

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JAILEN GORDON, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SHONNEY GORDON,

Respondent-Appellant,

and

JAMES K. CLARK,

Respondent.

UNPUBLISHED

December 22, 2009

No. 292592

Wayne Circuit Court

Family Division

LC No. 08-483656-NA

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Respondent Shonney Gordon appeals as of right from the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(b)(i), (g), (j), and (k)(iii). Respondent raises two issues. First, respondent maintains that the statutory grounds for termination were not established by clear and convincing evidence.¹ Second, respondent maintains the trial court erred when it failed to determine whether termination of her parental rights was in the best interest of the child, pursuant to MCL 712A.19b(5). For the reasons set forth below, we conclude there is no merit to either issue raised by respondent. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

¹ In the first issue presented in respondent's brief on appeal, she also argues that termination was not in the best interest of the child. We address the merits of this argument while addressing respondent's second issue on appeal.

I. Basic Facts and Procedure

Respondent called 911 because Jailen, then 18 months old, suffered severe burns on the soles of his feet. Jailen's injuries occurred around 7:30 to 7:45 p.m., but respondent did not call 911 until 8:30 p.m. Respondent delayed because she was nervous and thought that Protective Services would take her child from her. When the police arrived at respondent's apartment, the apartment was filthy with dirty dishes piled up, laundry all over, and old food on the countertops. When the emergency medical services ("EMS") and the fire department arrived and asked respondent what had happened, she immediately asked if they were going to call Protective Services. Respondent told Officer Brian Hancock, who responded to her 911 call, that she had been bathing Jailen in the bathroom sink. He had been sitting on the countertop when she turned away from him to grab a washcloth. When Jailen screamed, she turned back to him. She thought that Jailen must have hit the faucet with his arm or leg and turned the hot water on. While Hancock was at the apartment, he found a marijuana cigarette on the living room floor. Respondent admitted that it was hers and that she had smoked marijuana around 3:00 p.m. that afternoon. Hancock reported the incident to Protective Services.

When Jailen was at the hospital, his doctors discovered that his height and weight were far below the fifth percentile for his age. A failure to thrive is a failure to grow normally, and any child whose height and weight falls below the fifth percentile is automatically diagnosed as failure to thrive. Petitioner filed an original petition for the termination of respondent's parental rights.

II. Standard of Review

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The trial court must also find clear and convincing evidence that termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5). This Court reviews a trial court's factual findings in an order terminating parental rights for clear error. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A finding of fact is clearly erroneous, if although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *In re Miller, supra*.

III. The Evidence Supporting the Statutory Grounds for Termination

Clear and convincing evidence established the statutory grounds for termination of respondent's parental rights. There was no dispute that Jailen suffered severe physical injury. MCL 722.628(3)(c) defines severe physical injury as an injury to a child that requires hospitalization and seriously impairs the child's health or well-being. Mary Lu Angelilli, the Children's Hospital pediatrician who reviewed Jailen's case and interviewed respondent because of suspected abuse, testified that Jailen suffered from second-degree burns and that he received treatment for the burns in the hospital from November 11 to 15, 2008. Angelilli stated that second degree burns were very painful and that the doctors gave Jailen Tylenol with Codeine and Motrin for his pain. Angelilli did not believe that Jailen's injuries were consistent with respondent's explanation of how the burns occurred. Angelilli concluded that Jailen's burns were intentionally inflicted and not accidental. Angelilli thought that Jailen's burns, which were

in a contiguous area that went from the soles of his feet around the sides extending partially to the top, were consistent with injuries suffered by a child who was unable to move his feet from hot water.

Respondent had changed her version of what caused Jailen's injuries several times. The version she told Angelilli and Hancock was different than both her trial testimony and the version she told Sergeant James Howell and Judy Carruthers, the officer and Protective Services worker who interviewed her at the hospital. Regardless, respondent's versions of events were inconsistent with Jailen's actual injuries. If Jailen had been sitting on the edge of the sink with the water coming out of the faucet, Angelilli expected that the top and center of his feet would have been burned, he would have had individual splash marks on his feet and legs and the soles of his feet would have been less significantly burned because he would have lifted his feet out of the water. If Jailen had been sitting in the sink, Angelilli would have expected burns on other parts of Jailen's body and splash marks caused by Jailen lifting his feet up and down to get them out of the water. Thus, the medical testimony demonstrated that the child's injuries were not consistent with respondent's explanation.

There was a reasonable likelihood that the child would suffer injury or abuse if returned to respondent's care. Respondent insisted that Jailen's injuries were caused when he accidentally flipped the faucet to hot, even after the medical testimony ruled that out as a cause of Jailen's injuries. Given respondent's lack of truthfulness about the incident combined with respondent's concern about what would happen to her after she called 911, there was a reasonable likelihood that the child would suffer injury in the foreseeable future.

In addition to Jailen's burns, he was suffering from a failure to thrive. Jailen's height and weight were far below the fifth percentile. If a child's height and weight fall below the fifth percentile, he is automatically diagnosed as failure to thrive. Jailen was about the size of a six- to eight-month-old infant. Angelilli testified that Jailen's height and weight were far from normal and that genetics or picky eating did not explain height and weight that far below normal. Respondent listed a number of trivial reasons why Jailen may have been underweight, but did not express concern about his condition. Angelilli thought that respondent fed Jailen an inadequate number of calories. Respondent gave Jailen two cups of water, two cups of juice, two cups of milk, and very little solid food every day. Jailen's diet should have consisted primarily of solid food and his amount of fluid intake should have been limited to 20 ounces per day. Angelilli found Jailen's overall health to be good, which ruled out another illness hindering his growth.

In sum, clear and convincing evidence supported the statutory bases for termination. Respondent's child suffered second-degree burns while in her care and her version of events was inconsistent with his injuries. Respondent fed Jailen a liquid diet, which led to his height and weight falling way below normal, and classifying him as a failure to thrive. Respondent's response to both of these conditions demonstrated a complete lack of understanding of the conditions themselves and her responsibility for them. Given respondent's denial of abuse and responsibility for his lack of growth, there was no reasonable expectation that respondent would be able to properly care for Jailen.

IV. Best Interest Finding

Respondent next argues that the trial court erred because it failed to address the child's best interests. The trial court did address the child's best interests but applied the wrong standard. While the trial court clearly erred in applying the wrong standard for the child's best interests, the trial court's error was harmless and does not require reversal. MCR 2.613(A). While the trial court did not find that termination of respondent's parental rights was in the child's best interests, the record supports that conclusion if the trial court had applied the proper standard. There is no reasonable probability that the trial court's error affected the outcome of the trial. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra