STATE OF MICHIGAN

COURT OF APPEALS

In re WOJTKIEWICZ/LUMM, Minors.

UNPUBLISHED
December 19, 2017

No. 337247
Oakland Circuit Court
Family Division
LC No. 16-844525-NA

Before: MURRAY, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals of right the trial court's order terminating her parental rights to the four minor children, AW, CW, VL, and GL, pursuant to MCL 712A.19b(3)(b)(*i*), (g), and (j). On appeal, respondent challenges only the trial court's determination that termination of her parental rights was in the children's best interests. We affirm.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child[ren]'s best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child[ren] with the parent not be made." *In re Olive/Metts Minors*, 297 Mich App 35, 42; 823 NW2d 144 (2012), citing MCL 712A.19b(5); MCR 3.977(E)(4). "[W]hether termination of parental rights is in the best interests of the child[ren] must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). We review for clear error a trial court's determination that termination is in a child's best interests under MCL 712A.19b(5). *In re Olive/Metts*, 297 Mich App at 40-41; MCR 3.977(K). "A trial court's decision is clearly erroneous '[i]f, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made.' " *In re Olive/Metts*, 297 Mich App at 41, quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We must give "due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004) (citations omitted).

In determining whether termination of parental rights is in a child's best interests, the "trial court should weigh all the evidence available." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014) (citation omitted). "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.' " *Id.*, quoting *In re Olive/Metts*, 297 Mich App at 41-42 (internal citations in *Olive/Metts* omitted).

Further, the court may consider the parent's history of child abuse, *In re Powers Minors*, 244 Mich App 111, 120; 624 NW2d 472 (2000), the child's safety and wellbeing, *In re VanDalen*, 293 Mich App 120, 142; 809 NW2d 412 (2011), the length of time the child has been outside of the parent's care, and the likelihood that "the child could be returned to her parent's home within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012). The court may also consider psychological evaluations, the age of the children, and a parent's history. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). "[T]he trial court has a duty to decide the best interests of each child individually." *In re Olive/Metts*, 297 Mich App at 42.

In this case, the trial court weighed several of these relevant factors in deciding whether termination of respondent's parental rights was in the children's best interests. First, the court considered the two incidents of respondent's abuse of her young daughters, AW and CW. The court found that the evidence clearly established that respondent physically abused AW and CW by repeatedly striking them in the face/head area while disciplining them, which led to involvement by the police and petitioner and resulted in respondent's criminal convictions of third and fourth-degree child abuse and her incarceration. The timing of the incidents was particularly troubling, considering that they occurred while petitioner was already involved with the family and shortly after respondent participated in intensive in-home services to address the violence in the home, and, moreover, the incident involving CW occurred the day after respondent pleaded guilty to child abuse of AW, thereby clearly demonstrating a failure to benefit from the intensive services she received and a lack of ability to safely parent the children. The court further found that the incidents were not isolated, but instead there was pervasive violence and physical discipline in the home. We find no clear error in these findings, which were supported by the evidence.

Next, the trial court considered respondent's extensive use of marijuana while caring for the children and during her pregnancies with VL and GL, which is well-established by the evidence and further demonstrates her problematic parenting ability. Respondent admittedly used marijuana at least twice daily during her pregnancies with VL and GL, which she justified as necessary to treat her bipolar disorder because she was unable to take her psychotropic medication, even though she was not medically prescribed marijuana and her doctor never recommended it. VL and GL's father testified that respondent was "high" while caring for the children. And, despite petitioner's involvement after VL tested positive for marijuana at birth, respondent did not refrain from using marijuana during her most recent pregnancy with GL, who also tested positive at birth. Respondent did not report her marijuana use as a problem and indicated during her psychological evaluation that she planned to continue to use marijuana in the future to treat her bipolar symptoms.[1] Clearly, respondent did not appreciate or have insight regarding her marijuana use during her pregnancies and while parenting the children.

[1] The court found respondent's testimony regarding her discussions with medical professionals about her marijuana use during her pregnancies to be incredible.

Next, the court considered respondent's parenting ability, concluding that respondent has "profound" parenting deficits and her ability to safely parent the children is "poor" and "severely hampered" by her lack of insight into her issues of aggression and marijuana use. We find no clear error in this unfavorable assessment. The court found that respondent's lack of insight was demonstrated by her testimony minimizing and failing to take full responsibility for her conduct, as well as the psychological evaluation revealing that respondent "appeared to minimize her angry tendencies and history of aggression," "minimized the extent of her abuse of her children," "appeared to displace blame for her abusive behavior onto her children," had only a limited capacity for insight, had a longstanding failure to address her anger issues, and appeared to have impaired operational judgment. *In re Jones*, 286 Mich App at 131 (a parent's psychological evaluation is a relevant consideration). This lack of insight, in light of the incidents of physical abuse of AW and CW (especially the very concerning timing of the abuse), respondent's extensive, daily use of marijuana while caring for her young children and during her pregnancies, her history of mental illness and aggression that she has not consistently treated, and her psychological evaluation, demonstrates that respondent had parenting issues that jeopardized the safety and wellbeing of the children. Although there was a substantial amount of favorable testimony regarding her parenting ability from her relatives who testified on her behalf, they also expressed that they would like respondent to gain mental and physical stability before the children returned to her care. And VL and GL's father believed that the children would not be safe in respondent's care without first addressing her psychological needs and her aggressive behavior. The court found that respondent was a witness of poor credibility and that her testimony "that she acknowledged responsibility for what has happened, were said for form, not substance and that she truly does not believe she was fully responsible for what brought the children to court." Giving due regard to the trial court's special opportunity to observe the witnesses and make credibility determinations, *In re BZ*, 264 Mich App at 296-297, we are not left with a definite and firm conviction that the trial court made a mistake in finding that respondent lacked insight into her issues in parenting children, minimized her conduct, and failed to take full responsibility for her conduct, and her ability to safely parent the children is poor.

Next, the trial court considered respondent's unfavorable prognosis that she would be able to address her issues to gain stability and safely parent the children so they could return to her care within a reasonable time. Although respondent expressed a willingness to comply with services necessary for her to reunify with the children and a desire for her children to return to her care, she would not be able to begin services until her release from jail in six or seven months, after which, according to Shannon Conz, who conducted the psychological evaluation, respondent would need at least six months, but preferably one year or longer, of extensive treatment before she could gain the necessary mental stability and address her aggression to be safe to begin reunifying with them.[2] And, respondent herself testified that she believed she would need one year after her release to complete services and gain stability in housing and employment. The children, thus, would be waiting a minimum of 18 months and possibly two years or more before respondent could potentially gain stability so that she could provide a safe,

[2] The court qualified Conz, without objection, as an expert in child psychology in the area of child abuse and neglect.

stable environment for them. That respondent has demonstrated a past inability to benefit from the intensive in-home services provided to her before the initiation of the termination proceedings, and that Conz opined that it is "unlikely," given her history and lack of insight, that respondent will make improvements in her lifestyle within a reasonable time in order to become a safe, stable parent for her children, does not demonstrate a favorable prognosis that the children could return to respondent's care within the foreseeable future. We find no clear error in the court's determination.

Next, the trial court considered the bond between the children and respondent, which we acknowledge is a very important consideration in this case with respect to AW and CW. We initially note that the trial court properly recognized that the four children at issue are not similarly situated with respect to their bond with respondent. *In re White*, 303 Mich App at 715, citing *In re Olive/Metts*, 297 Mich App at 42 ("[I]f the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests."). Regarding the younger children, VL and GL, their father testified that he does not believe that there would be a "great bond" between respondent and GL, who has not seen respondent since she was incarcerated when he was only 11 days old, and the father did not know whether VL, who was only 14 months old when respondent was incarcerated, even knew that respondent was her mother anymore. Further, Conz opined that, given the young ages of VL and GL, it is "likely that any parent bond that may have existed prior to her incarceration will have diminished" by the time she is released from jail. The evidence thus, clearly demonstrates that the younger children lack a significant bond, if any, to respondent and the court did not clearly err in so finding.

On the other hand, by all accounts, the older children—AW, who was 8 years old, and CW, who was 7 years old—share a strong bond with respondent that the court found to be "significant." Testimony from numerous witnesses alluded to the children's expressions that they love and miss respondent, want to see her, and desire to have contact with her. Further, CW expressed a strong desire to return to respondent's care upon her release from jail. AW appeared conflicted about returning to respondent's care, expressing to Conz that she wanted to return to respondent's care, but she was afraid respondent would hurt her again, she did not want respondent to hurt her family, and she would rather stay with her father, where she felt safe. CW also reported that AW stated that she never wants to live with respondent again. Nevertheless, it is clear that AW and CW are bonded to respondent and desire to have contact with her and the court properly weighed their bond as a factor against termination.

Next, the trial court considered the bond, in light of the children's safety, stability, and need for permanency, giving strong weight to the psychological evaluation. Regarding the younger children, VL and GL, by all accounts they were doing well, developing fine, and had attained safety, stability, and permanency with their father. Considering respondent's past abuse of her older daughters, the safety of VL and GL, who were very young, was paramount and that, without adequately addressing her anger management and mental health issues, they remained at

a risk of harm by respondent.[3] As discussed, the court found that respondent failed to demonstrate any benefit from past intensive services to address the violence in her home and her prognosis for being able to rectify her issues so she could safely parent the children within a reasonable time was not favorable. VL's minimal bond, if any, to respondent, and GL's likely nonexistent bond, clearly does not outweigh their wellbeing, safety, and permanency that would be furthered by terminating respondent's parental rights.

Regarding AW and CW, the court recognized that, in light of their significant bond to respondent, the decision is more difficult, but ultimately agreed with Conz's conclusion that their safety and security is paramount and supersedes the bond. We find no clear error in this conclusion on the evidence presented. The psychological evaluation indicated that respondent's violence toward AW and CW had clearly detrimentally affected them, especially AW. Conz opined that the abuse had a "permanent impact" on them, has caused them to feel "scared and confused," and likely partly "fueled [AW's] violent behavioral outbursts," and both daughters were struggling with emotional issues and distress, albeit AW's were more serious. Conz opined that their safety, in light of the past abuse, was paramount in this case and that, without adequately addressing respondent's anger management and mental health issues, they remained at a risk of further harm. Unfortunately, respondent's prognosis for improvement within a reasonable time was not favorable, especially given her past failure to benefit from intensive in-home services and her lack of insight into her issues. And, according to Conz, the time it would take for respondent to potentially overcome her issues so that she could work toward reunification with AW and CW amounted to a "significant" length of time that they would remain without a sense of permanency or stability, which they definitely "need[ed] to start feeling safe again." Conz opined that AW and CW, who were sad, scared, and confused about the situation and the role their mother will or will not play in their lives, would benefit from understanding that there is finality regarding their mother. For their safety, stability, wellbeing, and permanency, it was in their best interests not to be in respondent's care, despite their bond to her, and attaining permanency through termination would alleviate the stress AW and CW were exhibiting. Further, the caseworker believed that it would be very traumatic to the children to be subjected to the reunification process because it would take a long period of time and they deserved permanency. Since respondent's incarceration, AW and CW, in the opinion of Conz and the caseworker, have attained safety and stability with their father and stepmother. CW was adjusting well and AW, who was now attending counseling obtained by her father to address her behavioral issues, was improving. Conz concluded that the safety and security of the children are paramount and supersedes their bond with respondent. In light of Conz's assessment, which the trial court relied heavily upon, we are not definitely and firmly convinced that the court made a mistake in concluding that the evidence overcame the children's bond with their mother.

[3] Although there is no evidence that respondent ever physically disciplined VL or GL, who both tested positive for marijuana at birth, under the doctrine of anticipatory neglect, " '[h]ow a parent treats one child is certainly probative of how that parent may treat other children.' " *In re LaFrance Minors*, 306 Mich App 713, 730; 858 NW2d 143 (2014); quoting *In the Matter of LaFlure,* 48 Mich App 377, 392; 210 NW2d 482 (1973). Thus, VL and GL were also at a risk of harm if returned to respondent's care.

Lastly, the court gave some consideration to the children's current placement in safe and stable homes with their respective fathers.[4] Respondent and the fathers were not planning together for reunification, and, as respondent asserts, both fathers planned to seek full custody of the children if her parental rights were not terminated. As Conz recognized, if the children remained in the full custody of their fathers, it could lessen the risk of harm posed by respondent. However, Conz also expressed fear that, even though the children were placed with their fathers, respondent would have an ability to have the children placed in her care if her parental rights were not terminated, and as discussed, Conz believed that it was not in the children's best interests to return to respondent's care for their stability, wellbeing, and safety, which is paramount in this case. Further, the caseworker pointed out in her testimony that termination will bring finality and permanency to the children in the sense that they are in a stable, safe, and permanent environment with their fathers that is not disrupted with respect to respondent's own claims of her parental rights while the children wait for her to get out of jail and complete services. It is well-established that the "parental rights of one parent may be terminated without termination of the parental rights of the other parent and it is not necessary that the child be in foster care in order for the termination petition to be entertained." *In re Marin*, 198 Mich App 560, 568; 499 NW2d 400 (1993). Nevertheless, the trial court's consideration of the children's placement with their fathers inured to respondent's benefit because the court weighed that factor against termination, and given that their placement in the custody of their fathers could minimize the risk of future harm posed by respondent, we do not believe the court clearly erred in its determination of this factor.

In light of the foregoing findings, we are not left with definite and firm conviction that the trial court made a mistake in its best-interest determination. *In re Olive/Metts*, 297 Mich App at 40-41. On appeal, respondent focuses on the bond with her children, particularly her strong bond with AW and CW, and that the children are in safe and stable placements with their respective fathers. However, the trial court fully addressed these factors and concluded that the children's need for safety, stability, and permanency is paramount and weighs in favor of termination, especially in light of the evidence indicating that it is unlikely that respondent would be able to address her serious issues within a reasonable time to become a safe and stable parent, the past abuse of the children, which has clearly detrimentally affected AW and CW, and the minimal bond with VL and GL. On the entirety of the evidence, we are not persuaded that the trial court clearly erred in finding, by a preponderance of the evidence, that termination of

[4] Respondent correctly asserts that "a child's placement with relatives weighs against termination," *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010), and if a child is living with a relative when the case proceeds to termination, the trial court must "explicitly address whether termination is appropriate in light of the children's placement with relatives" in making its best-interest determination. *In re Olive/Metts*, 297 Mich App at 43. However, relative, as defined under MCL 712A.13a(1)(j), does not include a biological father. *In re Schadler*, 315 Mich App 406, 412-413; 890 NW2d 676 (2016). Because the children in this case were placed with their respective fathers, they were not placed with a "relative," and thus, contrary to respondent's assertion, the court was not required to address relative placement in determining whether termination was in the children's best interests. *Id.*

respondent's parental rights was in the children's best interests. MCL 712.19b(5); *In re Moss*, 301 Mich App at 90.

Respondent, citing *In re Terry*, 240 Mich App 14, 25-26; 610 NW2d 563 (2000), also asserts that termination of her parental rights was premature because the nature of the services she received prior to the termination proceedings failed to reasonably accommodate her mental health issues as required by the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*. Specifically, respondent complains that she was not provided with counseling services to address her bipolar condition and aggression, even though petitioner had knowledge that she was not taking her psychotropic medications due to her pregnancies. We conclude that this issue does not warrant appellate relief.[5]

Generally, unless certain aggravating circumstances exist, the petitioner has "an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks/Brown*, ___ Mich ___, ___; 893 NW2d 637 (Docket No. 153786) (2017); slip op at 4, citing MCL 712A.18f(3)(b), (c); MCL 712A.19a(2). In the context of the ADA in relation to termination of parental rights, if petitioner "fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *In re Terry*, 240 Mich App at 26. Thus, parental rights should not be terminated where petitioner was required to make reasonable efforts to reunify the family but did not provide the necessary services, including those services to accommodate a known disability. *In re Hicks/Brown*, ___ Mich at ___; slip op at 8-9.

However, "[a]ny claim that the parent's rights under the ADA were violated must be raised well before a dispositional hearing regarding whether to terminate . . . parental rights, and the failure to timely raise the issue constitutes a waiver." *In re Terry*, 240 Mich App at 26 n 5. There is no indication in the record before this Court that respondent raised this issue in a timely manner. Instead, it appears that the issue was first mentioned by respondent's counsel in closing argument at the best-interest hearing, after the court had already found statutory grounds to terminate based on respondent's plea to jurisdiction and the statutory grounds for termination. Regardless of when petitioner first advanced her claims that she did not receive appropriate accommodations, the record demonstrates that, before seeking to terminate respondent's parental rights, petitioner did indeed undertake efforts to address her mental health concerns with services that accommodated her issues, including providing intensive in-home services and recommending and attempting to get her counseling. Before these termination proceedings, respondent was twice provided with and participated in intensive, in-home Families First services tailored to address the violence in the home, develop non-violent coping skills, and develop a safety plan. The caseworker testified that Families First is one of the most intensive services offered by the Department of Health and Human Services, and it is uncommon for a parent to receive two rounds of Families First services so close together without removal of the children, evidencing that petitioner "gave [respondent] an extra chance" with services to rectify the issues. Respondent now asserts that petitioner should have provided her with counseling

[5] Respondent did not raise this issue in her statement of questions presented.

services to address her mental health issues. However, the record indicates that petitioner did request and recommend that respondent attend counseling and that attempts were made for her to do so, but, after she initially was unable to secure a therapist, she decided she would wait until after her pregnancy to start counseling.[6] This evidences that respondent was not denied the opportunity to participate in counseling services to address her mental health issues before termination in violation of the ADA, but that respondent failed to fully follow through with petitioner's request and recommendation for counseling. "[T]here exists a commensurate responsibility on the part of respondent[ ] to participate in the services that are offered." *In re Frey*, 297 Mich App at 248.

Unfortunately, shortly after GL's birth, respondent physically abused CW resulting in her second conviction of child abuse and her incarceration. At that point, petitioner filed the petition to terminate her parental rights, after which petitioner was not required to provide additional reunification services because termination was the agency's goal. *In re Moss*, 301 Mich App at 91. Although the termination petition may not have been statutorily mandated in this case, petitioner can request termination of parental rights in the initial petition. *In re Moss*, 301 Mich App at 91, citing MCL 712A.19b(4); MCR 3.961(B)(6). See also MCL 722.638(3) (recognizing that petitioner has discretion to file a petition requesting termination at the initial disposition). As set forth in MCR 3.977(E), further reunification efforts are not required where, as here, the initial petition requested termination as authorized under MCL 712A.19b(4) and MCR 3.961(6); the court found by a preponderance of the evidence that a statutory ground under MCL 712A.2(b) to assume jurisdiction over the children has been established; and the court found, by clear and convincing evidence, that at least one statutory ground for termination under MCL 712A.19b(3) has been established and that termination of parental rights was in the children's best interests. *In re Moss*, 301 Mich App at 91-92. Therefore, on this record, we are not left with a definite and firm conviction that the court erred in finding that reasonable efforts were made in this case. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

[6] As discussed, respondent testified that she was using marijuana to treat her bipolar disorder during her pregnancies.