

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* KML FAISON, Minor.

UNPUBLISHED  
January 9, 2018

No. 338808  
Wayne Circuit Court  
Family Division  
LC No. 13-511911-NA

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*In re* BRAGG, Minors.

No. 338811  
Wayne Circuit Court  
Family Division  
LC No. 13-511911-NA

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Before: STEPHENS, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Respondent mother appeals as of right two orders of the circuit court. In Docket No. 338808, she challenges the circuit court's order terminating her parental rights to her youngest child, KF, pursuant to MCL 712A.19b(3)(b)(i) (physical injury), (b)(ii) (failure to prevent physical injury), (c)(i) (182 days have passed since initial dispositional ruling and the conditions that led to the disposition have not been rectified), (g) (failure to provide proper care or custody), (j) (likelihood of harm if returned to the custody of the parent), and (k)(iii) (physical abuse that amounts to battering, torture, or other severe physical abuse). In Docket No. 338811, respondent mother challenges an order terminating her parental rights to her two older children, KBI and KBII, under the same statutory provisions.<sup>1</sup> Because the trial court clearly erred when it found statutory grounds to terminate respondent mother's parental rights to the children, we reverse both orders and remand for further proceedings.

The case began in 2013, with a petition regarding KBI and KBII. The basis for removal of these children was respondent mother's mental health; respondent mother had voluntarily checked herself into a hospital, where she was diagnosed with depression, and could not find an

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<sup>1</sup> This Court consolidated the appeals. *In re KML Faison*, unpublished order of the Court of Appeals, entered July 6, 2017 (Docket No. 338808).

appropriate individual to care for the children. After taking jurisdiction over these children, respondent mother got off to a bit of a slow start, but soon became compliant with services and made marked improvements. The children were returned to her care approximately a year later, in March 2014. The matter was on the verge of being dismissed entirely. However, respondent mother then stopped taking her medication and attending therapy. By September 2014, the children were again in foster care. Respondent mother was not compliant with her treatment plan, and the case was on the verge of a permanent custody petition by July 2015. During this period, respondent mother also became pregnant, and she gave birth to KF. KF was placed in foster care almost immediately after his birth.

After KF's birth, respondent mother seemed to rebound, and by July 2016, the children were all returned to her care. The matter was again on the verge of complete dismissal until January 24, 2017. On that day, respondent mother took KF to the hospital. He had suffered skull fractures and fractured toes, injuries that were not accidental. This caused the children to once again be removed from respondent mother's care. The matter proceeded to an evidentiary hearing regarding termination of respondent mother's parental rights. While it was agreed that KF's injuries were not accidental, no evidence established that respondent mother caused them. Rather, she maintained that she had left KF in the care of her boyfriend at the time, and that she discovered KF's injuries the afternoon or evening of January 23, 2017. Although respondent mother immediately disassociated herself from her now-former boyfriend upon discovering the injuries, ultimately, the abuse suffered by KF caused the trial court to terminate respondent mother's parental rights, leading to the instant appeals.

"Termination of parental rights is appropriate when [the Department of Health and Human Services (DHHS)] proves one or more grounds for termination by clear and convincing evidence." *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012).

The trial court's decision that a ground for termination of parental rights has been proved by clear and convincing evidence is reviewed for clear error. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id.* at 296-297. [*In re Pops*, 315 Mich App 590, 593; 890 NW2d 902 (2016).]

If one or more statutory grounds for termination are established by clear and convincing evidence, the trial court must then determine whether termination is in the best interests of the children. *In re Moss*, 301 Mich App 76, 86; 836 NW2d 182 (2013). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *Id.* at 90. Like the trial court's determination at the statutory grounds phase, this Court reviews a trial court's decision at the best-interests stage for clear error. *In re BZ*, 264 Mich App at 296-297.

It is patently obvious that the trial court erred to the extent it relied on MCL 712A.19b(3)(b)(i) to terminate respondent mother's parental rights to the children. This provision allows termination if clear and convincing evidence establishes that "[t]he child or a sibling of the child has suffered physical injury," "[t]he parent's act caused the physical injury[.]"

. . . 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.” MCL 712A.19b(3)(b)(i) (emphasis supplied). In this case, there was no evidence establishing that respondent mother caused KF’s injuries. Rather, all evidence pointed to her former boyfriend as being the person who actually abused KF, although even this was not definitively established. In any event, the trial court never made a finding that respondent mother was the person who caused KF’s injuries. Rather, the trial court’s factual findings, which largely focused on whether respondent mother should have expected her former boyfriend to commit the abuse, certainly imply that the trial court believed he was the perpetrator. Thus, the trial court clearly erred to the extent it relied on this statutory ground to terminate respondent mother’s parental rights.

For essentially the same reason, there was no clear or convincing evidence to support termination under MCL 712A.19b(3)(k)(iii). This provision allows termination if:

(k) *The parent abused the child or a sibling of the child* and the abuse included 1 or more of the following:

\* \* \*

(iii) Battering, torture, or other severe physical abuse. [MCL 712A.19b(3)(k)(iii) (emphasis supplied).]

Again, there was no evidence, nor a finding by the trial court, that respondent mother abused KF or one of his siblings. Rather, the trial court seemed to believe that her former boyfriend was the individual who perpetrated the abuse. Thus, termination was not appropriate under MCL 712A.19b(3)(k)(iii).

We also conclude that the trial court clearly erred with respect to MCL 712A.19b(3)(b)(ii). Termination is appropriate under this section if a child or sibling is injured, “[t]he parent who had the opportunity to prevent the physical injury . . . failed to do so[,] and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent’s home.” MCL 712A.19b(3)(b)(ii). As this Court has explained with respect to this statutory ground for termination:

[W]e conclude that subparagraph (b)(ii) must be interpreted in the context of its sister subparagraphs, (b)(i) and (b)(iii). It is clear under these provisions that for physical injury to fall within MCL 712A.19b(3), it must be caused by a “parent’s act” or a “nonparent adult’s act” and not merely contributed to by an unintentional omission. Accordingly, subparagraph (ii) is intended to address the parent who, while not the abuser, failed to protect the child from the other parent or nonparent adult who is an abuser. We reject the suggestion that subparagraph (ii) was intended to be broader than subparagraphs (i) and (iii) in that it could apply merely to a negligent failure to respond to an accidental injury or naturally occurring medical condition not caused by an “act” of a parent or other adult. [*In re LaFrance*, 306 Mich App 713, 725; 858 NW2d 143 (2014).]

Thus, not all injuries fall within the scope of MCL 712A.19b(3)(b)(ii). *Id.* Rather, the injuries must be the product of abuse. *Id.* at 725-726. In this case, the parties stipulated that KF’s

injuries were not accidental. In other words, they stipulated that the injuries were intentionally inflicted, i.e., were the product of child abuse. Thus, the injuries would fall within the scope of those contemplated by MCL 712A.19b(3)(b)(ii).

That said, we cannot conclude that there was clear and convincing evidence satisfying the requirements of the statute. While KF was injured, there was not clear and convincing evidence that respondent mother had the opportunity to prevent KF's injuries and failed to do so. As the trial court recognized, the evidence submitted at the evidentiary hearing regarding statutory grounds for termination did not make it clear whether respondent mother was in the home when KF was injured. If she was not, then she had no direct ability to prevent the abuse itself. If she was, the evidence presented at this hearing did not establish that she heard or was otherwise aware that KF was being abused. It does not appear that respondent mother had any knowledge of the abuse, and thus, she did not have a direct opportunity to prevent KF's injuries from occurring. Cf. *In re Gonzales/Martinez*, 310 Mich App 426, 431-432; 871 NW2d 868 (2015) (finding termination appropriate under MCL 712A.19b(3)(b)(ii) where the respondent mother was informed of abuse being perpetrated by her boyfriend, but took no action to stop it); *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009) (finding termination appropriate under MCL 712A.19b(3)(b)(ii) where the respondent mother "failed to protect SRC and HRC from the sexual abuse despite knowing about it."); *In re Archer*, 277 Mich App 71, 74-75; 744 NW2d 1 (2007) (finding termination appropriate under MCL 712A.19b(3)(b)(ii) where the respondent mother admitted being present when the father struck a child's finger with a hammer, and also when he tied the same child to a chair and then " 'hog-tied' him. ").

The trial court believed that respondent mother should have expected her former boyfriend to physically abuse her children, and for that reason, she failed to prevent the abuse by allowing him to have unsupervised contact with KF. At the evidentiary hearing regarding statutory grounds for termination, there was evidence submitted indicating that respondent mother's former boyfriend had anger problems, and that respondent mother was aware of this fact. There was also evidence submitted, evidence the trial court found compelling, that he had abused a dog. However, no evidence was submitted at the hearing indicating that he had ever physically abused the children. While he did have a prior conviction for misdemeanor domestic violence, there was no evidence that respondent mother was aware of this fact. Nor was there evidence that respondent mother had herself been abused by her former boyfriend. Under these circumstances, we cannot conclude that clear and convincing evidence showed that respondent mother should have expected her former boyfriend to abuse the children, and thus, had the opportunity to prevent KF's injuries, but failed to do so.

And in any event, the trial court appears to have failed entirely to consider the final requirement of the statute. Under MCL 712A.19b(3)(b)(ii), even if a parent had the ability to prevent an abusive injury, to terminate that parent's parental rights there must also be clear and convincing evidence establishing that "there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home." The trial court did not address this question at all. Nor can we find any evidence that would support such a finding. There was no evidence that respondent mother had any relevant or recent history of associating

with men who were abusive.<sup>2</sup> Once she realized that her former boyfriend had likely abused KF, she directed him to leave. There was no evidence that respondent mother was still associating with him or any other man, much less anyone else that had a history of abuse. Nor was there any significant evidence that respondent mother herself had any predisposition to abuse the children; at best, there was evidence of one unsubstantiated report to child protective services of abuse by respondent mother. On this record, there was not clear and convincing evidence establishing that if the children were returned to respondent mother's care, they were reasonably likely to suffer injury or abuse in the foreseeable future. Accordingly, the trial court clearly erred when it terminated respondent mother's parental rights under MCL 712A.19b(3)(c)(ii).

The trial court also relied on MCL 712A.19b(3)(g) and (j), and we conclude that the trial court clearly erred by finding termination appropriate under these provisions. Termination is appropriate under MCL 712A.19b(3)(g) if "[t]he 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." "A parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). But "[b]y the same token, the parent's compliance with the parent-agency agreement is evidence of her ability to provide proper care and custody." *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

In this case, respondent mother was not always compliant with her treatment plan. She had difficulty at points staying consistent with mental health treatment. However, after her children were removed from her care for a second time in 2015, she became fully compliant with her treatment plan. She progressed in her mental health treatment to the point where she no longer required medication. All of her children were returned to her in the summer of 2016, and while the case continued, there were no concerns regarding her care of the children until KF was injured. She had obtained appropriate housing, and while her employment history was scattered, she continued to search for jobs and further her education. She also obtained financial assistance, and was continuing to work with service providers to apply for additional assistance and find employment.

Certainly, KF's injuries are concerning. Perhaps one could say that the fact that these injuries occurred demonstrated that respondent mother failed to provide proper care and custody for KF. See *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011) ("When there is severe injury to an infant, it does not matter whether respondents committed the abuse at all, because under these circumstances there was clear and convincing evidence that they did not provide proper care."). But the statutory provision requires proof of *two* elements, the second of which is that "there is no reasonable expectation that the parent will be able to" provide proper care and

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<sup>2</sup> There was evidence that respondent mother had been with an abusive boyfriend at some point in time before the children came into care in 2013. However, this seemed to be a relatively minor concern, and she received domestic violence counseling regardless. There was no evidence that she was with any other abusive partners until KF was injured.

custody “within a reasonable time given the child’s age.” *In re JK*, 468 Mich at 214. We reiterate that there was no evidence that respondent mother injured KF. There was likewise virtually no evidence that any of the children had been abused in the past. Nor was there evidence that respondent mother was continuing to associate with her former boyfriend. Given respondent mother’s recent history of compliance with her service plan, the evidentiary record demonstrates multiple reasons why one should expect respondent mother to provide proper care and custody to the children in the future. We conclude that the trial court clearly erred when it found that there was clear and convincing evidence to terminate respondent mother’s parental rights under MCL 712A.19b(3)(g). See *In re JK*, 468 Mich at 214 (“The respondent in this case fulfilled every requirement of the parent-agency agreement. Her compliance negated any statutory basis for termination [under MCL 712A.19b(3)(g).]”). See also *In re Gach*, 315 Mich App 83, 96; 889 NW2d 707 (2016) (where there was evidence of one instance of neglect, but evidence established that the child was otherwise generally given proper care and custody, termination under MCL 712A.19b(3)(g) was inappropriate).

Similar reasoning applies to MCL 712A.19b(3)(j). Termination is appropriate under this statutory provision if “[t]here 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 parent’s home.” MCL 712A.19b(3)(j). As it does with respect to MCL 712A.19b(3)(g), “a parent’s failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent’s home.” *In re White*, 303 Mich App at 711. But logic would dictate that the opposite is also true, and that a parent’s compliance with a treatment plan tends to demonstrate that the child would not be harmed. See *In re JK*, 468 Mich at 214. Again, in this case, while KF was harmed on one occasion, there was no evidence showing that respondent mother was responsible for his injuries. Nor was there evidence that she had a pattern of abuse, or further, of associating with individuals who were abusive. She was compliant with her service plan. While KF’s injuries are unfortunate, there is no evidence tending to show that he or any of the other children are likely to suffer similar harm, or any other harm, if returned to respondent mother’s care. The trial court clearly erred when it found termination appropriate under this statutory provision.

While not mentioned in respondent mother’s brief, there are two other statutory provisions that bear discussion. The petition seeking permanent custody of the children cited, in addition to all of the grounds discussed above, MCL 712A.19b(3)(b)(iii). At the evidentiary hearing, respondent cited MCL 712A.19b(3)(b) generally, but without stating a specific subdivision. Given the trial court’s broad reference to “the sections cited” at the evidentiary hearing, and given the fact that MCL 712A.19b(3)(b)(iii) was cited in the petition, one might think that the trial court intended to cite this subdivision as a ground for termination as well. However, courts speak through their written orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). The trial court’s written order cited MCL 712A.19b(3)(b)(i) and (ii), but not (iii). Thus, it does not appear that the trial court intended to rely on this particular subdivision to terminate respondent mother’s parental rights.

Nor does it appear that the subdivision is applicable. MCL 712A.19b(3)(b)(iii) permits termination if a “nonparent adult’s act caused” physical injury to a child “and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent’s home.” Here, while it certainly appears

that a nonparent adult abused KF, there is no reason to believe that KF (or any of respondent mother's children) would be reasonably likely to suffer abuse at his hands in the future. It appears that respondent mother has separated from her former boyfriend, and there was no evidence that she continues to have any sort of relationship with him. Thus, there is no reason to believe that the children will again come into contact with this individual.

However, there is one somewhat glaring omission from respondent mother's appellate brief. When arguing the matter at the evidentiary hearing, petitioner noted that the petition failed to cite MCL 712A.19b(c)(i) as a ground for termination, and asked that the trial court consider this ground in addition to those stated in the petition. And indeed, the trial court specifically cited this ground in its written order. Respondent mother's brief, however, fails to discuss this particular statutory ground at all. While we can understand how this ground was missed by respondent mother's appellate counsel, the fact of the matter is that the trial court's decision to terminate respondent mother's parental rights under this subsection has gone unchallenged on appeal. We could conclude that by failing to challenge this statutory ground on appeal, respondent mother has abandoned any contention of error with regard to that ground. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). And because only one statutory ground need be established to terminate parental rights, *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012), we could ignore any errors with regard to the remaining statutory grounds cited by the trial court, and conclude that statutory grounds were sufficiently proven based on respondent mother's abandonment of any contention of error with respect to this one statutory ground.

We, however, do not believe that respondent mother should be punished for what appears to be an oversight by her appellate counsel, particularly in this instance where it appears that this statutory provision, too, was not established by clear and convincing evidence. Termination under MCL 712A.19b(3)(c)(i) is appropriate when "[t]he parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." As the trial court noted in its findings, this matter went on for over four years, and thus, the time requirement of this statutory provision was easily established. However, the trial court did not analyze at all whether the conditions that led to the adjudication still existed, or if they did, were unlikely to be resolved in a reasonable time.

And it is clear that the conditions that led to the adjudication were resolved or close to resolution. The primary concern that led to the adjudication was respondent mother's mental health. There were also concerns about respondent mother's ability to provide adequate care for the children in terms of housing and income. However, these issues were resolved to the point that the children had been returned to respondent mother about six months before KF was injured. The matter was on the verge of dismissal. Respondent mother had been consistent with therapy for a long period of time, and was taken off all medications because she no longer required them. While respondent mother was not employed, she was receiving financial assistance, was actively seeking employment, and was working with the caseworkers to find work and any other financial assistance that was available to her. She had her own transportation, and had also furthered her education, at least to some extent. Under these

circumstances, the conditions that led to the adjudication were either resolved or appeared close to resolution. Thus, termination under this statutory ground was clearly erroneous.

Because no statutory grounds were proved by clear and convincing evidence, the trial court erred by terminating respondent mother's parental rights. See *In re Moss*, 301 Mich App at 86. Accordingly, we reverse the trial court's orders terminating respondent mother's rights to KL, KBI, and KBII, and remand for further proceedings consistent with this opinion.<sup>3</sup>

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens  
/s/ Mark J. Cavanagh  
/s/ Kirsten Frank Kelly

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<sup>3</sup> Because the trial court clearly erred with respect to the statutory grounds portion of the analysis, we need not consider whether it clearly erred with respect to the best-interests portion of the analysis.