

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 4, 2012

In the Matter of BARDEN/BRYNE, Minors.

No. 309156
Lenawee Circuit Court
Family Division
LC No. 09-000346-NA

In the Matter of BARDEN/BRYNE, Minors.

No. 309157
Lenawee Circuit Court
Family Division
LC No. 09-000346-NA

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

PER CURIAM.

In these consolidated appeals, respondent-mother, M. Barden, and respondent-father, Doctor J. Barden, each appeal as of right from the trial court's order terminating their parental rights to their two minor sons under MCL 712A.19b(3)(c)(i) (conditions leading to adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (the child is reasonably likely to be harmed if returned to the parent's home). M. Barden further appeals as of right from the trial court's order terminating her parental rights to her third minor son, the father of whom is not a party to these proceedings. We affirm.

I. FACTS

A. BACKGROUND FACTS

Deputy David Patterson testified that on November 25, 2009, he received an anonymous tip concerning animal cruelty at a house. The informant indicated that the man who lived in the house was a doctor, and was located at a medical clinic at a different address. At the house, Deputy Paterson discovered a large pile of trash about ten feet from the back door. The pile of trash was about eight feet in diameter and one foot tall, and contained medical waste, uncapped syringes, dirty diapers, bloody gauze, and other garbage. Deputy Patterson also discovered an

undernourished horse, the skeleton of a dead horse located under a tarp, and a dead chicken. No one was present at the house.

Deputy Patterson testified that he went to the medical clinic. When he first arrived at the clinic, he saw that Dr. J. Barden, the only adult present, was sleeping in a chair. He also saw children's sleeping bags on the floor of a room, and an infant sleeping with his face partially buried by a comforter. Deputy Patterson testified that the comforter was a suffocation hazard. Deputy Patterson also saw that the middle son was in a very soiled, urine-soaked diaper.

Deputy Patterson testified that Dr. J. Barden acknowledged that the house was his residence, but told him that his family had stayed at the clinic for three days because the utilities at the house had been shut off. Deputy Patterson testified that when he directed Dr. J. Barden to change the middle son's diaper, Dr. J. Barden did not have any wipes or hygiene items. He testified that the son appeared to have severe diaper rash and screamed in pain when Dr. J. Barden rinsed his bottom. Deputy Patterson called Child Protective Services (CPS). CPS took the children into protective custody.

Deputy Patterson testified that on further investigation, he found numerous other risks to the children in the clinic. He found small rubber balls, shredded plastic, debris, change, jewelry, and other choking hazards strewn across the floor and furniture. He found a large shard of glass in a wastebasket that one of the children was running past. He found a broken plate glass mirror that he testified could easily injure a child if the child fell on it. He also found numerous uncapped syringes lying on a table and in a wastebasket, where they were accessible to the children.

Deputy Patterson also found several garbage bags on the floor, and directed Dr. J. Barden to open one of the garbage bags. He saw that it contained medical waste, including bloody gauze, wrappings, and syringes. He testified that it was the only garbage bag that he asked Dr. J. Barden to open.

Dr. J. Barden was born in 1941. Dr. J. Barden testified at the termination trial that although he uses a cane and walks with a limp, he is mobile and physically fit.

B. PETITIONS AND HEARINGS

Dr. J. Barden and M. Barden were not married when the Department of Human Services (DHS) filed the original neglect petition. The petition listed the conditions in which Deputy Patterson found the children living, and further alleged that when DHS took the children to the emergency room, the oldest son was diagnosed with eczema, the youngest and middle sons were treated for rashes on their genital areas, and the middle son was treated for an ear infection. The petition also alleged that M. Barden had prior convictions, including seven convictions of driving with a suspended license.

At the December 2009 pre-trial hearing, M. Barden testified that Dr. J. Barden was the natural father of the two youngest sons. Dr. J. Barden admitted that he was possibly the sons' father, that he "love[d] them both to death" and that they were the "center of [his] life," but he refused to acknowledge paternity because of the potential ramifications it might have on his

medical license. The trial court informed Dr. J. Barden that he had 21 days to establish himself as the sons' legal father.

In January 2010, Dr. J. Barden again refused to acknowledge paternity of the youngest sons. M. Barden admitted or pleaded no contest to the allegations in the petition. The trial court reviewed a photograph of the children's living conditions in the medical clinic, and concluded that the children came within its jurisdiction. The trial court listed the youngest sons' father as John Doe.

At the dispositional hearing in March 2010, Lance Cadmus, the children's CPS worker, testified that M. Barden missed or was late to her supervised visits with the children, that at the visits she minimally interacted with the children but spent extensive time on the phone, that her appearance was dirty and unkempt, and that she exuded a strong body odor. The trial court placed the children in foster care and ordered M. Barden to participate in services. The trial court ordered M. Barden to provide a clean and stable home environment, to remain free of criminal activity, to demonstrate an ability to parent the children in an age-appropriate fashion, to demonstrate that she could financially support herself, to attend and be on time for all of her scheduled visits, and to maintain appropriate hygiene. The trial court also ordered M. Barden to participate in and benefit from a psychological evaluation, a parenting program, weekly individual counseling, and couples' counseling.

M. Barden pleaded guilty to animal cruelty and fourth-degree child abuse in a criminal case, and was sentenced to serve a term in jail and probation. Thus, M. Barden was in jail for part of the time between March 2010 and June 2010.

In June 2010, Diane Dee Pavlowski, the children's Catholic Charities foster worker, testified that M. Barden was not very involved in services. Pavlowski testified that when M. Barden attended her parenting visits, she did not demonstrate an attachment to the children and interacted with them only minimally.

In August 2010, Elizabeth Davis, the children's DHS foster worker, testified that M. Barden habitually arrived late to both counseling and parenting classes, that she had made no progress in counseling, and that her prognosis was poor. Davis testified that M. Barden's hygiene had improved, but that her involvement with her children was very limited during parenting visitation. Davis testified that M. Barden's parenting class reported that she did not take responsibility for her situation. The trial court recognized that M. Barden had attended all of her visits since she was released from incarceration, but that she was late to the visits and that her engagement with the children was minimal. The trial court warned M. Barden that it was concerned for the children's permanency, and informed M. Barden that it could terminate her parental rights at the next hearing.

In October 2010, Davis testified at the permanency planning hearing that M. Barden was again in jail, and had made no progress. Darrin Kost, M. Barden's probation officer, testified at the termination trial that M. Barden violated the terms her probation in October 2010, was arrested twice for driving with a suspended license, and was returned to jail. The trial court changed the children's permanency planning goal to termination.

DHS filed the petition to terminate M. Barden's parental rights in November 2010. The trial court set the termination trial for January 2011, but granted M. Barden's request to adjourn the trial to seek new counsel. The trial court again adjourned the trial in March 2011 at the request of M. Barden's new counsel.

In May 2011, the prosecution indicated that it was ready to proceed with the termination trial. However, the parties' discussion in chambers revealed that M. Barden and Dr. J. Barden married in April 2011, and that Dr. J. Barden now wanted to assert his parental rights and participate in services. The trial court informed Dr. J. Barden that it would allow him the opportunity to participate in services, but that he should quickly demonstrate that he was "sincere in [his] desire to parent these children" because the children had already been in foster care for a lengthy period. The trial court adjourned the termination trial and allowed DHS to amend the petition to include Dr. J. Barden.

By agreement, the parties made handwritten amendments to the petition. Dr. J. Barden then admitted that he had exposed the children to broken glass, hypodermic needles, and medical waste while they were in his care. The trial court ordered Dr. J. Barden to participate in services, including a parenting program, anger management classes, a psychological evaluation, a physical evaluation to determine his physical fitness to parent young children, and couples' counseling.

In June 2011, Pavlowski testified that Dr. J. Barden had been late to his counseling sessions, and that the Bardens had been late to their first parenting visit. Pavlowski testified that Dr. J. Barden's ability to physically interact with his children was limited because he had to remain seated, and that he and the children did not appear to have any bond.

In September 2011, Pavlowski testified that Dr. J. Barden did not complete or benefit from counseling services. She testified that Dr. J. Barden still did not acknowledge that the children had been at a risk of harm when CPS removed them from his care. DHS asked to change the children's permanency goal to termination.

In November 2011, DHS filed a supplemental petition to terminate the Bardens' parental rights. The trial court held the termination trial on December 13, 2011.

C. TERMINATION TRIAL

Pavlowski testified that CPS previously substantiated eight neglect claims against M. Barden, four of which included Dr. J. Barden. Pavlowski testified that on one occasion, M. Barden left the sons alone in a motel room to drive Dr. J. Barden to work. On another occasion, M. Barden left the oldest son, then aged four or five years, alone to supervise the middle son, then an infant. Pavlowski testified that M. Barden had not provided documentation of stable housing, or proof of occupancy of the house she claimed that she purchased. M. Barden largely did not provide proof of employment for two years. When M. Barden claimed employment, the employers had not acknowledged that M. Barden was an employee. Pavlowski testified that M. Barden habitually drove without a driver's license, was habitually late to her parenting visitation, and did not fully participate in services.

M. Barden testified that at the time that CPS removed the children, the family was staying at a motel. M. Barden did not have a receipt from the motel. Dr. J. Barden testified that

the family had been staying in a motel because of electrical problems with the house. Dr. J. Barden denied that he told Deputy Patterson that the family was living in the clinic when CPS removed the children. M. Barden testified that she had lived in three different locations since CPS removed the children, but claimed to have purchased a house.

M. Barden denied that the children were able to access the hazards that Deputy Patterson described. M. Barden claimed that her fourth-degree child abuse conviction was for not feeding the oldest son, because she could not get the officer that was driving her to stop at McDonald's. M. Barden testified that she did not know why CPS had removed the children. Dr. J. Barden testified that he did not think he had done anything wrong when CPS removed the children.

M. Barden testified that she learned from her parenting classes and had improved "100 percent." Dr. J. Barden testified that he benefitted from counseling and could implement what he learned. Dr. J. Barden also testified that he has three adult children who turned out well. When questioned further by the DHS, Dr. J. Barden admitted that his fourth adult child is in prison because of a first-degree murder conviction.

1. PARENTAL PARTICIPATION IN SERVICES

Dr. Thomas Muldary conducted the Bardens' psychological evaluations. Dr. Muldary testified that M. Barden fabricated realities that connected to the truth only loosely. Dr. Muldary testified that M. Barden was twenty-seven years old, but claimed that her employment history included that she was a certified first medical responder, performed laboratory studies in phlebotomy, performed x-rays and ultrasounds, was an industrial machine mechanic, automobile mechanic, and airplane mechanic, was a process server for the court system, had competed in figure skating, hockey, and baseball and won numerous awards and trophies in those sports, and was trouble shooter for the Detroit Windsor Tunnel and the Ambassador Bridge. Dr. Muldary categorized M. Barden's claims as grandiose. Dr. Muldary also testified that M. Barden rationalized her behavior, made excuses, and tended to project blame. Dr. Muldary testified that M. Barden had shown little progress between May 2010 and September 2011, and that because M. Barden did not take responsibility or acknowledge any problems, it was unlikely that she would be able to change her behavior or benefit from services.

L. Kim DuVall testified that she was M. Barden's therapist and counselor in her parenting program. DuVall testified that the program discharged M. Barden for nonattendance. DuVall testified that M. Barden attended only six of twelve sessions, was frequently late, and would not call to indicate that she would be late or absent. DuVall testified that when M. Barden did attend the program, she was uninvolved and either did not follow the discussion or changed the discussion topic to her accomplishments. DuVall testified that M. Barden said that nothing was her fault, that she was a great parent, and that there were no problems. DuVall concluded that it was unlikely that M. Barden would benefit from services.

Melanie Wells, M. Barden's individual counselor, testified that M. Barden did not accept responsibility for the children's removal and would frequently blame others. Wells testified that when she asked about the children, M. Barden would not talk about them, but would instead talk about herself. Wells testified that M. Barden frequently arrived late to sessions, and that she unsuccessfully discharged M. Barden because of her lack of progress.

Dr. Muldary testified that when he met with Dr. J. Barden, he refused to acknowledge that he had done anything wrong and did not feel that there was anything that he needed to improve. Michael Snyder-Baker, Dr. J. Barden's counselor in his parenting program, testified that Dr. J. Barden refused to take accountability or accept that he had put his children at risk. Snyder-Baker testified that when a person does not believe that something is wrong, it is very likely that the person will continue to engage in similar behavior.

Karin Gray, the Bardens' couples' counselor, testified that the Bardens did not successfully complete couples' counseling and did not benefit from her services. Gray testified that the Bardens had shown a "total absen[ce] of ownership of any behavior that contributed to the removal of their children. Verbalized denial of ownership[,]” and that Dr. J. Barden stated at nearly all of the sessions that “I still don't believe I've done anything wrong.” She testified that the Bardens blamed others for the children's removal.

M. Barden began counseling with Sally Welsh in September 2011. Welsh testified that she saw M. Barden more than 30 times, and that M. Barden displayed progress in identifying her thinking errors. Welsh testified that the trial court could safely return the children to the Barden's care. When questioned by DHS, Welsh admitted that she was not aware of the allegations contained in the petition, and that the allegations reflected poor parenting skills.

Dr. Muldary opined that he did not expect the Bardens to benefit from services, and predicted that if the trial court returned the children, they would be at a moderate to high risk for further neglect.

2. VISITATIONS

In September 2011, Pavlowski testified that the children did not appear to know Dr. J. Barden, that they did not appear bonded to him, and that his physical ability to interact with the children was limited. At the termination trial, Dr. Muldary testified that Dr. J. Barden claimed that he was still uncertain whether the youngest children were his, and demonstrated “questionable attachments” to them. Pavlowski testified that M. Barden had never demonstrated affection for the youngest son, and did not pick him up or hug him. Pavlowski testified that there was some improvement after Dr. J. Barden joined the visits.

Linda Edwards, M. Barden's visitation supervisor, testified that the children did not appear bonded to M. Barden and that they did not mind if she missed visits. Edwards testified that M. Barden would only interact with the middle son. She testified that M. Barden “was pretty much interested in her telephone,” spent much of her visits taking calls or talking to Edwards, and that Edwards had to redirect her to talk to her children. Edwards testified that M. Barden was on time for the last five visits only, and would arrive as much as one and one-half hours late for her two-hour visits.

Welsh testified that she had observed two visits between the Bardens and the children, and that the children appeared bonded to M. Barden.

3. THE CHILDREN'S DEVELOPMENT

Amy Vanhise testified that she evaluated the younger sons in December 2009 for Early On Services. She testified that the youngest son exhibited gross motor delays and language delays, and that the middle son exhibited language delays. Vanhise testified that by a six-month review the sons had made significant developmental gains, and that by January 2011 they no longer exhibited developmental delays. Vanhise was concerned about returning the sons to an environment where they did not receive adequate attention.

Linda Byrd testified that she began counseling the oldest son in January 2010, and that he was "a very angry little boy." Byrd testified that the oldest son also had nightmares of traumatic events. She testified he was beginning to control his behavior, show his anger appropriately, and feel better about himself. She testified that although the son was improving, his emotional delays would require continued services. Byrd was concerned that if the son's services were discontinued, it would impede his progress, and she was concerned about returning the son to the Bardens' care. Byrd testified that the son told her that he did not want to return to the Bardens' care, although he wanted to continue to visit them.

D. TRIAL COURT'S RULING

The trial court summarized the testimony, and stated that it had difficulty accepting Welsh's testimony. It concluded that Welsh's testimony was less credible because Welsh had been unaware of the neglect allegations. The trial court found that Dr. J. Barden's testimony about the conditions at the clinic was incredible and inconsistent. It found that Dr. J. Barden's statements that he was willing to learn were not credible because he was unwilling to acknowledge or accept responsibility for the conditions that led to the children's removal. The trial court also expressed concerns about M. Barden's lawless behaviors.

The trial court determined that the evidence clearly and convincingly supported termination under the statutory grounds because the Bardens did not accept responsibility for the children's removal and did not make significant improvements. The trial court opined that the children had been in foster care for too long. The trial court then determined that termination was in the children's best interests.

Dr. J. and M. Barden now appeal.

II. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

To terminate a parent's 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.¹ We

¹ MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999).

review for clear error a trial court's decision to terminate a parent's parental rights.² A finding is clearly erroneous if, although there is evidence to support it, this Court is definitely and firmly convinced that the trial court made a mistake.³ We give regard "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."⁴

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

The trial court first determined that DHS proved MCL 712A.19b(3)(c)(i) by clear and convincing evidence. This statutory ground provides for termination where the conditions that led to the trial court's jurisdiction over the children continue to exist, and the parents are not likely to rectify the conditions within a reasonable time:

(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 . . . :

(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.

Here, multiple conditions led to the trial court's jurisdiction. The Bardens did not provide their children with proper care and custody and did not provide for their basic housing, hygiene, and medical needs. The Bardens' living conditions were unstable, filthy, and hazardous. They exposed their young children to hazards that include choking, suffocation, infection, and physical injury.

First, Dr. J. Barden argues that Deputy Patterson caused the conditions at the medical clinic because he placed the medical debris on the floor at Deputy Patterson's direction. Deputy Patterson testified that he discovered the conditions at the medical clinic, and that he asked Dr. J. Barden to open a single trash bag to see what it contained. Before moving to the medical clinic, the Bardens lived in a house that had a pile of trash, dirty diapers, and medical waste near the back door.

Second, Dr. J. Barden argues that he fully complied with and benefited from his service plan. Dr. Muldary, Gray, and Snyder-Baker all testified that Dr. J. Barden did not fully participate in or benefit from their services. We defer to the trial court's determination of credibility on these allegations.⁵ We are not definitely and firmly convinced that the trial court

² MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633.

³ *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

⁴ MCR 2.613(C); *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008).

⁵ MCR 2.613(C); *In re LE*, 278 Mich App at 18.

made a mistake when it found that Deputy Patterson did not cause the conditions at the medical clinic, and that Dr. J. Barden did not benefit from services.

M. Barden argues that Welsh's testimony established that M. Barden had made progress in counseling and thus it was likely that she could rectify the conditions within a reasonable time. The majority of the testimony established that M. Barden's prognosis was poor, and that M. Barden's behavior was unlikely to change. The trial court found Welsh's testimony incredible. We will not interfere with the trial court's credibility determination.⁶

For over two years, the Bardens maintained to a variety of service providers that they had done nothing wrong. Multiple experts testified that when a person will not admit that they have done something wrong, that person will not take steps to change his or her behavior. Thus, we are also not convinced that the trial court made a mistake when it determined that the conditions would not change within a reasonable time.

C. MCL 712A.19b(3)(g)

The trial court determined that DHS also proved MCL 712A.19b(3)(g) by clear and convincing evidence. This statutory ground provides for termination if "[t]he 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." A parent's failure to participate in and benefit from a service plan is evidence that that parent will not be able to provide a child with proper care and custody.⁷

DHS provided extensive evidence that neither Dr. J. Barden nor M. Barden participated in or benefitted from services. For the same reasons that support the trial court's findings under § 19b(3)(c)(i), we conclude that the trial court did not clearly err in finding that termination of the Barden's parental rights was warranted under § 19b(3)(g).

D. MCL 712A.19b(3)(j)

The trial court determined that DHS also proved MCL 712A.19b(3)(j) by clear and convincing evidence. This statutory ground provides for termination if "[t]here 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."

The trial court determined that, because the Bardens are unable to recognize that their living conditions were unsafe for the children and did not benefit from services designed to rectify those unsafe conditions, the Bardens were not likely to provide a safe home for children, and it was reasonably likely that they would be harmed if returned to the Barden's care. For the same reasons that support the trial court's determinations under § 19b(3)(c)(i) and (g), we

⁶ *Id.*

⁷ *In re JK*, 468 Mich at 214.

conclude that the trial court did not clearly err when it determined that the evidence proved § 19b(3)(j).

III. BEST INTERESTS DETERMINATION

A. STANDARD OF REVIEW

If DHS has established a statutory ground for termination by clear and convincing evidence and the trial court finds from evidence on the whole record that termination is in the child's best interests, the trial court must order the parent's rights terminated.⁸ We review for clear error the trial court's decision regarding the child's best interests.⁹

B. ANALYSIS

We conclude that the trial court did not clearly err when it determined that termination of the Bardens' parental rights was in the children's best interests. To determine whether termination is in a 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."¹⁰

DHS established that the children and the Bardens had a weak bond. Pavlowski testified that M. Barden did not hold, hug, or interact with the youngest son. Edwards testified that the children did not seem to mind when M. Barden was not there. Pavlowski testified that the children did not seem bonded to either M. Barden or Dr. J. Barden. Multiple witnesses testified that M. Barden frequently missed or was late to visits and, when she attended visits, spent much of the time talking on her phone or talking to the visit supervisor. Although Dr. J. Barden testified that he loved his children, he refused to acknowledge his paternity or participate in services for the first one and one-half years that the children were in foster care.

Neither parent participated fully in or benefited from parenting classes. Dr. J. Barden also testified below that he had successfully parented his other children to adulthood, but admitted on cross-examination that one of his adult children is in prison for murder. All of the Bardens' sons initially suffered from developmental delays. The oldest son suffered from an emotional delay and anger issues, and the youngest sons suffered from language and motor delays. All of the sons improved in foster care. Several witnesses testified that the children needed stability and would benefit from it.

Thus, although there was evidence that the Bardens love their children, there was also evidence that the children were not bonded to them, that the Bardens had deficient parenting

⁸ MCL 712A.19b(5); MCR 3.977(H); *In re Trejo Minors*, 462 Mich at 351.

⁹ *Id.* at 356-357.

¹⁰ *In re Olive/Metts*, ___ Mich App ___, slip op p 3; ___ NW2d ___ (2012) (internal quotations omitted).

abilities, and that a foster home had advantages over the Bardens' home. We conclude that the trial court did not clearly err when it determined that termination was in the children's best interests.

IV. CONCLUSION

We affirm the trial court's determination that DHS established by clear and convincing evidence the statutory grounds that supported terminating the Bardens' parental rights. We also affirm the trial court's determination that termination was in the children's best interests.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck