STATE OF MICHIGAN

COURT OF APPEALS

In re L. RINESMITH, Minor.

UNPUBLISHED
October 13, 2016

No. 332686
Jackson Circuit Court
Family Division
LC No. 15-002905-NA

In re T. KILPATRICK, Minor.

No. 332687
Jackson Circuit Court
Family Division
LC No. 15-002933-NA

Before: RIORDAN, P.J., and METER and OWENS, JJ.

PER CURIAM.

In these consolidated appeals, respondent-father appeals as of right the trial court orders terminating his parental rights to LR and TK[1] under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or abuse to the child or a sibling of the child), (j) (reasonable likelihood of harm), and (k)(*iii*) (parent abused the child or a sibling of the child by battery, torture, or other severe physical abuse).[2] We affirm.

I. FACTUAL BACKGROUND

[1] LR and TK have separate mothers. LR's mother voluntarily released her parental rights to LR approximately two months after respondent-father's rights were terminated. TK remained in her mother's care before, during, and after the termination proceedings. Neither mother is a party on appeal, and neither of them has an appeal pending. Thus, we will refer to respondent-father as "respondent" in this opinion.

[2] As discussed further below, the petitions filed with regard to both children identified additional statutory grounds for termination of respondent's parental rights. However, it appears that the trial court only ruled on (b)(*i*), (j), and (k)(*iii*) and did not address the remaining statutory grounds.

In September 2015, LR was born. On October 16, 2015, LR's mother noticed for the first time, shortly after she woke up that morning, that his leg was swollen and that he would cry when she touched it. After calling the hospital, LR's mother took him to a local urgent care facility. Although respondent was at home, he did not accompany them. LR was then transported by ambulance to Allegiance Hospital. The next day, LR was taken into protective custody and placed at C.S. Mott Children's Hospital.

On October 19, 2015, the Department of Health and Human Services ("DHHS") filed a petition seeking termination of respondent's parental rights and the parental rights of LR's mother pursuant to MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (j), and (k)(*iii*). The petition alleged, *inter alia*, that LR had been diagnosed with serious physical injuries—including a "right tibia fracture at 21 degrees, left ulna fracture which appeared to be healing, pulmonary contusion, pulmonary fluid on the left side, posterior displaced fractures of the left side ribs 3, 4, 7, and 8, as well as a suspicion of a non-displaced fracture of rib 9 on the left side," and a brain bleed—and that the explanations for the injuries provided by his parents were not consistent with the nature of the harm. Additionally, the petition alleged that treating doctors had concluded that this case involved child abuse. Further, the petition indicated that during the execution of a search warrant at the home of respondent and LR's mother, the police found three receiving blankets and one piece of clothing with dried blood on them and noted that the home was cluttered and dirty, that it smelled of marijuana, and that safe sleep procedures were not being followed. An amended petition was filed on October 21, 2015, which indicated that Dr. Lisa Markman had concluded that LR was a victim of physical abuse and that LR could have sustained life-threatening injuries if he had been left in his parents' home.

On October 21, 2015, DHHS filed a petition seeking termination of respondent's parental rights to TK, who was two years old at the time and living exclusively with her mother, under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (j), (k)(*i*), and (k)(*iii*). In addition to repeating allegations concerning LR's injuries, the petition alleged, *inter alia*, that TK's mother had reported that respondent had a history of violent tendencies and behavior, and that respondent had "failed to provide for [TK] emotionally, physically, or financially in approximately two years."

During the April 2016 termination hearing, the trial court heard testimony from Dr. Markman; LR's mother; Officer Bradley Elston, who executed the search warrant at respondent's home; Officer John Lillie, who interviewed respondent at the police department during the child abuse investigation; and Amber Fater, a caseworker for Children's Protective Services ("CPS"). It is noteworthy that Dr. Markman testified that LR's injuries were symptomatic of physical abuse based on her review of LR's medical records and imaging study results and her examination of LR. LR's mother testified that she and respondent were LR's primary caregivers, respondent cared for LR at night while she was sleeping, and she did not inflict the abuse. She also described in detail relevant incidents that occurred in the days and hours before she discovered that LR was injured. Additionally, Officer Lillie testified that respondent offered various explanations for LR's injuries and altered some of his explanations during the course of the interview.

