STATE OF MICHIGAN

COURT OF APPEALS

In re MENZIES, Minors.

UNPUBLISHED
October 17, 2017

No. 337695
Oakland Circuit Court
Family Division
LC No. 2016-842099-NA

Before: GLEICHER, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to the minor children, AM and EM. The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*i*), (g), (j), and (k)(*iii*). We affirm.

Respondent and C. Carter are the parents of AM and EM. When EM was three months old, Children's Protective Services ("CPS") received a complaint that the infant had been brought to the hospital with injuries indicative of nonaccidental physical abuse. Shortly thereafter, a petition was filed requesting termination of respondent's parental rights to his two children at the initial dispositional hearing.[1] As relevant to this appeal, the trial court took jurisdiction over the children after a jury found that a statutory basis for jurisdiction had been established by a preponderance of the evidence. Thereafter, relying on the same extensive evidence presented to the jury during the adjudicative phase, the trial court found that there existed clear and convincing evidence to establish statutory grounds for termination under MCL 712A.19b(3)(b)(*i*), (g), (j), and (k)(*iii*). The court thereafter conducted a best-interest hearing and found that termination of respondent's parental rights was in the children's best interests. Accordingly, the court entered an order terminating respondent's parental rights to AM and EM. Respondent now appeals that order.

[1] Although Carter was also named a respondent in the petition, after a best-interest hearing, the court declined to terminate Carter's parental rights and permitted her to participate in a treatment plan and work toward reunification with her children. Consequently, Carter's parental rights are not at issue in this appeal.

Respondent first argues on appeal that the trial court abused its discretion when it denied his motion to adjourn the best-interest hearing until after his related criminal matter was resolved.[2] We disagree.

A trial court's decision to grant or deny a respondent's motion for an adjournment is reviewed for an abuse of discretion. See *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993) (recognizing that the trial court's decision on a motion for continuance is reviewed for an abuse of discretion). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *In re COH*, 495 Mich 184, 201; 848 NW2d 107 (2014) (quotation marks and citation omitted).

In child protective proceedings, a trial court's decision to grant or deny a respondent's motion for an adjournment is governed by MCR 3.923(G), which provides that "[a]djournments of trials or hearings in child protective proceedings should be granted only (1) for good cause, (2) after taking into consideration the best interests of the child, and (3) for as short a period of time as necessary."

In denying respondent's motion, the trial court observed that in initially scheduling the best-interest hearing, it had already taken into account the pendency of the criminal proceedings, and had extended the scheduling of the hearing as a result. The trial court also expressed its concern that the case had been pending since the spring of 2016, and that waiting to schedule the best-interest hearing until after respondent's April 24th, 2017 court date in the criminal proceedings would essentially require the court to hold the hearing in June or July of 2017. Such an extended time frame was necessary to allow for adequate time for a psychological evaluation to take place with respect to respondent. Thus, a review of the record confirms that the trial court carefully weighed the best interests of the children, as well as whether respondent had good cause for requesting the adjournment, in rendering its ultimate ruling denying respondent's motion to adjourn. MCR 3.923(G).

On appeal, respondent appears to contend that because the adjournment was not granted, he was forced to choose between exercising his Fifth Amendment rights or defending the petition seeking to terminate his parental rights where he was prevented from participating in a psychological evaluation. As petitioner points out, in *In re Stricklin*, 148 Mich App 659; 384 NW2d 833 (1986), this Court specifically rejected the rationale that respondent is advancing in support of his position.

In *In re Stricklin*, the respondents argued that the probate court erred when it denied their motions to adjourn a child protective proceeding until pending related criminal proceedings were finished. *Id.* at 662. Specifically, the respondents asserted "a violation of their rights to be free from compelled self-incrimination guaranteed them by the Fifth and Fourteenth Amendments to the United States Constitution, and by [Const 1963, art 1, § 17]." *Id*. The respondents argued that the "compulsion to testify was present because the risk of losing parental rights in the

[2] The parties do not dispute that on May 30, 2017, respondent pleaded guilty to second-degree child abuse, MCL 750.136b(3), and received a sentence of 17 months to 10 years' imprisonment.

probate proceedings was enhanced if they chose not to testify." *Stricklin*, 148 Mich App at 663. In the present case, respondent is employing a similar rationale, suggesting that the risk of his parental rights being terminated was enhanced by his failure to participate in the psychological evaluation.

In rejecting the respondents' position, this Court in *In re Stricklin* first considered the incongruity of the underlying premise of the respondents' argument:

> The validity of appellants' argument requires that their testimony at the probate proceeding would have had to have increased their chances of retaining their parental rights, i.e., that their testimony at the probate proceeding would have been nonincriminating. Of course, in order for there to have been a Fifth Amendment violation, the testimony offered at the criminal proceeding would have had to have been incriminating. Because of the essential similarity of issues in the two proceedings, any incriminating testimony offered at the criminal proceeding would have also been incriminating at the probate proceeding. If one is to accept appellants' premise that the penalty imposed for not testifying at the probate proceeding was the increased risk of loss of parental rights, one must conclude that the testimony sought through such compulsion would not have been incriminating. Yet, appellants' argument also requires the conclusion that that same testimony, if offered in the criminal proceeding, would have been incriminating. *The logical implausibility, if not impossibility, of such an argument considerably weakens the foundation upon which appellants rest their conclusion that their Fifth Amendment privileges were violated.* [*In re Stricklin*, 148 Mich App at 664-665 (emphasis added).]

The *Stricklin* Court went on to state that "*[t]he compulsion of nonincriminating testimony is not the sort of compulsion contemplated by the Fifth Amendment.*" *Id*. at 665 (emphasis added).

In our view, the analysis in *In re Stricklin* is equally applicable to the present case. Because respondent's criminal charges arose out of the same events at issue in the child protective proceeding, any testimony or statements made during the psychological evaluation that would have assisted respondent in challenging the allegations in the petition would not have been incriminating in the criminal proceeding. *Id*. at 664-665. Indeed, respondent's very argument is premised on the assumption that participation in the psychological evaluation would enhance his ability to retain his parental rights. Therefore, we are not persuaded that going forward with the best-interest hearing forced respondent to choose between exercising his right to not incriminate himself and defending the petition seeking to terminate his parental rights. Consequently, under these circumstances, it was not an abuse of discretion for the trial court to deny respondent's request for an adjournment of the best-interest hearing. *In re Jackson*, 199 Mich App at 28.

To the extent that respondent asserts, in a cursory fashion in his brief on appeal, that his right to procedural due process was infringed upon in the lower court proceedings, our review of the record does not support respondent's contention. Respondent appears to argue that he was not able to be fully heard by the trial court where he did not have an opportunity to participate in a psychological evaluation. We acknowledge that when considering respondent's bond with AM

during the best interest hearing, the trial court stated it would have liked to have the benefit of input from mental health professionals. However, where respondent was given the opportunity to present ample evidence of his bond with AM by way of detailed testimony from his grandmother, Ruth Sabrosky, during the best interest hearing, we are satisfied that respondent was amply provided with an opportunity to be heard in a meaningful time and manner before an impartial decisionmaker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Next, respondent argues that the trial court erred when it found that the statutory grounds for termination were established by clear and convincing evidence. We disagree.

To terminate parental rights, the trial court must find that at least one statutory ground for termination has been established by clear and convincing evidence. *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). This Court reviews the trial court's findings under the clearly erroneous standard. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if the reviewing court, after considering the record as a whole, is left with a definite and firm conviction that a mistake has been committed. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*i*), (g), (j), and (k)(*iii*). These statutory provisions provide for termination of parental rights when the following conditions are satisfied:

> (b) The child or sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
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> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
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> * * *
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> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
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> * * *
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> (j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.
>
> (k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:
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> * * *

(*iii*) Battering, torture, or other severe physical abuse.

After reviewing the record, we conclude that the trial court did not clearly err when it found that these statutory grounds for termination were established by clear and convincing evidence.

The record evidence established that EM had sustained severe physical injuries. Specifically, as a three-month-old infant, he suffered a significant skull fracture, multiple rib fractures, and a fractured ulna. Further, there was ample record evidence confirming that EM's injuries were intentionally caused by physical abuse at respondent's hands. Dr. Allison Ball, the lead pediatrician on Beaumont Hospital's child protection team, explained that "when children fall short distances at home it's a very simple fracture on one side of the head." EM, however, had a very complex fracture that extended from one side of his head to the other. Dr. Ball also rejected the notion that a "head-butt" by a toddler sibling could have caused EM's fractured ribs. Specifically, Dr. Ball noted that a toddler could not generate enough force to fracture a three-month-old's very pliable ribs. Dr. Donald Gibson, a pediatric radiologist, further testified that a significant amount of force caused EM's skull fracture. In his opinion, it was highly unlikely that EM could have sustained this type of fracture in the manner suggested by respondent. Specifically, a fracture of the nature EM experienced would require a fall from a significant height, and falling from a baby's bouncy seat or an air mattress[3] was not likely to be of sufficient height to cause the severe skull fracture inflicted on EM. Dr. Gibson further testified that the fracture to EM's ulna would typically occur where a child is "raised forcefully by their arm[ ]." Dr. Gibson also stated that EM's injuries were consistent with suspected child abuse. Dr. Ball agreed, stating her conclusion that EM's injuries resulted from child abuse. In light of this evidence, the trial court did not clearly err in finding that respondent intentionally physically abused EM.[4]

Respondent asserts that the evidence was insufficient for the court to rule out accidental injury and then conclude that EM was the victim of child abuse. We acknowledge that respondent's expert, Dr. Jeffrey Settecerri, a pediatric orthopedic specialist, testified that a child diagnosed with failure to thrive, depending on how severe, could be at a heightened risk of injury from a fall. He also opined that a fall from three feet could possibly result in the type of injuries experienced by EM, and that EM's toddler sibling could have possibly fractured EM's ribs with a head-butt. However, Dr. Settecerri ultimately concluded that non-accidental trauma was "probably at the top of the differential diagnosis" and that EM's injuries were indicative of physical abuse. Moreover, to the extent that the trial court's determination that the injuries to EM were not accidentally caused amounted to a credibility determination on the basis of the

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[3] The record reflects that respondent, in multiple differing explanations, stated that EM's fall from a bouncy seat and an air mattress led to his injuries.

[4] Further, the record evidence supported the trial court's conclusion that EM was physically abused by respondent where EM was left in respondent's care while Carter was running errands on April 20, 2016 and respondent contacted Carter by way of telephone to report concerns about EM.

record evidence as a whole, and between the testifying physicians, we will not interfere with the trier of fact's determinations regarding matters of credibility. *In re Medina*, 317 Mich App 219, 227; 894 NW2d 653 (2016); see also MCR 2.613 (providing that this Court must give regard "to the special opportunity of the trial court to judge the credibility of witnesses who appeared before it.")

The record evidence also supports the trial court's conclusion that both children would be at risk of harm if returned to respondent's care. It is undisputed that EM sustained severe injuries, and respondent persisted in blaming EM's toddler sibling, and alternatively, an accidental fall, as the cause of EM's injuries. Moreover, although respondent eventually called Carter to share that EM was crying and not drinking from his bottle, he did not take steps to seek necessary medical treatment for EM. Where the record evidence supported the trial court's finding that respondent caused EM's injuries, even where respondent continued to assert implausible explanations for EM's condition, the trial court correctly concluded that there existed a reasonable likelihood that the children would suffer further severe physical harm in respondent's care. MCL 712A.19b(3)(j). On the basis of the foregoing, we agree with the trial court that there was clear and convincing evidence to terminate respondent's parental rights to the two children pursuant to MCL 712A.19b(3)(b)(*i*), (g), (j), and (k)(*iii*).

Finally, respondent argues that the trial court erred in concluding that termination of his parental rights was in the children's best interest. We disagree.

This Court reviews for clear error the trial court's determination that termination of respondent's parental rights was in the best interests of the children. *In re Trejo Minors*, 462 Mich at 356-357. "[T]he preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). The trial court may consider several factors when deciding if termination of parental rights is in a child's best interests, including "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." *In re Olive/Metts Minors,* 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). The trial court may also consider psychological evaluations, the child's tender age, the parent's continued involvement in domestic violence, and a parent's history. *In re Jones,* 286 Mich App 126, 131; 777 NW2d 728 (2009).

The trial court did not clearly err when it found that termination of respondent's parental rights was in the children's best interests. Respondent physically abused EM, then took steps to cover up the abuse. Respondent continued to deny the manner in which EM was injured and, instead blamed EM's older sibling, a toddler, for EM's injuries. As the trial court observed, respondent also failed to promptly obtain medical treatment for EM, and it was only after EM's mother decided to take EM to the hospital that EM received necessary medical treatment. Clearly, the children would continue to be at risk if returned to respondent's care. While there is evidence in the record that a bond existed between respondent and AM, and that he visited with AM appropriately during supervised visitation, the trial court correctly recognized that any bond respondent had with either child did not outweigh the children's need for safety and protection in light of the serious physical abuse that occurred in this case.

Respondent argues that the trial court failed to give adequate weight to the fact that the children were placed with the maternal grandparents. This position is unsupported by the record. Even though placement with a relative weighs against termination, and the fact that a child is living with relatives must be considered, "a trial court may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests[.]" *In re Olive/Metts*, 297 Mich App at 43 (citations omitted). The record clearly establishes that the trial court seriously weighed as a factor that the children were in relative placement. The trial court concluded, however, that termination of respondent's parental rights was still in the children's best interests in light of the severity of the physical abuse to EM. Under these circumstances, where the record evidence clearly supported the trial court's determination that EM, a vulnerable infant, suffered severe physical abuse and trauma at respondent's hands, the trial court did not clearly err when it determined that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle