STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
December 7, 2010

In the Matter of E. THOMAS, Minor.

No. 296353
Oakland Circuit Court
Family Division
LC No. 09-757748-NA

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to her child at the initial dispositional hearing pursuant to MCL 712A.19b(3)(b)(*ii*), (g), (i), and (j). We reverse.

Respondent's parental rights to five other children were previously terminated in 2004, and her parental rights to a sixth child were terminated in 2006. The child at issue in this case was born in December 2008. Respondent left Michigan to give birth to the child in Ohio, where she also married the child's father, Duane Thomas. After returning to Michigan, respondent, Thomas, and the child lived in a two-bedroom apartment that was leased in the name of respondent's father. In March 2009, the Department of Human Services ("DHS") learned of the new child's birth and subsequently filed a petition requesting termination of respondent's parental rights to the child at the initial dispositional hearing. At a trial in June 2009, a jury found that there were statutory grounds for the court to assume jurisdiction over the child. The trial court also found that the evidence at the adjudicative trial established statutory grounds for termination under MCL 712A.19b(3)(b)(*ii*), (g), (i), and (j). The court thereafter conducted a best interests hearing in October and November 2009, following which it found that termination of respondent's parental rights was in the child's best interests and, accordingly, entered an order terminating respondent's parental rights to the child.

I. JURISDICTION

Respondent first argues that the trial court erred by failing to order a new trial on the ground that the jury's determination regarding the existence of a statutory ground for exercising jurisdiction over the child was against the great weight of the evidence. However, because respondent never moved for a new trial on this basis, any great weight argument is not properly

before this Court.[1] *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993). Respondent's argument is substantively directed at whether sufficient evidence was presented to permit the jury to find a statutory basis for jurisdiction, an issue she preserved by moving for a directed verdict at trial. Accordingly, we shall review respondent's argument in that context.

In a child protection proceeding, the petitioner must establish a statutory basis for the court's jurisdiction over a child under MCL 712A.2(b). *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002). Jurisdiction must be established by a preponderance of the evidence. MCR 3.972(C)(1); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). MCL 712A.2(b) provides that a court has jurisdiction over a child under the age of 18 in the following relevant circumstances:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

It was proper for the trial court to instruct the jury on the doctrine of anticipatory neglect for purposes of determining jurisdiction. The doctrine of anticipatory neglect recognizes that evidence of how a parent treats one child is probative of how that parent may treat another child. *In re Powers*, 208 Mich App 582, 588; 528 NW2d 799 (1995) superseded in part on other grounds *In re Jenks*, 281 Mich App 514, 517-518 n 2; 760 NW2d 514 (2008). The doctrine may provide an appropriate basis for invoking the court's jurisdiction. *In re BZ*, 264 Mich App at 296; *In re Powers*, 208 Mich App at 589.

Here, there was evidence presented at trial that respondent did not successfully address the problems that existed in the prior proceedings and continued to deny personal responsibility for any of the conditions that led to the termination of her parental rights to her six other children. Instead, she placed the blame for the circumstances that led to the prior terminations solely on her former abusive husband. In one of the prior cases, however, the court found that termination of respondent's parental rights to five of her children was justified under both MCL 712A.19b(3)(b)(*i*) and (b)(*ii*), thereby reflecting the court's determination that respondent not only failed to protect her children from abuse, but also caused physical injury or abuse, and that further injury or abuse was reasonably likely to occur in the foreseeable future if the children

[1] Furthermore, respondent erroneously relies on MCR 2.611, which does not apply to juvenile proceedings. *In re Alton*, 203 Mich App 405, 409; 513 NW2d 162 (1994). Rather, a motion for a new trial in a juvenile proceeding must be brought under MCR 3.992 (formerly MCR 5.992). *Id.*

were placed in respondent's home. This evidence, together with the evidence that respondent had not participated in services to address the issues from the former case, and had continued to deny personal responsibility for the conditions in the prior case, justified reliance on the doctrine of anticipatory neglect as a basis for finding that respondent's new child was subject to a substantial risk of harm to her well-being. The evidence was also sufficient to enable the jury to find by a preponderance of the evidence that the child was within the court's jurisdiction under MCL 712A.2(b).

II. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

Respondent argues that reversal is required because the trial court failed to make sufficient findings of fact and conclusions of law with regard to the statutory grounds for termination. We disagree.

MCL 712A.19b(1) requires a trial court to "state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated." MCR 3.977(I)(1)[2] similarly provides:

> *General.* The court shall state on the record or in writing its findings of fact and conclusions of law. Brief, definite, and pertinent findings and conclusions on contested matters are sufficient. . . .

The purpose of the requirement that a trial court state its findings of fact and conclusions of law is to aid appellate review and to show that the trial court was aware of the issues and correctly applied the law. See *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995). In this case, because of respondent's previous history involving the termination of her parental rights to six other children, the parties' arguments were principally focused on the best interests phase of the proceeding. The trial court made detailed findings regarding the child's best interests. Although the trial court's findings regarding the statutory grounds for termination were not as similarly detailed, only brief, definite, and pertinent findings were required. Considering the context of the case, the trial court's findings regarding the statutory grounds for termination, while brief, were sufficient to comply with MCL 712A.19b(1) and MCR 3.977(I)(1).

III. STATUTORY GROUNDS FOR TERMINATION AND THE CHILD'S BEST INTERESTS

Respondent also challenges the trial court's findings and decision regarding the statutory grounds for termination and the child's best interests.

The petitioner has the burden of establishing a statutory ground for termination under MCL 712A.19b(3) by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). This Court reviews the trial court's factual findings, as well as its ultimate decision whether a statutory ground for termination has been proven, for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly

[2] The court rule was amended, effective May 1, 2010. See 485 Mich at clxxxviii. At the time this case was decided, current subsection (I) was codified as subsection (H).

erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. Once the court finds that a statutory ground for termination has been established, it shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). This Court also reviews the trial court's best interests decision for clear error. *Id*.

As previously indicated, the trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*ii*), (g), (i), and (j). Reviewing the evidence as a whole, we harbor serious doubts that the statutory grounds for termination were established by clear and convincing evidence as to (b)(*ii*), (g), and (j). A trial court may terminate parental rights pursuant to MCL 712A.19b(3)(i) where:

> Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

Assuming, without deciding, that the above statutory basis was clearly and convincingly established, we nevertheless reverse because clear and convincing evidence did not establish that termination was in the child's best interests.

The prosecutor's entire theory for termination in this matter was anticipatory neglect. As stated in *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973), "[h]ow a parent treats one child is certainly probative of how that parent may treat other children." Since that pronouncement, the theory of anticipatory neglect has regularly been applied by our courts as a satisfactory singular basis for taking jurisdiction over a child. See, e.g., *In re Gazella*, 264 Mich App 668, 680-681; 692 NW2d 708 (2005) superseded in part on other grounds *In re Hansen*, 285 Mich App 158; 774 NW2d 698 (2009). The same does not apply, however, to the ultimate termination of parental rights. While the concept of anticipatory neglect is *probative* of the parent's treatment of another child, "such evidence is not conclusive or automatically determinative." *Matter of Kantola*, 139 Mich App 23, 28; 361 NW2d 20 (1984). Thus, the doctrine was not intended to serve as a single, dispositive basis for termination.

In the instant matter, testimony at both the adjudicative trial and the best interests hearing was overwhelmingly positive in respondent's favor. The protective services worker assigned to investigate the matter testified at the adjudicative hearing that when the child was removed, the apartment where the child resided was appropriate. The protective services worker who actually removed the child found the area of the apartment she could see to be appropriate and testified that respondent provided her with items for the child's care on removal. Subsequent weekly visits between the child and respondent were supervised and the supervising foster care services worker testified that respondent was appropriate with the child. The worker also testified that respondent was cooperative, kept all appointments, and indicated a need for improvement of her parenting skills. Several other DHS workers, and one from Orchard Children's Services, who supervised visits between respondent and the child, all testified positively about the visits and consistently reported that respondent was loving and attentive, that her behavior during visits was exemplary, and that respondent did nothing during the visits to cause concern. The child's pediatrician testified that he regularly saw the child for care and that respondent appeared

appropriate with the child at all visits. The pediatrician also testified that respondent asked appropriate questions concerning the child's care, and that the child had received her immunizations and otherwise appeared well cared for.

Dr. Weiss, a psychologist who evaluated respondent in 2009, testified that respondent functioned at the borderline range of intelligence, and had somewhat of a disconnection between her cognitive and emotional functions. Dr. Weiss believed that respondent was capable of raising children, but felt that there should be an initial period of supervision, monitoring, and education so that respondent could learn new information and behaviors. Dr. Weiss could not provide a timeline for when respondent would reach a level of proficiency to parent a child; he did not believe it would take years, but it would probably take less than a year before she would show progress from additional education. Respondent's 17-year-old daughter (to whom respondent's rights had been terminated and who had been adopted by respondent's mother) testified that respondent was a good mother to the child, and that she had changed for the better since divorcing her former husband.

The only negative testimony presented throughout the trial and hearing concerned respondent's inability to take full responsibility for her role in having her parental rights terminated to six other children. A 2009 psychological evaluation of respondent prepared by Dr. Park noted respondent's lack of full understanding of her role in the prior terminations and indicated that "this is unlikely to improve as [respondent] does not feel that she needs mental health treatment and feels as though she has done everything that has been asked of her." Respondent's testimony, at times, also indicated a lack of acknowledgement of responsibility concerning the prior proceedings. At other times, however, respondent admitted she was not previously a good parent. Respondent also agreed that she could benefit from therapy and presented evidence that, although not currently court-ordered to attend any classes, she had taken the initiative to attend and complete parenting classes and had further attended nine weekly therapy sessions. It also cannot be ignored that not only does respondent function at a borderline intelligence level, but that at the time of the prior termination proceedings, respondent had been married to a man who was, by all accounts, highly abusive to her and the children. Respondent has since divorced the alleged abusive husband.

Although concerns may exist with regard to respondent, the trial court failed to provide her with an opportunity to succeed, and terminated her rights to the minor child based primarily on her actions three to five years prior, rather than on an objective analysis and determination of her current abilities and willingness to improve, and any current risk posed to the minor child. It appears that termination was based simply on anticipatory neglect. As pointed out by the child's guardian ad litem, the record does not support a finding that respondent is the same person that she was when her rights were terminated to the other children some years prior, and none of the prosecution's witnesses testified that respondent's parental rights should be terminated or that termination would be in the child's best interests. Under the circumstances, we believe that the best interests of the child would have been better served by providing respondent additional services and an expanded opportunity to demonstrate her parenting ability. The trial court clearly erred in finding that termination of respondent's parental rights was in the child's best interests.

Reversed.

/s/ Deborah A. Servitto
/s/ Brian K. Zahra
/s/ Pat M. Donofrio