

STATE OF MICHIGAN
COURT OF APPEALS

In re RIVERA-IZAGUIRRE/FERNANDEZ/
MENDEZ-IZAGUIRRE, Minors.

UNPUBLISHED
October 17, 2019

No. 348299
Oakland Circuit Court
Family Division
LC No. 16-840696-NA

Before: CAVANAGH, P.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court’s order terminating her parental rights to the minor children, JRI, JF, JAF, and JMI, pursuant to MCL 712A.19b(3)(b)(ii), (b)(iii), (g), and (j). We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The Department of Health and Human Services (“petitioner” or “DHHS”) initiated this child protective proceeding after respondent’s 20-month-old daughter, JB, died in March 2017, while in the exclusive care of respondent’s live-in boyfriend, A. Colon, while respondent was at work.¹ The cause of death was determined to be blunt force trauma to the head, most likely attributable to physical abuse. Despite the allegations of abuse, Colon maintained throughout the proceedings that JB died after she accidentally fell down the basement stairs. Petitioner alleged that respondent left JB in the care of Colon after being made aware that he was physically abusing JB to the point of leaving injuries on at least six occasions, and she was aware that Colon was illegally using marijuana on a regular basis while caring for the children and that he would become more violent when he did not have any marijuana accessible to him. Petitioner also alleged that Colon informed respondent that JB had fallen down the stairs and was unresponsive, yet respondent did not contact EMS; instead, she waited for a ride from a co-

¹ In March of 2018, respondent gave birth to Colon’s child, JMI, and Colon became a respondent in these proceedings by way of an amended petition. By separate order, the trial court terminated Colon’s parental rights to JMI; his parental rights are not at issue in this appeal.

worker and then transported JB to the hospital, which delayed JB from receiving medical treatment for at least 45 minutes. The petition sought termination of respondent's parental rights.

At the conclusion of the 5-day adjudicative trial, the trial court found that a preponderance of the evidence established statutory grounds to assert jurisdiction over respondent's children. Following this assumption of jurisdiction, all parties agreed that the court could rely on the evidence presented during the adjudicative trial to determine if statutory grounds for termination were also established. Thereafter, the court issued an opinion and order finding clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(b)(ii), (b)(iii), (g), and (j).

Initially, the court adopted its findings of fact from the adjudicative trial. It then, once again, found that JB suffered fatal injuries while in Colon's exclusive care and control and that these injuries were not consistent with a fall down a flight of stairs. Instead, the court found clear and convincing evidence that JB's injuries were the result of abusive head trauma, shaking, or both suffered at the hands of Colon. The court specifically rejected the theory offered by Colon's expert witness, Dr. Marcus DeGraw, that JB possibly experienced an accidental fall and her injuries turned critically fatal because of a blood-coagulation disorder.

After having found that JB's injuries were the result of nonaccidental trauma, the court concluded that respondent failed to protect JB from Colon's abuse. The court noted that respondent was aware that Colon frequently "disciplined" the children to the point where they were left with bruises and marks on their bodies. It was also noted that the autopsy confirmed that JB had both old and new bruising on her legs and buttocks. The court found clear and convincing evidence that respondent had the opportunity to prevent the abuse perpetrated by Colon, yet failed to do so. It further concluded that, under the circumstances in this case, there existed a reasonable likelihood that JB's siblings would be at risk for future harm if returned to respondent's care. The court noted that despite overwhelming evidence that Colon was responsible for JB's death, respondent continued her relationship with him, ignored the evidence implicating him, and then became pregnant and gave birth to his daughter, JMI, during these proceedings. Following a hearing in January 2019, the court concluded that termination of respondent's parental rights was in the children's best interests. This appeal followed.

II. ANALYSIS

On appeal, respondent challenges the trial court's assumption of jurisdiction over the children, its finding of statutory bases for termination, and its determination that termination was in the best interests of the children. We will address each argument in turn.

A. JURISDICTION

Respondent first contends that the trial court erred in assuming jurisdiction over the children. Specifically, respondent argues that petitioner presented insufficient evidence to warrant the court's assumption of jurisdiction over her children. We disagree. We review a trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). A trial court's findings of fact are "clearly erroneous if the reviewing court is left with 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.

"Child protective proceedings are generally divided into two phases: the adjudicative and the dispositional." *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). The adjudicative phase determines whether the trial court may exercise jurisdiction over the children. *Id.* Pursuant to MCL 712A.2(b)(1) and (2), a trial court has jurisdiction in proceedings involving a child

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . .

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in . . .

In order for a court properly to exercise jurisdiction pursuant to MCL 712A.2(b)(1) and (2), the petitioner must prove by a preponderance of the evidence that the circumstances described in the statute exist. See *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). " 'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314, 316 (2008).

At the conclusion of the bench trial, the court found, by a preponderance of the evidence, that there existed statutory grounds to assert jurisdiction over the children. The court rejected any assertion that a fall down the stairs caused JB's fatal injuries. Instead, the court found overwhelming evidence that JB died from "abusive head trauma, shaking, or both" while in Colon's exclusive care. With regard to respondent's conduct, the court found that she knew or should have known that her children were at risk of harm in Colon's care. The court found that respondent was aware of prior abuse of the children, particularly JB, at Colon's hand, that Colon became more agitated when his marijuana supply was depleted, and that Colon became violent when agitated. Based on the foregoing findings, the court concluded that there existed statutory grounds to exercise jurisdiction over the minor children.

Our review of the record firmly convinces us that the evidence was more than sufficient to support the court's exercise of jurisdiction pursuant to MCL 712A.2(b)(1) and (2). The evidence established that in March 2017, 20-month-old JB died from blunt force trauma to the head. On the morning of her death, JB was left in the exclusive care of Colon. A preponderance of the evidence—indeed, the overwhelming weight of the evidence—demonstrated that JB died from nonaccidental trauma. It further demonstrated that Colon's claim that JB accidentally fell down the basement stairs was not plausible.

Two experts testified at the adjudicative trial that, in general, stairway falls do not result in severe injury. Indeed, both agreed that it was extremely rare that a stairway fall would result in death. Dr. Allison Ball testified that the type of injuries sustained by JB were not typically seen with stairway falls. Dr. Ball found particularly concerning the nature of JB's bruises, the severity of her head injury, and the presence of bilateral retinal hemorrhaging. The bruising was notable because of its location. Dr. Ball explained that bruising to the thighs and buttocks would not usually be seen in a stairway fall. Dr. Ball then explained that JB experienced a severe head injury without any fracturing of the skull. With a purported history of a stairway fall and the severity of the head injuries, Dr. Ball would have expected to see skull fractures if the injury had occurred in the manner reported. Dr. Ball also provided compelling testimony regarding the presence of bilateral retinal hemorrhaging. Dr. Ball explained that the retinal hemorrhaging stood out because this type of injury requires severe high-level force, such as through extremely violent shaking. Retinal hemorrhaging typically occurs with severe motor vehicle crashes, freefalling from a second, third, or fourth-floor window, or from large furniture falling on a child. Dr. Ball explained that retinal hemorrhaging is common with severe shaking because retinal hemorrhages typically require rotational force of the head, or acceleration/deceleration. Dr. Ball opined that the type of force necessary to result in retinal hemorrhaging is not typically found with a fall down the stairs. Because JB's injuries were inconsistent with a stairway fall, Dr. Ball concluded that it was more probable that she was the victim of physical abuse.

Dr. Marcus DeGraw testified on behalf of Colon during the adjudication trial. In many respects, his testimony was consistent with Dr. Ball's. He readily admitted that with an otherwise healthy child, he would not expect to see retinal or subarachnoid hemorrhaging from a fall down the stairs. He explained that it would be "almost unheard of" for a child to die from injuries sustained after falling down the stairs. Dr. DeGraw also explained that very few things, other than acceleration and deceleration, could have caused the retinal hemorrhaging that JB experienced. He offered as examples of possible causes: a 125-pound television falling on a child's head or a severe motor vehicle accident. In his opinion, however, it was possible that JB experienced some sort of head trauma and that a blood-clotting disorder significantly contributed to the severity of her injuries. Of note, however, Dr. DeGraw admitted that if a severe blood-clotting disorder were removed from the hypothesis, JB's injuries would "absolutely" be consistent with child abuse.

The record shows that the trial court considered the opinions of both experts before ultimately concluding that JB died from injuries inflicted by Colon. The court based this finding in part on its finding that JB did not suffer from a bleeding disorder. Overwhelming evidence supports this conclusion. During resuscitation efforts, blood was drawn from JB. The results of this blood work indicated that JB's partial thromboplastin time (PTT) levels were abnormal, indeed, very elevated. As both experts explained, the PTT levels evaluate a patient's blood-clotting ability. Dr. Ball explained that it was common to see an elevated PTT level in a patient with a brain injury and she noted that JB had no history of a bleeding disorder. Dr. DeGraw agreed, but believed that even for a brain injury, JB's PTT level was extraordinarily elevated and could be indicative of a blood-clotting disorder. However, he also testified that the blood-clotting disorder would have had to be severe and he acknowledged that the age of diagnosis for moderate hemophilia is eight to nine months and one month if the child is a severe hemophiliac. Moreover, Dr. DeGraw explained that a child with a severe bleeding disorder would exhibit symptoms, such as unexplained or severe bleeding, and those symptoms would be obvious to a

parent. Consequently, even Dr. DeGraw did not champion a particularly persuasive argument that JB suffered from hemophilia or some other blood-coagulation disorder. Given this, it would appear that the opinions of both expert witnesses supported a finding that JB's injuries were not consistent with an accidental fall down the stairs, but rather were caused by nonaccidental, abusive trauma.

Additional evidence also supported the court's finding that JB had suffered severe and fatal abuse at Colon's hand. JB was allegedly asleep in the same bed with Colon when respondent left for work. Colon made statements to the effect that he was awakened by the sounds of thumping noises. Colon claimed that when he went to investigate, he found JB lying at the bottom of the basement stairs, two floors below the bedroom where he was allegedly asleep with her. Respondent testified that JB suffered from hip laxity and that she had only learned to walk three months before her death. According to respondent, JB would not usually attempt the stairs by herself. Indeed, JB had never attempted the basement stairs before. When JB went down the carpeted stairs from the second-floor bedroom to the main floor of the home, she would scoot down on her bottom. Additionally, a family friend witnessed JB a week before she died, scooting slowly down the stairs from the second floor, on her stomach, with her feet first. Under the foregoing circumstances, it was unlikely that JB woke up, traveled down one set of stairs, and then fell to her death as she attempted to maneuver a second set of stairs. It was equally implausible that thumping sounds emanating from a small child tumbling down stairs two floors below his bedroom awakened Colon.

Respondent's and Colon's actions at the time of the events further supports the implausibility of Colon's explanation for the child's injuries. It is undisputed that JB was in critical condition on the morning of March 29, 2017, yet neither respondent nor Colon called 911. Respondent claimed that she believed it would be quicker if Colon sought help from a maternal aunt. However, when she discovered that this individual was unavailable, respondent still did not call 911. Colon claimed that he did not call 911 because of a language barrier. However, two witnesses testified that Colon could speak and understand some English. The questionable conduct of the adults closest to JB suggests a certain level of concealment.

There was also evidence that respondent knew or should have known that JB was not safe in Colon's care. The autopsy report noted several old bruises on JB's legs and buttocks. During forensic interviews, the older siblings stated that Colon frequently "whooped" them with a belt or a shoe, leaving marks. The children made disclosures about being hit by both respondent and Colon, and that it was happening often. It is difficult to fathom that respondent was unaware that her children were being physically disciplined by her live-in boyfriend, including when she was at work. Moreover, respondent admitted that the day before JB's death, Colon physically "disciplined" her and, as a result, the child was left with bruises on her legs. Although respondent denied as much during trial, in statements made to police investigators, she admitted that there were at least six prior occasions where she was aware of Colon's use of physical discipline and found it to be inappropriate. On more than one occasion, that discipline resulted in bruising. Further, respondent was aware that Colon became agitated and violent when his supply of marijuana ran out. Respondent explained that at the time of JB's death, there was no money available for Colon to buy marijuana. From the foregoing evidence, the trial court could conclude, based on a preponderance of the evidence, that respondent had the opportunity to protect JB, yet failed to do so.

There was also overwhelming evidence from which the court could find that the children would be at risk of harm in respondent's care. Early on, respondent was advised that a continued relationship with Colon would jeopardize her ability to have visitation with her children. Indeed, throughout the pendency of this case, respondent's parenting time remained suspended. Not only did respondent continue her relationship with Colon, she twice became pregnant by him. The first pregnancy ended in a miscarriage. However, respondent gave birth to her and Colon's daughter, JMI, almost exactly one year after JB died. Then, throughout the adjudicative trial, respondent maintained the belief that Colon was not responsible for JB's fatal injuries. The evidence supported a finding that respondent was unwilling or unable to recognize and protect her children from obvious and known risks. At the very least, it was clear that respondent was unwilling to take the steps necessary to ensure her children's safety.

A preponderance of the evidence supports the court's findings that JB died because of nonaccidental trauma inflicted by Colon, that respondent left JB in Colon's care although he presented an obvious and known risk of harm to her children, and that respondent maintained a relationship with Colon even after being informed that JB's injuries were inconsistent with a fall and despite being advised that continued contact with Colon would jeopardize the return of her children. These findings establish respondent's inability to provide proper care and custody for the children and the likelihood of continuing harm to the children. MCL 712A.2(b)(1). They also establish that respondent's home, because of her neglect of her children's safety, is a dangerous and unfit place for them to live. MCL 712A.2(b)(2). Thus, we conclude that the trial court did not clearly err when it found that the children came within its jurisdiction pursuant to MCL 712A.2(b)(1) and (2).

B. STATUTORY GROUNDS

Respondent also contends that the trial court erred when it found that clear and convincing evidence established statutory grounds for the termination of her parental rights. Again, we disagree. To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). This Court reviews the trial court's findings under the clearly erroneous standard. MCR 3.977(K). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been committed. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(ii), (b)(iii), (g), and (j). To terminate parental rights pursuant to MCL 712A.19b(3)(b)(ii), the trial court must find by clear and convincing evidence that

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

* * *

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse 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.

After the court found that the children came within its jurisdiction, the parties did not offer any additional evidence and instead elected to proceed, for statutory grounds purposes, on the evidence that was presented during the adjudicative phase. While the trial court found that this evidence was sufficient to meet the evidentiary burden for establishing jurisdiction, it similarly concluded that the evidence also met the higher standard of proof when it held that the statutory grounds for termination of parental rights were established by clear and convincing evidence. After reviewing the record, we agree with the trial court's conclusions.

As discussed earlier, there was overwhelming evidence that JB died as a result of physical abuse perpetrated by respondent's boyfriend. The evidence was also clear and convincing that because respondent was aware that Colon used excessive physical force with the children, that she had an opportunity to protect JB from the abuse, yet failed to do so. As previously discussed, because respondent continued her relationship with the perpetrator of the abuse and she refused to accept the implausibility of his narrative, there was also clear and convincing evidence that respondent's children would be at risk of harm in the future if returned to her care. Thus, the evidence that supported jurisdiction pursuant to MCL 712A.2(b)(1) and (2) also met the clear and convincing evidentiary standard required to support termination of respondent's parental rights pursuant to MCL 712A.19b(3)(b)(ii). Accordingly, we conclude that the trial court did not clearly err in finding that clear and convincing evidence established MCL 712A.19b(3)(b)(ii) as a statutory basis for the termination of respondent's parental rights. Because petitioner needed only to establish one ground for termination, MCL 712A.19b(3), we need not address whether the trial court properly found additional grounds for termination, *In re Powers Minors*, 244 Mich App 111, 119; 624 NW2d 472 (2000).

C. BEST INTERESTS

Finally, respondent challenges the trial court's finding that termination of her parental rights was in the children's best interests. We find no merit to her arguments. "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 the parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The court may consider several factors when deciding if termination of parental rights is in a child's best interests, including the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012). The court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). This Court reviews for clear error a trial court's finding that termination of parental rights is in a child's best interests. *Id.* at 129.

The trial court did not clearly err when it found that termination of respondent's parental rights was in the children's best interests. Respondent failed to protect one of her children from severe and fatal physical abuse perpetrated by her live-in boyfriend. There was evidence to support a finding that she would be unable or unwilling to protect her surviving children in the

future. In support of this finding, we note that psychologist Dr. Melissa Sulfaro concluded that respondent exhibited a lack of insight regarding the importance of putting the safety of her children above her own needs.

Further, Dr. Sulfaro found that a strong parent-child bond did not exist. Respondent blames the lack of a bond on the trial court because it suspended her parenting time at the outset. Respondent asserts that the court's actions were intended to punish her rather than further the children's best interests. Respondent fails to acknowledge that the court suspended her parenting time, in part, because evidence existed of a continued relationship between herself and Colon, perpetrator of the fatal abuse of JB. The continuation of such a relationship created a potential risk to the children's emotional and physical well-being if visitation was granted. Thus, contrary to respondent's position, the trial court did not seek to punish her, but rather to protect the children. The lack of a bond cannot be attributable to any alleged punitive actions taken by the trial court.

Respondent also asserts that the court did not give sufficient weight to the fact that the children were placed with relatives. We disagree. Pursuant to MCL 712A.19a(8)(a), a child's placement with relatives weighs against termination. However, while the fact that a child is living with a relative must be considered, a trial court may still terminate parental rights in lieu of placement with a relative if it finds that termination is in the child's best interests. *In re Olive/Metts*, 297 Mich App at 43. Initially, because JF and JAF were returned to the custody of their biological father, this factor does not apply to them. A child's biological parent is not a "relative" as defined under MCL 712A.13a(1)(j); therefore, the trial court was not required to weigh these children's placements against termination. *In re Schandler*, 315 Mich App 406, 413; 890 NW2d 676 (2016). With respect to JRI and JMI, the court did consider the fact that they were in relative placement, but still concluded that termination of parental rights was in the children's best interests. The court found that termination of parental rights was the only avenue by which the children could be protected from respondent's poor decision-making. It should also be noted that the relatives were interested in providing permanency for the children, Spanish was spoken in the homes, and the caregivers were facilitating sibling visits. Considering this, the trial court did not clearly err when it determined that termination of respondent's parental rights was in the children's best interests despite their placement with relatives.

Finally, while argued as part of her best interests challenge and not addressed as a separate issue on appeal, respondent contends that she should have been offered services and an opportunity to work toward reunification. However, "[p]etitioner . . . is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). In any event, it is unlikely that providing respondent with services would have been fruitful. Dr. Sulfaro explained that while respondent might benefit from therapy, she would not be able to do so within a reasonable time. Dr. Sulfaro opined that respondent would require long-term, intensive treatment, including cognitive-behavioral therapy. Dr. Sulfaro also noted that although nearly two years had passed, respondent still did not fully believe that Colon was involved in JB's death. She held this belief despite being informed by several sources that JB's fatal injuries were not consistent with a fall down the stairs. Further, respondent voluntarily participated in parenting classes and briefly in individual counseling. Her continued contact with the perpetrator of the abuse made manifest her failure to benefit from the parenting classes. With respect to the counseling, respondent attended for two

months and then stopped participating. Respondent has not persuasively demonstrated that she was entitled to the benefit of a treatment plan.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jane M. Beckering

/s/ Michael F. Gadola