STATE OF MICHIGAN

COURT OF APPEALS

In re K. M. HARDY, Minor.

UNPUBLISHED
August 16, 2018

Nos. 342276; 342515
Clinton Circuit Court
Family Division
LC No. 15-026064-NA

Before: MURPHY, P.J., and GLEICHER and LETICA, JJ.

PER CURIAM.

In Docket No. 342276, respondent-father appeals by right the trial court's order terminating respondents' parental rights to the minor child, KH, pursuant to MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that child will be harmed if returned to parent). In Docket No. 342515, respondent-mother appeals by right the same order. We affirm.[1]

I. BACKGROUND

In July 2015, petitioner, the Department of Health and Human Services (DHHS), filed a petition seeking removal of KH from respondents' care, asserting that it was contrary to her welfare to remain with them because of respondents' "on-going domestic violence and mental health issues . . . ." The DHHS had already been working with respondents for several months due to complaints of physical neglect and improper supervision, and the petition was filed after an incident in which respondents argued about KH's care. During the argument, respondent-father attempted to physically remove the child from respondent-mother's arms, nearly causing respondent-mother to fall and drop KH. The argument continued to escalate and the police were called to intervene. KH was removed from respondents' care after an emergency hearing. On the basis of later admissions from respondents, the trial court found statutory grounds to exercise jurisdiction over KH based upon lack of proper custody or guardianship.

Thereafter, respondents participated in a variety of services offered by the DHHS and KH was returned to respondents' home in February 2017. Approximately four months later,

[1] These cases were consolidated by order of this Court. *In re Hardy*, unpublished order of the Court of Appeals, entered March 7, 2018 (Docket Nos. 342276 and 342515).

respondent-mother indicated, in KH's presence, that she was going to kill herself. Respondent-mother was admitted to the hospital and a safety plan was agreed upon whereby respondent-mother would move from the family home in order to allow KH to remain in a safe and stable environment. Nonetheless, respondent-father left KH in the paternal grandmother's care when respondent-mother was released from the hospital and respondent-mother returned to the family home. As a result of their noncompliance with the agreed upon safety plan, KH was again removed from respondents' care. In August 2017, the trial court agreed that the permanency plan should be changed to adoption and a supplemental petition seeking termination of respondents' parental rights was filed. Following evidentiary hearings in November 2017 and January 2018, the trial court entered an order terminating respondents' parental rights. This appeal followed.

II. STANDARD OF REVIEW

"We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest under MCL 712A.19b(5)." *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012) (quotation marks and citation omitted). "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." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

III. DOCKET NO. 342276

A. STATUTORY GROUNDS

Respondent-father argues that the trial court erred by finding that the grounds for termination were established by clear and convincing evidence. Respondent-father's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j), which, at the time of the termination proceedings,[2] provided:

> (3) 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:
>
> * * *
>
> (c) The 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 either of the following:

[2] MCL 712A.19b(3)(g) has since been substantively amended by 2018 PA 58, effective June 12, 2018.

(*i*) The 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.

* * *

(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. [MCL 712A.19b(3)(c)(*i*), (g), and (j).]

"Only one statutory ground for termination need be established." *Olive/Metts Minors*, 297 Mich App at 41.

The trial court did not clearly err by finding clear and convincing evidence to terminate respondent-father's parental rights pursuant to MCL 712A.19b(3)(c)(*i*). Although he argues that the conditions that led to the adjudication—mental health concerns, domestic violence, and the condition of the home—were rectified, the record shows that these conditions continued to exist long past the 182-day mark. While respondent-father made some progress with respect to the conditions that led to the adjudication, ultimately these conditions were not remedied. His participation in therapy was not consistent, and there were multiple periods where he refused to engage in therapy or stopped taking his medication. Major concerns also existed regarding whether he had been honest with his therapists, and respondent-father produced no evidence that his mental health issues had sufficiently improved. Respondents continued to argue in front of KH even though it was detrimental to her mental and emotional health, and they were unable to keep their home in good condition consistently without the help of outside services. On this record, the trial court did not clearly err by finding clear and convincing evidence to support termination under MCL 712A.19b(3)(c)(*i*).

Similarly, the trial court did not clearly err in finding grounds for termination under MCL 712A.19b(3)(g). "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) (emphasis added). Despite intermittent compliance with the case service plan, respondent-father did not fully benefit from the services because issues of mental health, domestic violence, and an unsafe home remained. Although KH was reunified with respondents after approximately 18 months in foster care, in the four months she resided with them there were multiple concerns about the condition and safety of the home, respondents continued to argue in front of her, and it appeared that the paternal grandmother was undertaking a significant portion of the childcare. Further, respondent-father failed to adhere to a safety plan he had created with DHHS. Overall, we conclude that it was not clear error for the

trial court to find that respondent-father was unable to provide proper care or custody and would not be able to do so within a reasonable amount of time. MCL 712A.19b(3)(g).

Termination was also appropriate under MCL 712A.19b(3)(j). Evidence was presented that the home was often in poor condition and that there were safety hazards, such as an e-cigarette within KH's reach. Furthermore, while in respondents' care, KH ate an unknown amount of "fiber gummies," which caused her to have vomiting and diarrhea, but respondents did not seek medical attention for her. This supports a conclusion that she was at risk of physical harm. Furthermore, the reasonable likelihood of harm contemplated in MCL 712A.19b(3)(j) encompasses both physical and emotional harm. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). KH's therapist testified that the chaos and instability in her life was emotionally harming her and could hinder her ability to form secure attachments. The trial court also found that respondent-father's inability to adhere to the safety plan was evidence that he did not understand KH's emotional needs. Accordingly, the trial court did not clearly err by finding that KH was at risk of harm if returned to respondent-father. MCL 712A.19b(3)(j).

B. BEST INTERESTS

Next, respondent-father argues that the trial court erred by finding that termination of respondent-father's parental rights was in KH's best interests.

"Once a statutory ground for termination had been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *Olive/Metts Minors*, 297 Mich App at 40, citing MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In determining a child's best interests, the court must consider a variety of factors, 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." *White*, 303 Mich App at 713 (quotation marks and citation omitted). Other factors a court may consider are "a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *Id*. at 714. A child's placement with a relative weighs against termination. MCL 712A.19a(8)(a); *Olive/Metts Minors*, 297 Mich App at 43.

In this case, the trial court did not clearly err by finding that termination of respondent-father's parental rights was in KH's best interests. First, although KH was in a relative placement with her paternal grandmother, the trial court found that discord in the relationship between respondents and the paternal grandparents would cause instability for KH. Furthermore, although respondent-father maintains that he has a strong bond with KH, was consistent in parenting time, and would check on her while he was at work, he does not address how these factors overshadow her need for permanence and stability. KH's therapist testified that the chaos in the child's young life could cause her an inability to develop normal and healthy attachment to her caregivers and that she could not wait another year to gain permanence and stability. Even after respondent-father participated in many of the services offered, the record shows that KH's life remained unstable based on the condition of the home, arguments between respondents, and respondents' inability to care for KH without significant help from the paternal grandmother.

Accordingly, the trial court did not clearly err by determining that termination was in KH's best interests. *Olive/Metts Minors*, 297 Mich App at 40.

IV. DOCKET NO. 342515

A. EVIDENTIARY REQUIREMENTS UNDER MCR 3.977

Respondent-mother first argues that the trial court erred in proceeding under MCR 3.977(H) at the termination trial. We review evidentiary rulings for an abuse of discretion, but review preliminary questions of law de novo. *In re Martin*, 316 Mich App 73, 80; 896 NW2d 452 (2016).

MCR 3.977 "applies to all proceedings in which termination of parental rights is sought." MCR 3.977(A)(1). Subrules (E) (governing termination of parental rights at the initial disposition) and (F) (governing termination of parental rights on the basis of different circumstances) both require that the trial court find "on the basis of clear and convincing *legally admissible evidence*" that the statutory grounds for termination have been established. MCR 3.977(E)(3); MCR 3.977(F)(1)(b) (emphasis added). However, all other parental rights termination proceedings[3] are governed by MCR 3.977(H), which provides that "[t]he Michigan Rules of Evidence do not apply, other than those with respect to privileges . . . ." MCR 3.977(H)(2). Accordingly, the question presented by respondent-mother is whether the supplemental petition contained circumstances warranting termination that were "new or different" from the circumstances that led the trial court to take jurisdiction. See MCR 3.977(F).

The court rules do not define the terms "new" or "different." However, in relation to the predecessor rule to MCR 3.977,[4] this Court indicated that "new" or "different" circumstances are those that are "unrelated" to the circumstances that led to the court's assumption of jurisdiction. *In re Snyder*, 223 Mich App 85, 89-90; 566 NW2d 18 (1997). Furthermore, "[i]n the absence of a statutory definition, we may turn to dictionaries in common usage for guidance." *In re Detmer*, 321 Mich App 49, 62; 910 NW2d 318 (2017). "New" is defined as "having recently come into existence," and "different" is defined as "partly or totally unlike in nature, form, or quality." *Merriam-Webster's Collegiate Dictionary* (11th ed).

In *Snyder*, 223 Mich App at 87, the children were removed based on unsafe and unsanitary conditions of the home. However, while the children were in foster care, they made statements indicating that they had been sexually abused, which led to the filing of the termination petition. *Id*. On appeal, this Court agreed that "the grounds for termination [were] unrelated to the basis on which the probate court initially established its jurisdiction over the

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[3] Other than termination of the parental rights of the parent of an Indian child. MCR 3.977(G).

[4] See *In re Utrera*, 281 Mich App 1, 13 n 4; 761 NW2d 253 (2008): "The rules governing juvenile proceedings have . . . been amended and renumbered, effective May 1, 2003. MCR subchapter 5.900 was moved to new MCR subchapter 3.900, and MCR 3.977 corresponds to former MCR 5.974."

children," and so legally admissible evidence was required to establish the statutory grounds. *Id*. at 90. Similarly, in *In re Gilliam*, 241 Mich App 133, 135; 613 NW2d 748 (2000), the children were removed from the home after they suffered from smoke inhalation when a fire broke out in the apartment where the children were left unsupervised. The respondent admitted that he did not have a suitable home for the children and could not care for them. *Id*. Accordingly, when the trial court relied on substance abuse and anger management problems to terminate the respondent's parental rights, those factors were required to be proven by legally admissible evidence. *Id*. at 137.

Here, the trial court took jurisdiction over KH after respondent-mother made admissions to the trial court about previous child protective services complaints, domestic violence incidents, respondent-mother's inability to stay awake to care for KH, and respondent-mother's self-harming behaviors and struggles with mental illness. In addition to these admitted allegations, the termination petition also included allegations that respondent-mother did not take medication as prescribed, was not forthcoming and honest in therapy, self-harmed during parenting time, continued to be unable to stay awake to care for KH, left KH unsupervised when she ingested an unknown amount of fiber gummies that made her sick, had multiple mental health crises throughout the duration of the case, threatened to kill herself in front of KH, and failed to maintain the home in a safe condition or achieve a healthy relationship with respondent-father. Respondent-mother's mental health concerns, respondents' domestic discord, and concerns about proper supervision and the condition of the home were inextricably linked to the admissions made in the adjudication. They are not "new and different" like the allegations of sexual abuse or substance abuse discussed in *Snyder*, 223 Mich App at 90, and *Gilliam*, 241 Mich App at 137. The circumstances did not "recently come into existence," and were not "unlike" those present at the adjudication. Accordingly, the trial court was correct in proceeding under MCR 3.977(H), and legally admissible evidence was not required to form the basis for the statutory grounds for termination.

Furthermore, even if we agreed that the trial court erred in proceeding under MCR 3.977(H), this error was harmless in light of respondent-mother's admissions to all of the circumstances she now argues were proven by legally inadmissible evidence. For example, she admitted that KH ingested an unknown quantity of fiber gummies while under her care and that she failed to seek medical attention for her, despite knowing that the gummies made KH vomit and have diarrhea for an extended period of time. She also admitted that she had only recently begun seeing improvement in her mental health, that she had threatened to kill herself in front of KH, and that KH's life was chaotic and traumatizing because of respondents' fighting.

B. INSUFFICIENT EVIDENCE

Next, respondent-mother argues that the trial court failed to make specific findings as they related to the petition. Under MCR 3.977(H):

> (3) *Order*. The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made, if the court finds

(a) on the basis of clear and convincing evidence admitted pursuant to subrule (H)(2) that one or more facts alleged in the petition:

(*i*) are true; and

(*ii*) come within MCL 712A.19b(3).

(b) that termination of parental rights is in the child's best interests. [MCR 3.977(H)(3).]

Respondent-mother argues that the trial court's failure to make specific reference to allegations in the petition requires reversal. This argument is meritless because the trial court obviously based its findings on allegations in the petition, as the entire termination trial was related to those allegations. Furthermore, respondent-mother does not elaborate on why the trial court's failure to explicitly state the obvious requires reversal. Accordingly, we will not attempt to rationalize her argument. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Next, respondent-mother argues that the trial court erred with respect to its findings regarding her mental health. She cites *In re LaFrance Minors*, 306 Mich App 713, 732; 858 NW2d 143 (2014), in which this Court held that "[t]ermination of parental rights requires both a failure and an inability to provide proper care and custody, which in turn requires more than speculative opinions . . . regarding what *might* happen in the future." (Quotation marks and citation omitted; second alteration in original.) She points out that early in the case she was prescribed a medication that psychologist Andrew Barclay deemed "counterproductive," and that she had no reported mental health conditions since switching medications. She also points out that Dr. Barclay testified that it would take a minimum of 18 months to two years of therapy before respondent-mother could begin to cope, and that no testimony was presented with respect to where respondent-mother was on this timetable.

However, the petition alleges, and the trial court found, a clear pattern of unstable mental health in respondent-mother. At the beginning of the case, respondent-mother was hospitalized and disclosed that she felt she could not take care of KH. The court heard testimony that she had not been forthcoming in therapy, and she admitted that she often "forgot" to take her medication. Even after KH was reunified with respondents for four months, respondent-mother seemingly continued to struggle to care for KH and threatened to kill herself in front of her child. In fact, multiple safety plans were instated because of respondent-mother's mental instability. Respondent-mother also testified that she had only recently begun benefitting from therapy, even though KH had been under the court's jurisdiction for over two years. Accordingly, the trial court's finding regarding respondent-mother's mental health was not clearly erroneous.

Next, respondent-mother argues that she was the victim of domestic violence and that the trial court erroneously used this against her. This Court has held that it is "impermissible for a parent's parental rights to be terminated solely because he or she was a victim of domestic violence." *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011). However, it is clear that respondent-mother's rights were not terminated *solely* because she was a victim of domestic violence. The domestic violence incidents that the court referenced were that respondent-mother threatened to kill herself, that the police were often called for verbal arguments, and that

respondents fought about whether respondent-mother was awake enough to care for the child. Respondent-mother was referred to multiple services, including relationship counseling, but did not benefit from them. While respondent-mother may have been a victim of domestic violence at times, it is evident that the trial court considered how respondent-mother's own actions exposed KH to a risk of harm. The trial court did not clearly err by finding that "relationship concerns" still existed.

C. STATUTORY GROUNDS

The trial court may terminate parental rights on a showing of at least one statutory ground by clear and convincing evidence. *Olive/Metts Minors*, 297 Mich App at 40-41. As it did with respect to respondent-father, the trial court found that termination of respondent-mother's parental rights was warranted under MCL 712A.19b(3)(c)(*i*), (g), and (j). In her challenge regarding the first ground, respondent-mother again argues that the trial court failed to base its finding on legally admissible evidence as required by MCR 3.977(F). For the reasons already explained, this argument lacks merit and the trial court properly proceeded under MCR 3.977(H). Respondent-mother does not otherwise challenge the trial court's finding that termination was appropriate under MCL 712A.19b(3)(c)(*i*).

Next, respondent-mother argues that the trial court erred by finding clear and convincing evidence in support of termination under MCL 712A.19b(3)(g), which permitted termination of parental rights 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."[5] "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." *White*, 303 Mich App at 710 (emphasis added). The record shows that despite participating in services to some extent for over two years, respondent-mother had only recently begun seeing improvements to her mental health. She continued to have outbursts that affected KH, including threatening to kill herself in front of her child. Although the paternal grandmother was a fit caregiver, the court found that the constant moves in and out of respondents' home were causing KH stress and anxiety. Furthermore, when respondents violated a safety plan by keeping KH outside the home, the trial court saw this as evidence that respondent-mother was unable to put KH's needs ahead of her own. There was also evidence that respondents continued to argue in front of their child and were unable to maintain the home without the intervention of services. The trial court did not clearly err by concluding that respondent-mother was unable to provide proper care and custody for KH.

Lastly, respondent-mother argues that the trial court erred when it found that MCL 712A.19b(3)(j) was established by clear and convincing evidence. Under that subsection, the trial court may terminate parental rights 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 home of the parent." MCL 712A.19b(3)(j). The trial court found that based on KH's age,

[5] As already noted, MCL 712A.19b(3)(g) has since been amended by 2018 PA 58, but respondents' parental rights were terminated under the former version of the statute.

"repeated changes in caregivers" were interfering with her ability to develop healthy and secure attachments to people, and that this interference could lead to "emotional disturbances." The court also found that her development could be impacted by witnessing domestic violence and being in and out of foster care, respondents' care, and her paternal grandmother's care. Finally, the trial court noted that respondent-mother threatened to kill herself in front of KH, which could also affect her development.

Respondent-mother points to *In re Boursaw*, 239 Mich App 161; 607 NW2d 408 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000), to argue that the trial court's finding of a reasonable likelihood of harm was only conjecture. Analogizing the circumstances at issue in this case to those presented in *Boursaw*, respondent-mother notes that in both instances there was "no evidence in the record that respondent ever struck or purposefully harmed the child in any way." *Id*. at 169. Respondent-mother's reliance on *Boursaw* is misplaced. The respondent in *Boursaw* had made substantial progress in the treatment plan, and the children had been in care for only 10 months. *Id*. at 169-178. Accordingly, this Court concluded that termination was premature. *Id*. at 178. By contrast, KH was harmed as a result of ingesting an amount of fiber gummies that made her sick when respondent-mother left KH unsupervised, and respondent-mother declined to seek medical attention for KH after this incident. Furthermore, unlike in *Boursaw*, KH had been under the court's jurisdiction for over two years and respondent-mother had only recently begun fully engaging in mental health therapy and taking her medication as prescribed. The trial court's findings of fact show that its focus was on emotional harm and the harm to KH's healthy development because of respondents' instability. This Court has recognized that both physical and emotional harm are contemplated under MCL 712A.19b(3)(j). See *Hudson*, 294 Mich at 268. Accordingly, the trial court's finding under this provision was not clearly erroneous.

Affirmed.

/s/ William B. Murphy
/s/ Elizabeth L. Gleicher
/s/ Anica Letica