Ultimately, the trial court found that statutory grounds for termination had been established regard to LR, reasoning:

> [T]he evidence establishes that the child has suffered physical injury under the circumstances where the parent caused the physical injury and that there's a reasonable likelihood that the child will suffer injury if placed in the parent's home, that there's a reasonable likelihood, based upon the conduct or capacity of [respondent], that the child would be harmed if returned to his home.

The trial court also found that a statutory ground for termination had been established with respect to TK, concluding, "I find that the parent abused a sibling of the child and that abuse included severe physical abuse and on that basis, termination is justified in the case of both children." Finally, the trial court found that termination was "in the best interest of each child," explaining that "it cannot possibly not be in the best interest of a child not to term—terminate the parental rights of a parent who caused severe physical abuse either to the child or to a sibling of a child." Consistent with its ruling on the record, the trial court entered separate orders terminating respondent's parental rights to each child on April 12, 2016.

II. STATUTORY GROUNDS

First, respondent argues in both appeals that the trial court clearly erred in concluding that a statutory basis for termination of his parental rights to LR and TK had been established by clear and convincing evidence. We disagree.

A. STANDARD OF REVIEW

In order to terminate parental rights, the trial court must find that a statutory basis for termination under MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709; 846 NW2d 61 (2014). "A finding is clearly erroneous [if] 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 Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted; alteration in original). Stated differently, "[c]lear error signifies a decision that strikes us as more than just maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). This Court gives "deference to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

B. ANALYSIS

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

Termination under MCL 712A.19b(3)(b)(*i*) is appropriate when (1) "[t]he child or a sibling of the child has suffered physical injury or physical or sexual abuse," (2) "[t]he parent's act caused the physical injury or physical or sexual abuse," and (3) a reasonable likelihood exists "that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home."

First, it is undisputed that LR suffered numerous physical injuries. Dr. Lisa Markman, who was qualified as an expert in child abuse pediatrics, testified that LR suffered multiple bone

fractures to his ribs and leg and that LR's frenula were torn. She specifically confirmed that LR's injuries were medically "diagnostic" of abuse and that LR could not have accidentally caused the injuries himself given the fact that a three-month-old baby is "non-mobile." Additionally, neither she nor Officer Lillie heard a plausible alternative explanation for the injuries.

Next, LR's mother testified that she did not inflict the injuries, and the trial court expressly found her testimony to be credible. See *In re HRC*, 286 Mich App at 459. She explained that she has a prosthetic leg, which made it difficult for her to move when she removed the leg each night, and that respondent generally cared for and fed LR during the night.[3] When LR's mother woke up on October 16, 2015, she noticed for the first time that LR's leg looked unusual and a little bit swollen, that he seemed to experience pain when it was moved, and that he would cry when it was touched. She immediately called the hospital when she noticed these symptoms. She also testified that she did not notice anything of that nature the previous night, and that respondent never mentioned that he had noticed anything regarding LR's leg that seemed unusual. Later, however, respondent told Officer Lillie that "a partial reason" for the injuries could have been the fact that he "had not gotten a lot of sleep because he had been cleaning the house and . . . when he doesn't have sleep, he gets agitated[.]" In light of this testimony, the trial court concluded that respondent inflicted LR's injuries. Given the strong circumstantial evidence in the record, we are not left with a definite and firm conviction that the trial court's finding was a mistake.[4] See *In re Mason*, 486 Mich at 152.[5]

Finally, respondent failed to accept responsibility for causing LR's injuries, and he never reported the injuries or took LR to the hospital. When LR's mother took LR to urgent care after calling the hospital, respondent did not go with her, even though he was home at the time. Then, when LR's mother informed respondent via text message that LR had bone fractures, respondent did not call her and merely asked, "How?" He also did not join her at the hospital. Again,

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[3] She also testified that respondent had been alone with the child a few days earlier while she was at a doctor's appointment.

[4] See *In re Ellis*, 294 Mich App 30, 35-36; 817 NW2d 111 (2011) ("[T]ermination of parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (j), and (k)(*iii*) is permissible even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent or respondents must have either caused or failed to prevent the child's injuries."). Cf. *In re Ellis*, 294 Mich App at 33-36 (discussing, in the context of a case where the parents were the child's only caregivers, the types of evidence sufficient to find that a parent abused a child or failed to prevent the abuse of a child, including several factors present in this case); *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (noting that a court should consider all direct and circumstantial evidence in reviewing sufficiency of the evidence claims).

[5] Notably, respondent pleaded guilty to second-degree child abuse, MCL 750.136b(3), on September 9, 2016. He was awaiting sentencing when oral argument was heard in this case.

respondent previously stated that agitation from lack of sleep may have been a contributing factor to the injuries. Most notably, it is clear from the record that LR's injuries were widespread and serious, even though he was only three months old and immobile. As such, the trial court did not clearly err in finding that there was "a reasonable likelihood that" LR would "suffer from injury or abuse in the foreseeable future if placed in [respondent's] home." MCL 712A.19b(3)(b)(*i*).

Accordingly, the trial court properly concluded that termination of respondent's parental rights under MCL 712A.19b(3)(b)(*i*) was supported by clear and convincing evidence. See *In re Mason*, 486 Mich at 152; *In re Williams*, 286 Mich App at 271.[6]

2. MCL 712A.19b(3)(k)(*iii*)

Under MCL 712A.19b(3)(k)(*iii*), termination is appropriate when "[t]he parent abused the child or a sibling of the child and the abuse included . . . [b]attering, torture, or other severe physical abuse." As previously explained, the trial court's finding that respondent abused LR was not clearly erroneous.

Respondent argues on appeal that there was insufficient evidence to prove that LR and TK were siblings. However, his status as TK's legal father was not a contested issue below, and the CPS caseworker testified that respondent was the legal father of TK. Further, respondent personally stated at the November 10, 2015 preliminary hearing that he was TK's father. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted). Additionally, respondent does not dispute on appeal that he is LR's father. Thus, because TK and LR shared a common father, they were "siblings" for purposes of MCL 712A.19b. See MCL 712A.13a(1)(*l*) (including in the definition of "sibling," for purposes of MCL 712A.19b, "a child who is related through birth or adoption by at least 1 common parent").

Next, the abuse must include "[b]attering, torture, or other severe physical abuse." See MCL 712A.19b(3)(k)(*iii*), Here, the trial court found that LR's injuries constituted "severe physical abuse." However, that term is not defined by statute. The primary goal "when interpreting a statute is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute." *Brackett v Focus Hope, Inc*, 482 Mich 269, 275; 753 NW2d 207 (2008). "An undefined statutory term must be accorded its plain and ordinary meaning," and "[a] lay dictionary may be consulted to define a common word or phrase that lacks a unique legal

[6] Although "only one statutory ground for termination must be established for each parent," *In re Laster*, 303 Mich App 485, 495; 845 NW2d 540 (2013), we note that the trial court did not clearly err in finding, for the same reasons discussed *supra*, that there was a reasonable likelihood, based on respondent's conduct or capacity, that LR would be harmed if he were returned to respondent's home (*i.e.*, failure to accept responsibility, failure to seek medical care, and the severity of the injuries). See MCL 712A.19b(3)(j).

meaning." *Id*. at 276. In relevant part, *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "severe" as "very painful or harmful," or "of a great degree." "Physical" is defined, in pertinent part, as "of or relating to the body," and "abuse" is defined as "physical maltreatment." *Merriam-Webster's Collegiate Dictionary* (11th ed). Cf. MCL 712A.13a(20) (stating that "abuse," for purposes of MCL 712A.13a, includes "[h]arm or threatened harm by a person to a juvenile's health or welfare that occurs through nonaccidental physical or mental injury"); MCL 750.136b (defining "serious physical harm," for purposes of the child abuse statute, as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.").

LR, who was approximately three weeks old, had torn frenula, numerous fractured ribs, and two fractures in his leg. These injuries required medical treatment at a hospital, and Dr. Markman expressly testified that LR's injuries were medically "diagnostic" of child abuse. On this record, it is clear that the injuries sustained by LR were the result of "severe physical abuse."

Because the record includes significant evidence confirming that respondent abused LR, that LR was a sibling of TK, and that the abuse constituted "severe physical abuse," the trial court did not clearly err in concluding that a statutory basis for termination of respondent's parental rights to both LR and TK was established under MCL 712A.19b(3)(k)(*iii*) by clear and convincing evidence. See *In re White*, 303 Mich App at 709; *In re Moss*, 301 Mich App at 80.

III. BEST INTERESTS

In both appeals, respondent contends that the trial court erred in finding that termination was in the minor children's best interests. We disagree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

Pursuant to MCL 712A.19b(5), "[t]he trial court must order the parent's rights terminated if the [DHHS] has established a statutory ground for termination by clear and convincing evidence and it finds from a preponderance of the evidence on the whole record that termination is in the children's best interests." *In re White*, 303 Mich App at 713. We review for clear error a trial court's best-interest determination. *Id*., citing MCR 3.977(K).

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90.

> To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include "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." The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [*White*, 303 Mich App at 713-714 (footnotes omitted); see also *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012).]

Among other things, a court also may consider the children's ages and the parent's history. See *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

B. ANALYSIS

Viewing the record as a whole, the trial court's finding that termination was in LR's best interests was supported by a preponderance of the evidence. The testimony confirmed the trial court's finding that respondent inflicted severe injuries resulting in torn frenula and fractures to LR's ribs and leg—injuries that were medically "diagnostic" of child abuse—while LR was only three weeks old. Respondent failed to seek medical treatment for LR's injuries and demonstrated a lack of concern when LR's mother took LR to urgent care. Officer Lillie also testified, based on his nine years of experience as a police officer, that he did not believe that respondent's response during their conversation was normal for a parent learning that "their extremely young child is—has got some pretty severe broken bones," as respondent "remained quite calm." There is no doubt that it is in a child's best interests to live in a home free from severe physical abuse and with a caregiver who will obtain appropriate medical care. From the evidence presented below, returning LR to respondent's care would place him at risk for future harm given the prior abuse. Thus, the trial court did not clearly err in finding that termination of respondent's parental rights was in LR's best interests. See *In re Moss*, 301 Mich App at 90.

With respect to TK, respondent's abuse of LR was probative of how he will treat TK if she were returned to his care. See *In re HRC*, 286 Mich App at 460-461 (explaining that the father's treatment of certain children was "probative of how he will treat their other siblings"). Moreover, the CPS worker testified that respondent had no "real" relationship with TK. Likewise, it was her understanding that respondent had not been involved in TK's life for the previous two years,[7] and TK was only three years old. The court could fairly infer from this testimony that respondent had no bond or, at most, a nominal bond with TK. See *In re Laster*, 303 Mich App 485, 496; 845 NW2d 540 (2013) (considering the fact that the "respondent-father had very minimal involvement in the children's lives" in affirming the trial court's determination that termination of the respondent's parental rights was in the children's best interests). Thus, given respondent's treatment of LR and his extremely minimal involvement in TK's life, the trial court did not clearly err in finding, by a preponderance of the evidence, that termination was in TK's best interests. See *In re Moss*, 301 Mich App at 90.

IV. CONCLUSION

[7] Although respondent argues on appeal that the CPS worker merely testified that respondent " 'has another child' " with whom "he had 'not been involved . . . for the last two years,' " and did not identify that child as TK, reading the worker's testimony in context clearly confirms that she was referring to TK.

The trial court did not clearly err in concluding that a statutory ground for termination of respondent's parental rights to both of the minor children had been established by clear and convincing evidence. Likewise, the trial court did not clearly err in concluding that termination of respondent's parental rights was in the best interests of the children.

Affirmed.

/s/ Michael J. Riordan
/s/ Patrick M. Meter
/s/ Donald S. Owens