STATE OF MICHIGAN

COURT OF APPEALS

In re LAVOIE, Minors.

UNPUBLISHED
March 13, 2018

Nos. 339772; 340037
Delta Circuit Court
Family Division
LC Nos. 17-000287-NA;
17-000288-NA

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

In these consolidated appeals, the Department of Health and Human Services (DHHS) and the respondents, the parents of the two minor children, appeal as of right the circuit court's order terminating respondents' parental rights to their children under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm). Through their lawyer-guardian ad litem, the minor children requested termination over the objections of the DHHS and respondents. For the reasons set forth below, we affirm.

I. BACKGROUND

This case originated with a petition filed on March 17, 2017, reporting that a neighbor and his dog found the younger child outside, "naked, bruised, dirty and crying[,]" and curled up in the snow about 30 to 35 yards from a nearby river. The temperature was in the low 30s. Responding law enforcement officers went door to door until they found the parents, who believed their daughter was asleep. The petition also reported the house to be "cluttered, filthy and unmanageable." The petition noted respondents' history of abuse and neglect and an incident when the older child went out onto the roof without respondents' knowledge.

The children were immediately removed from the home, and respondents entered pleas of admission to enable the trial court to exercise jurisdiction over the children. At the end of a dispositional hearing that lasted eight days, the trial court terminated respondents' parental rights in August 2017.

The DHHS argues on appeal that the trial court erred by concluding that respondents had been offered adequate reunification services. The DHHS and respondents also argue that the trial court erred by determining both that termination of parental rights was warranted under MCL 712A.19b(3)(g) and (j) and that termination was in the children's best interests.

II. STANDARD OF REVIEW

We review for clear error a trial court's determinations that a ground for termination was proven by clear and convincing evidence and that termination was in the children's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake." *In re Dearmon*, 303 Mich App 684, 700; 847 NW2d 514 (2014). This Court defers to the trial court's "special opportunity to observe the witnesses." *Id*. (quotation marks and citation omitted).

III. REUNIFICATION SERVICES

The DHHS argues that the trial court erred by terminating respondents' parental rights at the initial dispositional hearing, four months after taking jurisdiction, instead of allowing them more time to benefit from services intended to help them overcome barriers to reunification. According to MCL 712A.19a(2), "[r]easonable efforts to reunify the child and family must be made in all cases . . . [,]" but for specified exceptions which do not apply to this case. MCL 712A.18f(4) requires the trial court to consider the case service plan before entering an order of disposition. It further authorizes the trial court to "order compliance with all or any part of the case service plan as the court considers necessary." *Id*. Where reasonable efforts toward reunification are required, but the petitioning agency has failed to allow the respondent a reasonable opportunity to participate in services, the result is a "hole" in the evidentiary record that renders termination of parental rights improper. *In re Mason*, 486 Mich 142, 158-160; 782 NW2d 747 (2010). However, "[w]hile the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). A respondent's failure to substantially comply with a treatment plan is evidence that return of the child to the parent may cause a substantial risk of harm to the child's well-being. *In re Trejo Minors*, 462 Mich 341, 346 n 3; 612 NW2d 407 (2000).

The parties do not dispute that the DHHS offered respondents reunification services during the pendency of this proceeding, which included supervised parenting time, parenting classes, counseling, an in-home worker, a supportive parenting time worker, and assistance with finding suitable housing. Both the DHHS and respondents point to favorable testimony concerning respondents' participation in services and prospects for improvement, but they do not contest any of the recitations of fact offered by the trial court in the course of addressing the issue, including the court's account of a home visit conducted during the course of the termination hearing.

The trial court visited the home and found that it was still unfit for children even after respondents had three months to clean it. The narrow stairway leading upstairs still had no secured railing. The children's old, dirty mattresses were still in the backyard, and respondents' bed and bedroom were both filthy. The refrigerator was dirty and contained beer, contrary to the case plan's directive that respondents not have alcohol. The trial court observed empty cigarette packs that conflicted with respondents' testimony that they smoked very little. The trial court found that the only clean part of the home was a 65-inch television surrounded by three knee-highs stacks of video games worth as much as $60 each.

Regarding the beer in the refrigerator, respondent-father stated that he did not know he was not supposed to have alcohol, and he pointed out that the trial court did not see the whisky in the freezer. The trial court responded by noting that the case service plan was sitting on the dresser. The trial court further remarked that the caseworker went over the case service plan with respondents in detail and that the caseworker testified that respondents understood the plan. Therefore, the trial court concluded, respondent-father did not testify truthfully in hopes of convincing the trial court that he was following the case service plan.

Additionally, the DHHS and respondents do not dispute the trial court's findings supporting its conclusion of "long-term chronic serious abuse and neglect . . . ." Although an employee with the school started working with respondents in 2012, she twice discontinued services because they failed to participate regularly. The last time she went to their home, "[s]omeone opened the back door and released a vicious dog which attacked her. . . ." Respondents failed to apply for public assistance benefits for which the younger child was qualified. Respondents missed several of the children's appointments with speech and occupational therapists and an evaluation at the hospital. Despite the DHHS caseworker's efforts to locate an apartment for respondents, they did not move in until two weeks after it first became available. In addition, respondents made no effort to search for an apartment on their own, despite having three or four months to look for one. Respondents received an $8,000 tax credit that they could have used to have the home cleaned, buy new furniture, or find a new home, but they did not. Instead, DHHS paid the security deposit and first month's rent for the apartment. In addition, respondent-father did not pay back any of the child support he owed, and he only paid $650 in support arrearage after he was arrested. Furthermore, respondents bought the children a 50-inch television worth $1,000. The trial court also noted that respondents each smoked one pack of cigarettes a day and that respondent-father drank over $80 worth of energy drinks per week. Although respondents bought the children new clothes, they failed to clean the clothing and had to throw it away after one month. Respondents also failed to use any of the money to obtain much-needed dental care for the children. The trial court concluded that respondents "repeatedly lied" to the caseworker and to the court. Therefore, the trial court was not persuaded that respondents "would follow court orders to keep the children safe." In light of the DHHS's and respondents' failure to challenge these factual particulars, their disagreement with the trial court concerning respondents' compliance with or participation in reunification services, simply reflects their determination to view their situation with a degree of optimism the trial court reasonably declined to share.

Although termination cases often follow from substantially longer periods of attempts to rehabilitate the parents, the four-month duration of this case was not insignificant for that purpose. The trial court noted that respondents' history of living in squalid conditions, neglecting financial obligations, and failing to take advantage of offers of assistance well predated the opening of this case. If the four months' duration of this case may be regarded as itself insufficient time for respondents to show that they could overcome their reunification barriers within a reasonable time, respondents' less than complete participation in services in that time, considered along with their record far predating this case, supports the trial court's conclusion that a sudden turnaround was not reasonably likely.

The DHHS relies on *In re Newman*, 189 Mich App 61, 67; 472 NW2d 38 (1991), in which this Court reversed a termination decision because the trial court erred by determining that

the condition of the respondents' home was a basis for termination where the respondents "were not given a full and fair opportunity to maintain the home." *Newman* is distinguishable from the instant case, however, because the descriptions of a "cluttered and dirty" house in *Newman* did not include such extreme conditions reported in the instant case, including feces on the walls, and because the respondents in *Newman* substantially cleaned the home without assistance. See *id.* at 66-67. In this case, respondents had a history of failing to avail themselves of avenues for improvement, despite the DHHS's provision of services, including in-home aid. Further, there was no evidence that respondents achieved a suitable home environment until the DHHS shouldered most of the burden to ensconce them in a new apartment, which respondents had occupied only briefly at the time of the termination hearing. For these reasons, the trial court did not clearly err by concluding that respondents had been offered adequate reunification services.

IV. STATUTORY TERMINATION CRITERIA

The trial court ordered termination of respondents' parental rights pursuant to MCL 712A.19b(3)(g) and (j), which provide:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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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.
>
> * * *
>
> (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.

In challenging the trial court's conclusion that termination was warranted under the two statutory criteria, the DHHS largely reiterates its arguments that the trial court should have allowed it and respondents more time to identify and take advantage of appropriate services. Respondents substantially echo this argument, including by highlighting favorable testimony on their progress with reunification services.

Many of the trial court's findings that we previously set forth bear on respondents' failure to provide proper care and custody and the risk of harm to the children if returned to them. These findings include respondents' history of living in squalor, minimal efforts to find suitable housing or otherwise remedy the situation, serious neglect of the children's bodily cleanliness and dental needs, failure to correct such serious behavioral problems on the part of the children as playing with, or even trying to eat, feces, and failure to prioritize paying debts or seeing to household necessities over investing in personal indulgences or other luxuries.

The trial court set forth additional concerns that the DHHS and respondents fail to challenge, including the conditions in which hospital personnel found the youngest child after she was rescued from the cold on March 17, 2017. The child's hair "was so greasy and dirty that some of it had to be cut off." She had several bruises and scratches. She had a puncture wound in her foot and a long, deep scratch across the middle of her back, which respondents explained likely resulted from the staples sticking out of the makeshift door to their bedroom that the child often squeezed past. The trial court also noted a bruise on the child's "inner thigh resembling a hand-print with four fingers being visible[,]" which the trial court found occurred while the child was in respondents' care because respondents only trusted the children's grandmother to take care of the children.

The DHHS and respondents do not dispute the bulk of the trial court's adverse findings concerning respondents' failure to provide proper care and custody. Indeed, respondents readily admit that "they had inadequate explanations as to how they disposed of the income" they received in the form of an $8,000 tax credit. They further admit that, after the children were removed, their place of residence "continued to be inappropriate for the children despite the respondent parents making efforts to clean the residence," including when the trial court and parties visited the place during trial. Respondents additionally admit that their "previous housing situations were not better than the residence in Rapid River," which had several issues.

Respondents protest that they "were finally able to obtain suitable housing through efforts by DHHS," into which they moved, after some delay, during the course of the termination hearing. However, respondents do not dispute that their own industry in the matter was seriously lacking. We conclude that the trial court had a strong evidentiary basis for doubting that respondents would, from the moment they moved into the apartment the DHHS arranged for them, start maintaining a residence in good sanitary and structural condition.

The DHHS objects that the trial court regarded respondents' provision of sweet treats to the children as a form of abuse or neglect. It is apparent, however, that the trial court expressed concern for respondents' provision of sweets to the children, not out of some general disapproval of such parental indulgences, but rather to underscore the court's concern for respondents' near-total neglect of the children's dental needs—a matter that is not in dispute.

Respondents point out that they had attributed some of their failings to depression and emphasize their progress in treatment for that condition. But the trial court ably discounted depression as an explanation for their parenting failures. The trial court acknowledged respondents' testimony that they were depressed but found that their depression did not impede their ability to function as parents. The trial court noted that respondent-mother had a full-time job and did not complain of depression to her doctor until after the children were removed from the home. Similarly, the trial court remarked that respondent-father was able to travel seven hours "to celebrate with relatives" and was happy when the younger child was born.

The principal factual finding with which the DHHS takes issue is the trial court's conclusion that the younger child ended up naked and outdoors on the morning of March 17, 2017, as the result of deliberate action on the part of one or both respondents. On appeal, respondents admit that they did not offer the trial court "a rational explanation as to how [the child] had exited the upstairs apartment." The trial court noted some inconsistencies in the explanations offered, concluded that respondents were not being candid in the matter, and

concluded that "one or both of the parents opened the doors and placed her outside of the home completely naked in 30-32 degree weather with the snow falling." We agree with the trial court's substantial discrediting of the accounts of respondents because they left gaps in the evidentiary record that might reasonably allow for less distressing explanations. See *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 614; 563 NW2d 693 (1997) (conjecture is the selection of one explanation consistent with the evidence from two or more equally plausible inferences). However, we need not concern ourselves with the possibility that the court stepped into the realm of conjecture because the court nonetheless properly held both respondents responsible for their younger child's misadventure. The trial court explained that the child "was under the exclusive control and supervision of" respondents. "[T]ermination of parental rights . . . 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." *In re Ellis*, 294 Mich App 30, 35-36; 817 NW2d 111 (2011) (emphasis added), citing MCL 712A.19b(3)(j), among other grounds. Therefore, the trial court was properly concerned by respondents' inability to explain how the child ended up outside in the cold, naked, where she would have died if the neighbor had not found her.

Respondents had a long history of living in dangerous and unsanitary conditions, neglecting the children's needs, and failing to take full advantage of advice and other services in the matter. In light of their history, the trial court properly held respondents responsible for their younger daughter wandering from the home naked in wintery weather. Therefore, the trial court did not clearly err by determining that termination of respondents' parental rights was warranted under MCL 712A.19b(3)(g) and (j).

V. BEST INTERESTS

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The best-interest question is decided on the basis of a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). "In deciding whether termination is in the child's best interests, the court may consider 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*, 297 Mich App at 41-42 (citations omitted).

The DHHS and respondents rely on testimony to the effect that a strong bond existed between respondents and the children. The trial court in fact agreed that such a bond existed, even as it opined that termination was in the children's best interests. It is undisputed that the two special-needs children urgently need permanency and stability. The DHHS and respondents emphasize that their expert in psychology opined that the children's special needs and behavioral problems would present special problems adapting to an adoptive home. However, those special needs pull in the other direction as well, both underscoring respondents' parental shortcomings and presenting heightened barriers to reunification. Further, the trial court's undisputed findings indicate that the children were showing positive developments in foster care that were lacking while they resided with respondents, who were unable to control the children. The trial court

found that the children were happy to see the foster mother at the end of parenting visits. The foster mother was able to improve the children's formerly wild behavior. She was able to get the children to brush their teeth and to make considerable progress in potty training them. The trial court concluded, and respondents agreed, that the children were thriving in foster care.

The trial court acknowledged that respondents' expert had encouraging things to say about respondents, but exercised its prerogative to discredit the credibility of that expert. The trial court was unable to determine what documentation the expert evaluated, noting as an example that the expert's summary of the events on March 17, 2017, did not reflect the gravity of the situation. The expert erroneously referred to respondent-mother as the wife of respondent-father. The trial court also took issue with the expert's conclusions that respondent-father was unable able to find a job because of a felony conviction when the evidence showed that respondent-father did not try to find work. The trial court disputed the expert's conclusion that respondents lived in poverty when respondent-mother testified that money was not a problem and when respondents received an $8,000 tax credit.

The DHHS and respondents reiterate their protestations concerning respondents' prospects for being able to provide a suitable home within a reasonable time, but the trial court did not clearly err by concluding otherwise, and the court's findings in this regard well support its best-interest determination. In light of respondents' long record of living in unsafe and unsanitary conditions while neglecting their children, their poor prospects for speedy reform in these regards, and how well the children were doing once removed from respondents and placed in foster care, the trial court did not clearly err by finding that termination of respondents' parental rights was in the children's best interests.

We affirm.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Brock A. Swartzle