

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JAYDEN BRIDGES and
MATTHEW PERRY, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KRYSTAL PAQUIN,

Respondent-Appellant,

and

CHARLES PERRY and SCOTT BRIDGES,

Respondents.

UNPUBLISHED
February 24, 2009

No. 286428
Wayne Circuit Court
Family Division
LC No. 07-472026

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Respondent-mother appeals as of right a circuit court order terminating her parental rights pursuant to MCL 712A.19b(3)(b)(i) [the parent's act caused physical injury or physical or sexual abuse and a reasonable likelihood exists that the children will suffer injury or abuse in the foreseeable future if placed in the parent's home], (ii) [the parent who had the opportunity to prevent physical injury or physical or sexual abuse of a child failed to do so and a reasonable likelihood exists that the children will suffer injury or abuse in the foreseeable future if placed in the parent's home], and (j) [given the parent's conduct or capacity, the children likely would suffer harm if returned to the parent's custody]. We reverse and remand.

I. Facts and Proceedings

Respondent is the mother of MP and JB, the two involved children. Respondent's third child, Michael, died on August 30, 2007, at 10 weeks of age.¹ On September 5, 2007, petitioner

¹ Michael's father, Charles Perry, is not a party to this appeal. Michael's twin brother is one of
(continued...)

filed a petition seeking the termination of respondent's parental rights. The petition alleged that on August 30, 2007, the Lincoln Park police department dispatched officers to respondent's residence based on "a report of a child not breathing." According to the petition, EMS personnel arrived, found Michael unresponsive, and took him to the hospital, where he was "pronounced dead on arrival." The petition asserted that Michael "was observed by hospital staff and the attending officer to have bruising to the right chest cavity, right arm and other redness to the face. Child abuse is strongly suspected." The petition further alleged:

9. Dr. Francisco Diaz, Wayne County Examiner's Office stated that the bruises were not in prominent areas, therefore not consistent with the explanation giving [sic] by [respondent].

10. [Respondent] stated she laid the twins in her bed upstairs, went downstairs [and] made bottles for them, to return upstairs to find Michael face down on the floor lying in clothing. She further stated Charles Perry was asleep during the incidents.

11. The autopsy results are pending.

12. The police stated the positioning of the body when [respondent] claims to have found him is of interest. The police are investigating this matter and the mother may face criminal prosecution.

13. Charles Perry reported to CPS that he was asleep during the incidents and was awakened by [respondent's] scream[.] Charles stated that he was unaware of the bruises; however, while attempting to administer CPR he noticed the bruising on Michael.

At a September 7, 2007 preliminary hearing, respondent waived a finding of probable cause to support the petition's allegations, and a referee ordered JB and MP placed in the care of relatives.²

The circuit court adjourned the adjudication trial several times, due to a long delay in obtaining an autopsy report from the Wayne County medical examiner. The adjudication trial finally commenced on March 7, 2008. Denasha Walker, a Child Protective Services (CPS) worker, recounted that she met with respondent and Perry on August 31, 2007, the day after Michael's death. Respondent related to Walker that during the evening before Michael died, the twins were "kind of fussy," so she put them into their car seats "and they fell asleep." At approximately 7:00 a.m., Michael awoke crying and had a soiled diaper. Respondent explained that she took both babies upstairs, changed Michael, and placed the twins on a bed. Respondent reported that she placed both babies "horizontal" on the bed, parallel to a "body pillow." Respondent remained upstairs until she heard her older child, JB, crying. She went downstairs to

(...continued)

the involved minors. Respondent's other child, JB, is now 2-1/2 years of age. His biological father is also not a party to this appeal.

² The referee placed JB in the care of his biological father.

prepare JB's breakfast, then heard one of the twins crying. Respondent readied bottles for the twins and went back upstairs. According to Walker, respondent recounted that "when she arrived upstairs she found Michael lying face down on the floor on the side of the bed." Respondent told Walker that she picked up Michael, noticed he appeared pale, and began to scream. Perry ran upstairs and grabbed the baby, while respondent ran downstairs to retrieve her cell phone. Respondent called 911, and an operator instructed her how to perform CPR. Respondent conveyed the operator's instructions to Perry, who attempted to follow them. Respondent told Walker that she had not observed any bruising on Michael when she changed him at 7:00 a.m.

Walker testified that she conducted a "Team Decision Meeting" on September 5, 2007, which respondent and Perry attended. During the meeting, Walker "revisit[ed]" the events surrounding Michael's death regarding "the children's ability to scoot and move and things of that nature." Respondent advised that the twins "were squirming, but not moving[.]" Respondent had no explanation for how Michael wound up on the floor. Walker explained that the petition requested termination of respondent's parental rights, but not Perry's, because "[m]om indicated to me that she was supervising the children at that time and . . . she didn't provide me with any explanation as to how the children [sic] sustained the injury, which ended in fatality." Walker conceded that respondent had no history of CPS involvement, and that the other children had no marks or bruises when she inspected them.

Detective William Sant Angelo testified that he interviewed respondent on August 30, 2007, shortly after other police officers arrived at respondent's home. Respondent related to Sant Angelo essentially the same sequence of events as that described by Walker. Sant Angelo added several details: (1) the bed was queen-sized, (2) although respondent reported having carried both twins upstairs in their car seats at the same time, Sant Angelo believed it would have been very difficult to carry two car seats upstairs due to debris on the steps, (3) respondent and Perry had moved into the home less than two weeks earlier, and the home was "in disarray," with boxes and clutter throughout, and (4) Perry said that while attempting to perform CPR, he had noticed some bruising on the baby's chest and head. Sant Angelo recalled that he viewed Michael's body at the hospital and noticed that the child's head evidenced "some slight discoloration," but he could not determine whether there was any bruising on the child's head. The bruising on the child's arm appeared to Sant Angelo as consistent with a hand having gripped it, and the bruising on the sternum seemed consistent with CPR compressions.

Sant Angelo recalled that he returned to respondent's home on August 31, 2007, and requested that she perform a reenactment of finding Michael on the floor. Using dolls provided either by the police or the medical examiner's office, respondent placed them on the bed in the same positions that she had on August 30, 2007. According to Sant Angelo, respondent's "story" during the reenactment matched the information she gave the day before.

On September 5, 2007, Sant Angelo met with respondent and Perry at the police station. Respondent "apologiz[ed] for lying" on the date of the reenactment, and told him that she had found Michael "on the opposite side of the bed laying face down and in a different direction than what she had originally" reported. Sant Angelo recalled that respondent claimed to have lied because "she was scared," and believed that Sant Angelo had "suggested that the child was there at that location." Sant Angelo denied that he had made any suggestion regarding the child's location on the floor, and expressed his belief that the child did not die of natural causes.

Respondent readily agreed to take a polygraph test; Sant Angelo described the results as “[i]nconclusive.”

Dr. Francisco Diaz, an assistant Wayne County medical examiner, testified that the cause of Michael’s death remained unknown, even after a full autopsy. Diaz found on Michael’s body: (1) a 1/4-inch contusion on the right forehead, (2) a 1/8-inch contusion on the right cheek, (3) six very faint 1/4-inch contusions on the right parietal scalp, (4) four 3/4-inch, parallel contusions on the anterior right upper arm, and (5) two 3/4-inch, parallel contusions in the right lateral pectoral area. Diaz opined that these injuries were not consistent with a fall from a bed, did not themselves cause the child’s death, and that a fall from the bed did not cause the child’s death. Nor could Diaz rule in or out that Michael’s death qualified as a homicide. He explained,

I mean, sometimes you have children who died suddenly, and there’s no autopsy finding. And, hence the wastebasket diagnosis was used, such as sudden infant death syndrome. This child had some contusions, some injuries; therefore, it doesn’t qualify for sudden infant death syndrome.

However, when I’m determining the cause of death, when I’m classifying the manner of death, and when I’m testifying in court, I need to address the issue beyond a reasonable degree of medical certainty. I cannot rule out that homicide took place. On the other hand, I cannot rule that in either.

In Diaz’s view, the bruising on Michael’s right cheek and chest might have resulted from resuscitation efforts, specifically intubation and CPR. The arm bruising appeared as if “somebody grabbed the kid.” All of the bruising was “recent within 24 hours” of death, and could have been caused “around the time of death,” but none of the bruising was a “factor” in the death. Diaz emphasized that he did not know the cause of the bruising, and that his investigation offered no explanation. He admitted that he could not “rule out” the possibility that the arm bruising occurred while someone held or lifted the child to administer CPR. Diaz further expressed that a 10-week-old child could not roll himself off the bed. Nevertheless, Diaz admitted, “I have no evidence of child abuse,” and “[t]here are no physical indications that this child was neither [sic] acutely nor chronically abused.” Diaz explained that if a baby of Michael’s age and size were deprived of oxygen, the autopsy findings “would be completely negative, either done by homicide of [sic] means or as a result of an accident.” Diaz concluded that he had “more questions than answers” regarding Michael’s death.

After Diaz testified, the prosecutor called respondent as a witness. Respondent’s counsel invoked the Fifth Amendment, citing the fact that the criminal investigation into the baby’s death remained open. On June 20, 2008, the circuit court terminated respondent’s parental rights. The circuit court’s findings of fact included the following:

Michael Perry ... died while in the care and custody of the mother. The explanation for the death is implausible and no other explanation or attempt to explain is forthcoming from the mother. Further, the manner of death is classified as indetermined. There were multiple contusions noted on the head, right arm and right lateral pectoral area. Neither the mother nor the father, Charles Perry, offered a plausible explanation as to origin of the bruises in the various areas of the body. The medical examiner’s summary and opinion that was part of the

Postmortem Report admitted into evidence, also stated that even though these contusions were not lethal their location, extent and physical characteristics are suggestive of mechanical compression therefore homicide cannot be ruled out. There is evidence by a preponderance that the living children would be at risk of harm if left in the care and supervision of the mother who failed to provide proper care and custody and who failed to supervise with the ultimate result being the death of a sibling.

The circuit court's written opinion concluded as follows regarding the grounds for termination:

A 10 month [sic] old baby in [respondent's] care and custody is found dead with no plausible explanation. Medical Examiner, while unable to rule in homicide, could not rule out homicide.

There is no medical cause of death.

The baby was found with contusions on the head, cheek, right arm and chest.

The stories provided do not explain the death or bruises.

Polygraph test was inconclusive, and the mother did admit to lying to the investigating officer about some part of the details surrounding her discovery of this 10 week old nonambulatory infant, having ambulated himself from the middle of a large mattress, where a body pillow blocked one side of him and his 10 week old twin brother blocked the other side of him, specifically somehow leaving the middle of the bed where he was lying on his back, to be discovered face down on his stomach, not on the floor near the middle of the bed where he was originally placed, but near the end of the bed.

The Court finds clear and convincing evidence supports termination in that reasonable likelihood exists that siblings of the deceased child in the mother's care would be at risk of harm and potentially suffer injury.

Further this Court finds that she failed to protect this child that was in her care and that her failure to protect this child and the incredible and implausible explanation she provided about the details of his death provide clear and convincing evidence that her other children are not safe in her care and custody.

The circuit court observed that neither respondent nor Perry presented evidence regarding the best interests of the children, and concluded that termination of respondent's parental rights to the surviving children served their best interests.

II. Standard of Review

We review for clear error a circuit court's decision to terminate parental rights. MCR 3.977(J). The clear error standard controls our review of "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." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision qualifies as clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes us as more than just maybe or probably wrong. *In re Trejo*, *supra* at 356.

The proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The clear and convincing evidence standard is "the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, 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. Evidence may be uncontroverted, and yet not be "clear and convincing." ... Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [*Id.* (internal quotation omitted, alteration in original).]

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

First, we endeavor to apply the clear and convincing standard to the statutory language in subsection (b)(i). To terminate a parent's rights under subsection (b)(i), a petitioner must present clear and convincing evidence that a child suffered a physical injury or abuse caused by a parent, and that a reasonable likelihood exists that a child will suffer from injury or abuse in the foreseeable future if placed in the parent's home. See also MCR 3.977(A)(3) ("The burden of proof is on the party seeking by court order to terminate the rights of the respondent over the child.").

After carefully reviewing the record, we conclude that the circuit court clearly erred by finding that clear and convincing evidence supported termination of respondent's parental rights under subsection (b)(i). No evidence existed that respondent ever intentionally harmed Michael, or otherwise inflicted the contusions noted at the time of the autopsy. Diaz conceded that he lacked "reasonable" medical certainty by a preponderance of the evidence available to him that Michael's death qualified as a homicide. The cause of Michael's death remains purely speculative. The speculative record simply does not support that respondent probably caused Michael's death. Furthermore, Diaz specifically denied detecting any evidence of acute or chronic abuse, and none of the other witnesses supplied evidence even remotely consistent with a conclusion that respondent had ever abused Michael. According to Diaz, the contusions found on Michael's chest, arm, and face were consistent with the events surrounding a frantic effort to grab and hold the child while performing CPR, and did not cause or contribute to his death. Nothing in the record supports an inference that any of the contusions contributed to Michael's death in any manner.

The circuit court inferred that the bruising on Michael's body resulted from injuries inflicted by respondent. The circuit court identified as the sole basis for this inference the

absence of any “plausible” explanation for the bruising supplied by respondent herself. However, because Diaz and Sant Angelo admitted that the bruising could have occurred during resuscitative efforts, respondent’s failure to supply an alternative “plausible” explanation does not even support a reasonable inference that she caused the injuries. And although respondent’s invocation of the Fifth Amendment permitted the circuit court to draw an adverse inference, *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995), the existence of an adverse inference did not relieve petitioner of its burden to produce clear and convincing proof of the ground for termination. See *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957). Even assuming that respondent’s failure to testify resulted in a *presumption* that her testimony would have been unfavorable, “[t]he burden of producing evidence of a fact cannot be met by relying on this ‘presumption.’” 2 McCormick, Evidence (6th Ed), § 264, p 225. See also MRE 301:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Consequently, an adverse inference drawn from respondent’s invocation of her Fifth Amendment right did not shift to her the burden of proving that she did not cause the bruising, and did not relieve petitioner of the need to prove a ground for termination by clear and convincing evidence.

A proceeding to terminate parental rights is civil in nature. *In re Sterling*, 162 Mich App 328, 341; 412 NW2d 284 (1987). Unlike most civil cases, the applicable standard of proof requires the petitioner to support a ground for termination with clear and convincing evidence. At best, the evidence gathered by petitioner supported equally plausible inferences that respondent caused the bruising and that the bruising occurred coincident to the CPR efforts. Absent any evidence that respondent probably caused Michael’s bruising, or that the bruising could not have occurred absent parental involvement, the circuit court clearly erred by finding that clear and convincing evidence established that respondent caused Michael’s physical injuries. Because the evidence failed to clearly and convincingly demonstrate that respondent caused any injury to Michael, no clear and convincing evidence supported the existence of a reasonable likelihood that her other children would suffer from injury or abuse in the foreseeable future if placed in her care.

B. MCL 712A.19b(3)(b)(ii)

The circuit court determined under subsection (b)(ii) that respondent possessed “the opportunity to prevent the physical injury or physical or sexual abuse” but failed to do so, and that a reasonable likelihood existed that the other children would suffer injury or abuse in the foreseeable future if returned to her care. But because the record fails to demonstrate the cause of Michael’s death, no evidence tended to show that respondent could have prevented it. Diaz testified that “sometimes you have children that died suddenly, and there’s no autopsy finding.” Such deaths, Diaz explained, might be attributed to “sudden infant death syndrome.” But the presence of Michael’s contusions prohibited that diagnosis in his case because a diagnosis of sudden infant death syndrome requires otherwise completely negative autopsy findings. Diaz’s testimony supports that Michael’s death is equally likely to have been caused naturally or by an

accident. The circuit court's conclusion that respondent could have prevented Michael's death thus rests entirely on conjecture, and not clear and convincing evidence.

Similarly, the evidence failed to establish a cause of Michael's bruising besides the resuscitative efforts. No evidence supported that respondent inflicted the bruising, or that she possessed an opportunity to prevent it. In the absence of clear and convincing evidence that respondent had any opportunity to prevent Michael's death or the contusions noted at his autopsy, the circuit court clearly erred by concluding that this subsection provided a basis for terminating respondent's parental rights.

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

Given the nebulous and entirely speculative nature of the testimony regarding the cause of Michael's death and the contusions, the evidence of record does not rise to the level of clear and convincing that JB or MP would endure harm if returned to respondent's care. Rather, the record evidence unequivocally supported that JB and MP appeared well cared for, and that respondent provided for all their needs. Because no evidence substantiated that a risk of harm existed concerning JB and MP, the circuit court clearly erred by terminating respondent's parental rights on this ground.

D. Summary

This case involves the tragic death of a 10-week-old infant. As aptly summarized by Dr. Diaz, the factual record presented to the circuit court contains "more questions than answers." However, neither the dreadful reality of Michael's death nor the many uncertainties surrounding it substantiates grounds for terminating respondent's parental rights to her remaining children. That respondent could not explain the child's death hardly equates to clear and convincing evidence that she caused it. Viewed in the light most favorable to petitioner, the evidence of what happened to Michael remains entirely equivocal. Respondent's involvement in Michael's death or any injury he sustained finds support in only pure speculation and conjecture. Furthermore, nothing in this record suggests that respondent cannot safely parent her remaining children. In the absence of any evidence supporting a reasonable likelihood of harm to JB and MP, the circuit court's decision lacked any basis beyond pure speculation.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher