STATE OF MICHIGAN

COURT OF APPEALS

In re ALI, Minors.

UNPUBLISHED
October 16, 2018

Nos. 342505; 342506
Ingham Circuit Court
Family Division
LC Nos. 2016-001062-NA
2016-001063-NA
2016-001064-NA
2016-001411-NA

Before: CAVANAGH, P.J., and MARKEY and LETICA, JJ.

PER CURIAM.

In these consolidated cases, respondents appeal by right a circuit court order terminating their rights to their four minor children under MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

I. FACTS

This case arose when petitioner received a complaint in connection with respondent-mother's older son and respondent-father's stepson, whose father reported injuries the child received while in respondents' care. According to the evidence, while respondent-mother was home, respondent-father, over a minor disciplinary concern, forced his stepson and respondents' two older children to disrobe. He then beat them with a belt. The stepson exhibited loop marks on his back and injuries to his thighs and hips, which respondent-mother encouraged him to attribute to a fall. One of the two other children exhibited a mark on his groin area consistent with being struck by a belt. Respondent-mother, however, attributed the mark to the use of cheap diapers, and the other child exhibited an abrasion behind his ear not consistent with respondent-mother's explanation that it too resulted from a fall. Respondent-father was convicted of third-degree child abuse in the matter.

Respondents were adjudicated on the bases of respondent-father's violent tendencies and respondent-mother's failure to protect the children from that violence, along with a substance-abuse problem on the part of respondent-father and mental health issues in relation to both respondents. The oldest of the abuse victims was removed from this case in deference to his placement with his natural father. After the parents were adjudicated by the circuit court, respondent-mother gave birth to another child, and an amended petition was filed adding the latest child to the case.

Respondents were offered various services, in which they participated inconsistently but without showing substantial benefit. When the therapists for the older two children complained that the children were being re-traumatized by their visits with respondents, parenting time was suspended, then reinstated for respondent-mother with respect to the younger two children.

After nearly two years, petitioner, upon concluding that the barriers to reunification remained in place with no short-term prospects for improvement, petitioned for termination of respondents' parental rights. A four-day evidentiary hearing followed.

The therapist for the oldest of the children reported that that child was diagnosed with post-traumatic stress disorder; his symptoms included anxiety, hypervigilance, sleep problems, aggression, and self-harm. Also, the child "really struggled prior to and following visits" with respondents. The therapist elaborated that the child was "afraid of a monster that he identified as his father" while "looking for a mommy figure to keep him safe." The therapist observed some parenting times, in the course of which she found it "difficult to watch in that [respondent-father] appeared very agitated and did not do a very good job in terms of being able to read the children's cues for . . . wanting to play or be close to him."

An expert in psychology diagnosed respondent-father with "child neglect, child physical abuse, personality disorder issues with mixed features," along with "adjustment disorder with depressed mood," and advised that persons "with this profile tend to be skeptical and . . . distrustful . . . and . . . tend to be real hypervigilant or react to other people but tend to miss their own tendencies to be reactive, frustrated," and also "tend to rationalize and intellectualize their behavior." The expert opined that respondent-father needed to "understand the reasons and causes that led up and created the abuse and neglect situation" and to "develop alternative ways of thinking," and estimated that remedying the problem would require "probably six to nine months" yet.

The expert additionally testified that respondent-mother had her own history of abuse and neglect and advised that persons with her profile were "prone to . . . acting in their own self interest, even at the expense of potential consequences and the behavior intellectualized and justified later on," and that "once in a relationship . . . they're prone to be very dependent." The expert reported that respondent-mother now acknowledged abuse in connection with her oldest child, but expressed the concern that respondent-mother did not recognize that the younger children were similarly at risk. The expert further opined that "once all the external stress and supervision is decreased, she'd be very vulnerable to the relapse because . . . she sees the situation that . . . could be fixed without really some significant intervention." She also cautioned that if respondent-mother were to live apart from respondent-father, she would need time to learn to function independently. Respondent-mother's most recent counselor reported respondent-mother had attended only about half of their scheduled sessions, opined that she needed three to six months of consistent therapy to reach the desired level of independence, and agreed that it would take perhaps twice that long if respondent-mother continued to appear for only half of her sessions.

Throughout these proceedings, there was talk of respondents' separating, but they apparently remained together until shortly before the termination hearing when respondent-mother moved in with her mother and filed for divorce. However, on the first day of the

termination hearing, foster care agency's program manager reported that during a recent family team meeting, respondent-mother "did disclose . . . to the family team members that she did in fact leave her husband [and] was residing with her mom" and was having no further contact with respondent-father, but that "on that same day" respondent-father contacted him "and kind of informed me that he know [sic] that his wife had told us that she left him," which raised concerns that respondent-father had such detailed information about respondent-mother's participation in a family team meeting that respondent-father did not attend. Also, respondent-mother admitted responding with "come on then" to a sexually provocative posting on social media from respondent-father, explaining that among the reasons she separated from respondent-father was that "he has a whole other female in that post," and she had commented as she did out of pettiness.

After taking the proofs and hearing the arguments, the trial court concluded that termination of respondents' parental rights was warranted under three statutory criteria and that termination was in the children's best interests.

II. ISSUES ON APPEAL

Both parties challenge the trial court's conclusions that termination of their parental rights was warranted under three statutory criteria, and respondent-father additionally challenges the court's determination that termination of his parental rights was in the children's best interests. An appellate court "review[s] for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and . . . the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). "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). We must defer to the trial court's special opportunity to observe the witnesses. *Id.*

As noted above, the trial court terminated respondents' parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), which, at the time relevant,[1] provided as follows:

> (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:
>
> * * *

[1] The statutory termination criteria were revised by 2018 PA 58, effective June 12, 2018. Subsections (c)(*i*) and (j) were not changed, but subsection (g) now provides as follows:

> The parent, although, in the court's discretion, financially able to do so, 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.

> (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:
>
> (*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.

Further, "[i]f 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).

A. RESPONDENT-FATHER

Respondent-father challenges the trial court's conclusion with regard to MCL 712A.19b(3)(c)(*i*) by noting that he had participated in services intended to help him with thinking, reasoning, anger management, and substance abuse, and asserting in general terms that he had demonstrated having benefited from them. But, this argument does nothing to rebut the trial court's findings that respondent-father was often disruptive when attending classes and sometimes seriously erratic and disruptive in participating in parenting time. The trial court noted that "the testimony of the therapist for the boys . . . as well as the workers in this matter . . . is that the father's behavior was very difficult and very challenging." Indeed, the court reported that defendant's behavior as part of the proceedings below provided further evidence of such behavioral problems, in that respondent-father "has been erratic in these proceedings" by way of variously being "up" or "down," and also "out in the hall," "late consistently," and sometimes leaving in the middle of testimony. Respondent-father's general boasting of participating in services includes nothing to show error in the trial court's conclusion that he has not benefited from services because he "attends therapy on an inconsistent basis," is "not open," and "struggles," especially in light of the account of the associate director of Prevention and Training Services of respondent-father's inconsistent participation, along with her opinion that respondent-father had "a long way to go," and also the psychology expert's opinion that he still needed several months of therapy.

And respondent-father offers no explanation for his variously failing to appear for drug tests, or for consistently testing positive for prohibited substances when he did appear. See *In re Conley*, 216 Mich App 41, 43-44; 549 NW2d 353 (1996) (a failure to overcome a substance-abuse problem despite extensive treatment may justify termination of parental rights under § 19b(3)(c)(*i*) and (g)).

In challenging the trial court's conclusions under MCL 712A.19b(3)(g) and (j), respondent-father again relies on his participation in services and general assertions that he benefited from them. Again, those general arguments leave unrefuted the trial court's findings that respondent-father participated in only some services, and even then only erratically and often disruptively. See MCR 3.976(E)(2) ("Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being."). Likewise the older two of the children "are still in therapy working through trauma issues" including post-traumatic stress disorder, and both were "re-traumatized in parenting time" and thus would be harmed if returned to respondent-father's care.

Respondent-father additionally complains that the suspension of his parenting time prevented him from showing that he had benefited from services, but he offers no argument to challenge the propriety of that suspension and cites no authority for the proposition that a denial of parenting time, whether rightly or wrongly imposed, leaves a parent entirely without the ability to show progress with reunification services.

For these reasons, respondent-father has failed to show that the trial court clearly erred in concluding that termination of his paternal rights was warranted under three statutory criteria.

Respondent-father alternatively argues that, regardless of the statutory criteria, the trial court clearly erred in concluding that termination was in the children's best interests.

Although termination of parental rights requires proof of at least one of the statutory termination factors on clear and convincing evidence, "the preponderance of the evidence standard applies to the best-interest determination." *In re Moss*, 301 Mich App 76, 83; 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 35, 41-42; 823 NW2d 144 (2012) (citations omitted).

In this case, respondent-father challenges the trial court's conclusion that little or no bond existed between him and the children only by asserting that the evidence indicated that a "familiarity" existed "with the children and their Appellant-Father." However, because mere familiarity can fall far short of meaningful parental bonding, this argument falls far short of refuting the trial court's finding in this regard.

Respondent-father argues that custody with him would be preferable to the foster care placements because "[t]he foster parents are unrelated to the family and the children are spread between two separate foster families." But respondent-father says nothing about the evidence that the children were doing well in foster care or the court's findings that neither respondent was

prepared to address the children's special needs. And respondent-father seems to have overlooked the indications that the foster care placement for the younger two children changed as of late in December 2017, such that all four subject children were reunified in the same home.

Respondent-father agrees with the trial court that the children need permanence and stability, but in nominating himself as a provider of those things, he only points out that with him, the four children would be raised together. As noted, however, the record indicates that the children were being reared together as of the end of 2017. And as was the case in his challenging of the trial court's findings under the statutory termination criteria, respondent-father offers no basis for doubting the trial court's findings that he participated in services only inconsistently and failed to benefit from them.

For these reasons, respondent-father has failed to show that the trial court clearly erred in concluding that termination of his parental rights was in the children's best interests.

B. RESPONDENT-MOTHER

Respondent-mother challenges the trial court's conclusions that termination of her parental rights was warranted under three statutory criteria on three bases, each of which bears on how well she complied with her service plan: (1) that the trial court erred in faulting her for continuing her relationship with respondent-father given that she lacked resources for living on her own and received very limited assistance from petitioner in that regard, but even so she had moved away from respondent-father and initiated divorce proceedings, (2) that the trial court attached too much significance to respondent-mother's inconsistent participation in therapy given that she demonstrated some progress by admitting that she should have better protected the children from respondent-father's violence and ultimately recognized the need to put the safety of the children above her relationship with him, (3) that the trial court erred in suspending respondent-mother's parenting time out of concern for the behavior of respondent-father, where respondent-mother showed her ability to engage appropriately with the children when respondent-father was not present. These concerns all relate to the three overlapping statutory criteria at issue.

Concerning the relationship with respondent-father, the trial court recognized that relationship, including respondent-mother's conniving at respondent-father's excessive infliction of physical punishment and endeavoring to cover it up, as the major condition of her adjudication. The court noted that respondent-mother's plea did not include admitting that respondent-father's abuse of the older two children had ever resulted in marks on their bodies, and that respondent-mother testified that she knew nothing of the sort. Then, when a physician noted marks on the groin of one of them and behind the ear of another that comported with physical abuse, respondent-mother unsatisfactorily attempted to explain the injuries, respectively, as the result cheap diapers and a fall. The court expressed concern that "at this late stage the mother still testified . . . that the first time she ever heard that anything like that happened to [the older two subject children] was as this trial proceeded," even though that information had "been out there since . . . the amended petition was filed." The court further stated as follows:

> [Respondents] were together until . . . the end of October of 2017. So through the majority of this case, . . . or nearly a year and two or three months, the parents remained together.
>
> [Respondent-mother] has filed for divorce. . . . I don't know the sincerity of the separation, however . . . . I know that there was some [social media] postings that the mother's commenting, liking whatever posts regarding the father or to the father. So there might be some type of communication that continues, however, that is a concern to the Court. But the huge concern is the mother understanding what child abuse and neglect is, of having insight as to how her behavior impacts her children and how to prevent that, to move forward so that they don't have to experience that again.

On appeal, respondent-mother makes no effort to champion respondent-father as a parent or to defend his resort to the severe corporal punishment that resulted in the involvement of petitioner and the court. Instead, she emphasizes her having late in the case moved away from respondent-father and begun divorce proceedings.

But there was evidence to support the trial court's doubts concerning the "sincerity of the separation." The trial court mentioned respondent-mother's continued communications with and about respondent-father through social media. But also in evidence was the foster care program manager's concern that even late in the case, respondents were "still planning together," and that respondent-father had called him immediately after a family team meeting that respondent-mother attended but respondent-father did not, yet somehow, of which respondent-father nonetheless knew the details.

Respondent-mother suggests that she would have left respondent-father sooner but for financial constraints, with which petitioner assisted her only by providing lists of housing options. But as the trial court noted, petitioner "does not go out and rent a house for somebody. They can't do that." Respondent-mother cites no authority for the proposition that petitioner had an obligation to provide any greater assistance in this regard.

Respondent-mother also complains that petitioner and the trial court expressed both a disinclination to insist that she leave respondent-father and grave concern if she did not, although she stops short of suggesting that those authorities should in fact take a position on whether a marriage should continue and direct a parent accordingly. Regardless, neither petitioner nor the trial court created the tension between preserving her marriage and protecting her children from an abusive spouse. Instead, that tension was simply a manifestation of respondent-mother's reality as this case unfolded. Because this was a situation of respondent-mother's own making, her attempt to impugn petitioner or the court in the matter is misplaced.

Further, the trial court noted that when respondent-mother did move away from respondent-father, she moved in with her mother, which respondent-mother herself admitted was not suitable housing for the children. We note that, imperfect though the option of moving in with her mother may have been, respondent-mother never suggested that that option was not available to her from either before or at the start of these proceedings. Accordingly, respondent-mother's account of leaving her residence with respondent-father and taking up with her mother

comported with the court's suspicion that her display of separation from respondent-father was largely for show once the case had proceeded to a termination hearing.

For these reasons, we conclude that the trial court had a sound evidentiary basis for concluding that respondent-mother had not reliably distanced herself from respondent-father, and also that, if she had initially failed to provide proper care and custody for them by maintaining a household with an abusive spouse, she failed to rectify that condition insofar as she has ended up in admittedly inappropriate housing.

Concerning respondent-mother's participation in therapy, trial court noted that she "was diagnosed with narcissist personality features, adjustment disorder with mixed anxiety and depressed mood," and that the expert in psychology recommended therapy "specifically focused on abuse and neglect." The court summarized respondent-mother's participation in therapy as follows:

> Now, she did attend individual therapy on . . . a very inconsistent basis. She was consistent only for about six weeks during this whole time . . . until May of 2017 . . . . And towards the end of May it was reported that the mother seemed to lose interest.
>
> . . . [T]here were numerous missed therapist sessions where she failed to even call. It looks like she no-showed for 5 appointments and finally in September her therapy was eventually cancelled.
>
> * * *
>
> [Her current therapist] testified that they are currently focusing on mother's anxiety moving forward with or without the children and . . . nothing about child abuse and neglect. . . .
>
> . . . [Her two most recent therapists] testified they really didn't understand or have any information regarding the significance of seriousness of the abuse that led to the adjudication in this matter. . . . [T]herapy is usually dependent on disclosure of the client. If that information isn't going to be disclosed, the therapist can't work on it.
>
> . . . While these proceedings were going on she missed four out of the scheduled appointments she had with [her current therapist] and he's somebody that she sought out . . . .
>
> . . . [The psychologist] testified the mother would need at least several months of intensive therapy that dealt with these issues and consistent therapy. And the mother . . . just has failed to do that at all. She still . . . minimized the situation . . . . So, obviously, that still remains a major barrier.

On appeal, respondent-mother does not dispute that her state of mental health presented a reunification barrier that needed to be addressed through appropriate therapy. Instead, she

argues that the trial court failed to appreciate that she was "making progress" in her emotional stability and also that she ultimately admitted that the children were suffering abuse at respondent-father's hands and that she too shared in responsibility for it.

In stating that she was merely "making progress" with regard to emotional stability and the need to protect the children, respondent-mother effectively admits that she had yet to overcome those barriers. As the trial court noted, the experts consistently opined that she needed at least several months of additional therapy. And success in that regard would depend on respondent-mother's displaying greater consistency in attending therapy and greater candor in communicating her therapeutic needs in the matter than what she has been previously showing.

The trial court did credit respondent-mother for accepting responsibility for her failure to protect the children from her abusive spouse, even while the court expressed concern that she seemed to view that problem "as more of a one-time thing." Also countering respondent-mother's protestations of having made great progress in therapy is that she makes no effort to challenge the trial court's concern that she "testified she had no idea, this was the first time she heard that anything that [the older two of the subject children] might have had marks" resulting from respondent-father's abuse of them even though the August 12, 2017 amended petition set forth the attending physician's observations to that effect. Nor does respondent-mother take issue with the trial court's conclusion that the children "can't wait any longer" for resolution of this matter or its observation that no witness suggested that either respondent would be ready to take the children back in short order, and that in fact the psychologist opined that respondent-mother still needed several months of therapy. "[T]he Legislature did not intend that children be left indefinitely in foster care, but rather that parental rights be terminated if the conditions leading to the proceedings could not be rectified within a reasonable time." *In re Dahms*, 187 Mich App 644, 647; 468 NW2d 315 (1991), citing MCL 712A.19b(3)(c)(*i*).

For these reasons, the trial court did not clearly err in concluding that respondent-mother had substantially failed to comply with or benefit from the therapy she needed, and that this was not likely to change within a reasonable time.

Concerning the trial court's decision to limit her parenting time, in announcing its termination decision, the court stated that the older two of the subject children "were both re-traumatized in parenting time." Respondent-mother disputes that finding only by attributing that problem exclusively to respondent-father.

Respondent-mother's objections to the suspension of parenting time are not in fact grounds for challenging the court's findings under MCL 712A.19b(3)(c)(*i*), (g), or (j), because those criteria concern the well-being of the children, not necessarily a parent's culpability for failing to attend to it properly. See *In re Middleton*, 198 Mich App 197, 199; 497 NW2d 214 (1993) ("[c]ulpable neglect need not be shown for the court properly to exercise jurisdiction"); *In re Miller*, 182 Mich App 70, 82; 451 NW2d 576 (1988) (the statutory words "without regard to intent" indicate that the inquiry concerns the well-being of the child in the face of neglect, regardless of parental intent). Accordingly, even if respondent were at some disadvantage for want of parenting time improperly withheld, exposing such a procedural impropriety would nonetheless not impugn the trial court's findings under the three statutory termination criteria.

In any event, the trial court had a reasonable basis for suspending respondent-mother's parenting time with the older two children beyond reasons attributable directly to respondent-father. The oldest child's therapist opined that respondent-mother's history of failing to protect the children from respondent-father's aggression was part of what made parenting times difficult for that child. In other words, because respondent-mother shared in the responsibility for that aggression, its victims associated that aggression with her. Similarly, the counselor for the next oldest child reported that the latter presented with many symptoms of trauma and opined from her observations of parenting time, that the children had no "secure" attachment to respondent-mother. And the foster care program manager opined that respondent-mother's lack of consistency in attending parenting time or otherwise participating in services had "an impact on the kids making progress with their therapy."

For these reasons, respondent-mother has failed to show that the trial court erred in suspending her parenting time with the older two children, let alone that reversal of the termination orders with respect to her is in order for that reason.

We affirm.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Anica Letica