; 309137
Lenawee Circuit Court
Family Division
LC No. 10-000238-NA

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

PER CURIAM.

Respondents, R. Agney and P. Schermerhorn, appeal as of right a trial court order terminating their rights to the minor children, S.M. and J.M., pursuant to MCL 712A.19b(3)(c)(*i*), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j). Respondents appeal separately, claiming (1) there was not clear and convincing evidence to terminate their rights and (2) termination of their rights was not in the children's best interest.[1] We affirm.

S.M. and J.M. were removed from respondents' care on August 4, 2010, based on "deplorable" home conditions and medical neglect as evidenced by respondents' failure to attend required medical appointments for the children. The children have both been diagnosed with DiGeorge Syndrome, a chromosomal disorder which results in a variety of physical and developmental defects. R. Agney also has DiGeorge Syndrome. Throughout the course of these proceedings, respondents have received services including Families First Prevention Services, parenting aide services, Lenawee Intermediate School District (LISD) services, case management, psychological evaluations, parent education programs, individual counseling, LISD special education services, behavior counseling for the children, Dial-a-Ride tickets, couples counseling, Hands-On Parenting, and supervised visitation. Initially the permanency planning goal was reunification but, after nearly a year of services from which respondents failed to benefit, the goal was changed to adoption. A trial was held and respondents' parental rights were terminated.

I. CLEAR AND CONVINCING EVIDENCE UNDER MCL 712A.19b(3)

[1] The appeals have been consolidated. *In re Agney Minors*, unpublished order of the Court of Appeals, entered March 28, 2012 (Docket Nos. 309136 & 309137).

Respondents first argue on appeal that the trial court erred in finding clear and convincing evidence under the relevant statutory grounds to terminate their parental rights. This Court reviews a trial court's finding that a ground for termination has been established by clear and convincing evidence for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K). A finding is clearly erroneous, even when there is sufficient evidence to support it, if this Court is definitely and firmly convinced a mistake was made. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A trial court's ultimate decision must be more than merely "maybe or probably wrong" to be considered clearly erroneous. *In re Trejo*, 462 Mich at 356.

MCL 712A.19b governs termination of parental rights and sets forth the statutory grounds justifying termination. The grounds upon which respondents' parental rights were terminated are as follows:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
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> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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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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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent. [MCL 712A.19b(3).]

A. CONDITIONS THAT LED TO ADJUDICATION

The reasons cited for the children's removal were the "deplorable" condition of the home and failure to follow through on the children's medical needs. DHS alleged in its initial petition that the family home was filthy, infested with bedbugs, and had a foul odor, and that the children were often dirty and malodorous. The petition also described the significant medical needs of the children due to their DiGeorge Syndrome diagnoses, stated that the children had missed

several essential medical appointments, and noted that the filthy home presented an additional risk because of these medical issues. The petition referred to respondents' "impaired cognitive functioning" as the basis for their inability to provide for the children's special needs. The conditions required to achieve reunification included (A) provision of a home that meets the physical, medical, emotional, and developmental needs of the children, (B) provision of a home that is safe, clean, and secure, (C) provision of a family environment free from substance abuse, criminal activity, neglect, physical and sexual abuse, and domestic violence, and (D) that the parents obtain and maintain adequate income to support themselves and the children.

All evidence at trial indicated the "deplorable" home condition had been rectified by the time of trial. Respondents moved into a new home in February 2011. It is a duplex and R. Agney testified she keeps the house clean, a fact also testified to by another witness. Parent aide Kathleen Roe confirmed this, testifying that the home conditions were 100 percent improved.

With respect to respondents' failure to address the children's medical needs appropriately, respondents frame the issue as grounded in transportation problems, explaining that they missed appointments because they did not have a car. It is true respondents now have a vehicle that is properly insured, P. Schermerhorn has a driver's license, and R. Agney intends to get her license as soon as she can pay the necessary fines stemming from a previous unpaid ticket. R. Agney also testified that she understands the children's medical needs because she, too, has DiGeorge Syndrome and has had special needs all her life. P. Schermerhorn has become familiar with DiGeorge syndrome as well and has learned to give J.M. her breathing treatments.

Ultimately, however, the framing of the medical neglect issue as a mere transportation problem disregards the fact that a major concern was that the parties did not function at a level that allowed them to adequately address the children's medical needs. Many of the service providers who worked with R. Agney were concerned about her ability to recognize and address the children's needs on a daily basis. Psychologist Dr. Thomas Muldary testified R. Agney did not have a sophisticated understanding of the children's medical needs, had trouble dealing with everyday stresses, and was prone to becoming easily upset, confused, and "cognitively disorganized." Muldary believed that, given R. Agney's lack of improvement during the course of services and her baseline level of psychological functioning, she would not be able to care appropriately for the children, despite her best efforts. He noted that there would be a risk of harm for any child, but particularly for these children with their special needs. The children's physician, Dr. Cara Daniel, expressed concern, based on her interactions with respondents, that they would be unable to administer necessary medications correctly. R. Agney knew the children took Albuterol, but could not recall their other medications. Respondents also missed some of the appointments with Daniel. Counselor Kim DuVall discussed R. Agney's inability to maintain progress without reminders. DuVall opined that, if the children were returned to respondents' care, there was a low-to-moderate risk of neglect or medical abuse. Couples counselor Michael Snyder-Barker believed respondents' relationship issues would prevent them from engaging in child-centered parenting. DHS caseworker Kelly Allen believed, based on her interactions with respondents and a review of their file, that a risk of future neglect or abuse existed if the children were returned to respondents. Muldary testified that P. Schermerhorn did not have a sophisticated understanding of the children's condition, was unable to articulate their needs, and had a limited awareness of what was required in various parenting situations. Roe

testified that, although the house no longer had an unpleasant odor, she still noticed an odor coming from P. Schermerhorn.

The trial court acknowledged that, contrary to the assertions of DHS, respondents actually showed some benefit from the services they were provided. However, the court stated that "[t]he problem is that their gains and improvements are not significant enough to adequately reduce the risk of harm from further neglect given the extent of the past neglect and the very special needs of these particular children." In other words, although some strides had been made to repair the existing conditions, they had not been adequately remedied despite receiving services for two years. It was not clearly erroneous for the trial court to find that there was clear and convincing evidence that the conditions that existed at the time of adjudication continued to exist and that they would not be rectified within a reasonable amount of time given the children's ages. MCL 712A.19b(3)(c)(*i*).

B. WITHOUT REGARD TO INTENT, FAILURE TO PROVIDE PROPER CARE OR CUSTODY

In addressing the statutory basis found within MCL 712A.19b(3)(g), R. Agney cites to *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003), for the proposition that a parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody. She recognizes that it is not enough to simply show "compliance," as it must be proven that a benefit was obtained. *In re Gazella*, 264 Mich App 668, 680; 692 NW2d 708 (2005) superseded by statute on other grounds MCL 712A.19b(5). R. Agney claims she "fulfilled every requirement of the parent-agency agreement," but this assertion is blatantly contradicted by the record.

There is no real dispute that respondents were present for the majority, although not all, of the parent-agency agreement commitments. There is also no dispute that respondents are trying to be better parents. However, every provider testified that, despite some progress, they were concerned that respondents were unable to provide proper care and custody. Muldary testified that parenting the children, with their special needs, would be extremely difficult for R. Agney due to her limited coping skills. Muldary also pointed out P. Schermerhorn's foul personal odor and unkempt appearance, indicating an inability to address his basic personal needs and, by extension, those of the children. Although LISD Toddler Services Coordinator Lisa Meszaros testified that respondents' parenting skills improved, she still believed they were unengaged with the children and had difficulty interacting with each other as well. Respondents attended fewer than half the LISD sessions they were supposed to with Meszaros, and were eventually asked to stop attending because they were disruptive. DuVall cited concern based on respondents' inability to integrate what they learned in counseling and parenting classes into their daily lives without constant reminders. Even after a year of services, respondents still could not perform basic parenting tasks, such as changing diapers or bringing snacks, without being reminded. Roe, though testifying that respondents' parenting skills had improved 75 percent, explained that she was still concerned about whether respondents could handle the children full time. She said respondents do not have control of the children; the children just run around doing whatever they want and respondents simply follow them around and pick up after them. They do not plan activities for the children. Individual and parenting counselor Sally Welsh also discharged R. Agney unsuccessfully from parenting classes based on her inability to focus on the

material. R. Agney was fixated on her relationship with P. Schermerhorn and consequently unable to work on her parenting skills. Perhaps of greatest concern is respondents' inability to make lasting progress from the services they received. Both respondents had periods of significant regression, even while services were being offered. Several providers also testified that, as soon as the focus shifted, respondents would backslide in areas already covered.

Further, R. Agney has an older daughter who lives with her father. R. Agney's parental rights with respect to that daughter were suspended after an allegation that R. Agney's brother molested the girl while in R. Agney's care, and the matter is under investigation. P. Schermerhorn is also an admitted alcoholic and testified: "[I]f I am drinking when I'm upset, I just really don't care how much I drink." Although he has only drank twice since the children were removed, he never completed a sobriety program, dropping out of a 12-step program after only one session.

Respondents argue the court placed too much weight on Muldary's testimony that respondents did not demonstrate a benefit from services. However, it is the responsibility of the factfinder to determine the credibility and weight of trial testimony. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008), citing *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). R. Agney cites *In re JK*, 468 Mich at 211-214, which held that testimony by a therapist who had observed the mother and child for just one hour could not provide clear and convincing evidence to support termination when the mother's long-term therapist testified the mother and child had adequately bonded and the child should be returned to the mother's care. Respondents' situation is distinguishable. While in *In re JK* the service provider's testimony *contradicted* the testimony of the therapist upon whose testimony the court relied, here the testimony of the long-term service providers *corroborated* Muldary's relied-upon testimony that respondents could not provide proper care or custody. Ultimately, it was not *clearly erroneous* for the trial court to conclude that there was clear and convincing evidence that respondents could not provide proper care or custody.[2]

C. REASONABLE LIKELIHOOD OF HARM

Reasonable likelihood of harm is, by definition, closely related to an inability to provide proper care or custody. The risk of harm is exacerbated in this case due to the children's special needs. They must be closely monitored for changes in their medical conditions and otherwise require special care. In addition to the testimony set forth under the forgoing factors, and as noted, DuVall characterized the risk of future neglect or medical abuse to the children as low-to-moderate if they returned to respondents' care. As also noted, Muldary, Daniel, Snyder-Barker, and Allen testified directly that they were concerned about the risk of future harm or neglect to the children if returned to respondents' care. Accordingly, the trial court's determination that

[2] As an appellate court it is sometimes difficult – as it is in this case – to get a feel for the case and how respondents actually performed, especially when there is some evidence of compliance. This difficulty is essentially recognized by the clearly erroneous standard of review that takes into account the trial court's superior ability to decide these factual matters.

there was clear and convincing evidence that there was a reasonable likelihood of future harm or neglect if the children were returned to respondents' care was not clearly erroneous.

R. Agney emphasizes under this ground that she has never struck or purposefully harmed the children. This is undisputed. And R. Agney is correct in pointing out that a panel of this Court in *In re Boursaw*, 239 Mich App 161, 169; 607 NW2d 408 (1999) overruled in part on other grounds *In re Trejo*, 462 Mich at 341 (2000), considered respondent's failure to ever strike or purposefully harm her child as a factor in determining that there was not clear and convincing evidence to support termination under MCL 712A.19b(3)(j) and that the trial court's contrary conclusion was merely conjecture. However, that panel did not hold that physical abuse or purposeful harm was required under this factor. *Id.* Regardless, even if there was not clear and convincing evidence under this factor, there need only be clear and convincing evidence under one statutory factor to justify termination, which there is in this case. *In re JK*, 468 Mich at 210.

II. BEST INTEREST OF THE CHILDREN

Respondents also argue on appeal that termination was not in the children's best interest. A trial court's decision with respect to whether termination of parental rights is in a child's best interest is also reviewed for clear error. *In re Trejo*, 462 Mich at 356-357; MCR 3.977(K).

In addition to finding clear and convincing evidence under the statutory factors of MCL 712A.19b(3), the trial court must also find that termination is in the children's best interest before terminating parental rights. MCL 712A.19b(5). A finding with respect to the children's best interest is made by considering all of the evidence in the record. *In re LE*, 278 Mich App 1, 29; 747 NW2d 883 (2008).

The trial court found that, "due to the special needs of these children, and the minimal progress reached by these parents, that it is in their best interest to terminate the parental rights of [P.] Schermerhorn and [R.] Agney at this time." The court noted that "these special needs children need permanency and a proper environment where they can be consistently cared for and safely parented." After reviewing the entire record, we conclude that it was not clearly erroneous for the trial court to determine that termination was in the children's best interest. A major factor supporting termination as being in the children's best interest is respondents' complete inability to understand what is expected of them. R. Agney was not even able to understand why she was continually discharged unsuccessfully from the service programs, indicating an inability to comprehend what was required of her in terms of parenting expectations. She also demonstrated a lack of understanding about how her behavior affected others. P. Schermerhorn also showed impaired judgment and a lack of understanding with respect to parenting generally.

Another major factor supporting termination as being in the children's best interest is the length of time it has taken respondents to make even small amounts of progress. "[T]he Legislature did not intend that children be left indefinitely in foster care, but rather that parental rights be terminated if the conditions leading to the proceedings could not be rectified within a reasonable time." *In re Dahms*, 187 Mich App 644, 647; 468 NW2d 315 (1991). Respondents have been unable to progress to a level of functioning that instills confidence in their parenting ability despite over two years of services. Additionally, respondents suffered periods of

significant regression even while services were being offered. Finally, further services were not offered to them because DHS did not believe, based on statements by the service providers, that respondents would be able to benefit from additional services. This supports a finding that, even with additional time and services, respondents are unlikely to be able to reach an appropriate level of functioning as parents such that the children could safely be returned to their care. Accordingly, the trial court did not err in finding clear and convincing evidence that it was in the children's best interest to terminate respondents' parental rights at this time.

P. Schermerhorn also argues that the trial court abused its discretion in making the ultimate decision to terminate his parental rights. However, once a trial court finds by clear and convincing evidence that termination of parental rights is warranted under any ground provided in MCL 712A.19b(3) and that it is in the child's best interest, it *must* terminate the parent's rights. MCL 712A.19b(5) ("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."). Therefore, a trial court *has no discretion* regarding termination once these findings have been made.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray