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STATE OF MICHIGAN

COURT OF APPEALS

In re L J MURPHY, Minor.

UNPUBLISHED
April 29, 2021

No. 354852
St. Clair Circuit Court
Family Division
LC No. 18-000411-NA

In re B A L WARD, Minor.

No. 355289
St. Clair Circuit Court
Family Division
LC No. 18-000411-NA

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 354852 of these consolidated appeals,[1] respondent appeals by right the trial court's order terminating his parental rights to his minor child, LM, under MCL 712A.19b(3)(j) (reasonable likelihood the child would be harmed if returned home) and (m)(*i*) (parent was convicted of violations under MCL 750.520c). In Docket No. 355289, respondent also appeals by right the trial court's order terminating his parental rights to his minor child, BW, under MCL 712A.19b(3)(h) (parent's failure to provide proper care and custody), (j) (reasonable likelihood the child would be harmed if returned home) and (m)(*i*) (parent was convicted of violations under MCL 750.520c and MCL 750.520d). We affirm.

[1] See *In re Murphy, Minor*, unpublished order of the Court of Appeals, entered November 3, 2020 (Docket Nos. 354852 and 355289).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondent is the father of LM and BW (together, the Children).[2] In October 2018, the Children's half-sister, RW, disclosed that respondent had been sexually abusing her. At the time, RW lived with respondent, LM, another half-brother CM, and the Children's mother. The mother was pregnant with BW at the time. After RW disclosed the abuse, the Children and their mother moved out of the home and Children's Protective Services (CPS) started an investigation. Around this time, LM was diagnosed with stage-four neuroblastoma, a form of cancer. As a result of the CPS investigation, petitioner filed a petition to terminate respondent's parental rights to LM.

On December 13, 2018, the trial court conducted a preliminary hearing and determined that RW's disclosures of abuse were credible. The trial found that it was contrary to LM's welfare for him to remain in respondent's home, because there was probable cause that "[respondent] sexually abused a half-sister [RW]." However, the trial court declined to suspend respondent's parenting time with LM because of the severity of LM's medical condition. LM was released to the custody of his mother.

In February 2019, the trial court held an adjudication bench trial regarding whether to exercise its jurisdiction over LM. RW testified to multiple incidents in which respondent exposed his erect penis to her and requested that RW have a "secret relationship" with him. RW alleged that these incidents occurred when respondent was home alone with RW, CM, and LM. Detective Ernesto Fantin of the Port Huron Police Department testified that respondent had been criminally charged on the basis of the allegations made by RW and other sexual abuse allegations made by respondent's fifteen-year-old half-sister, TM. At the conclusion of the adjudication trial, the trial court found that it had jurisdiction over LM under MCL 712A.2b(1) and (2). The trial court then moved into the dispositional phase to consider petitioner's assertion that statutory grounds existed to terminate respondent's parental rights under MCL 712A.19b(3)(b)(*i*) and (j). The trial court declined at that time to find statutory grounds to terminate respondent's parental rights because of the age and gender differences between LM and RW, and because of LM's cancer diagnosis.

LM continued with his medical treatments, which included several surgeries, chemotherapy, and bone marrow transplants resulting in lengthy hospital stays. In March 2019, LM's mother gave birth to BW. In April 2019, respondent was arrested and incarcerated on criminal charges stemming from the abuse allegations made by RW and TM. The trial court conducted several hearings in which petitioner updated the trial court on respondent's progress in reunifying with LM. At each hearing, petitioner indicated that respondent was in jail and in protective custody; as a result of these circumstances, respondent was unable to engage in services.

In October 2019, respondent was convicted of one count of accosting RW, a minor, for immoral purposes, MCL 750.145a, but was found not guilty of one count of second-degree criminal sexual conduct ("CSC-II"), MCL 750.520c(1)(b), and two counts of indecent exposure, MCL 750.335a.[3] Respondent was sentenced on November 12, 2019, as a second-offense habitual

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[2] The Children's mother was not a respondent in either case and is not a party to this appeal.

[3] See *People v Murphy*, St Clair Circuit Court, Case No. 19-001015-FH.

offender, MCL 769.10, to a prison term of 12 months with credit for 204 days served. Later that month, respondent was convicted of CSC-II, MCL 750.520c(1)(b); one count of third-degree criminal sexual conduct ("CSC-III"), MCL 750.520d(1)(d); and two counts of accosting a minor for immoral purposes, MCL 750.145a, all stemming from defendant's sexual abuse of TM. Respondent was sentenced on January 6, 2020, as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 120 to 270 months for those convictions.

In March 2020, as a result of respondent's criminal convictions, the trial court authorized petitioner to file a supplemental petition to terminate respondent's parental rights to LM. Petitioner also filed a petition seeking to terminate respondent's parental rights to BW.

The hearing for the termination of respondent's parental rights to LM occurred on August 19, 2020. At the conclusion of the hearing, the trial court found that statutory grounds existed to terminate respondent's parental rights under MCL 712A.19b(3)(j), reasoning that there was a reasonable likelihood that LM would be harmed if returned to respondent given respondent's "tendency to prey on children for his own sexual gratification." The trial court also found that statutory grounds existed under MCL 712A.19b(3)(m)(*i*) because respondent had been convicted of a listed offense, MCL 750.520c, and because it was in LM's best interests "not to be exposed to a parent/child relationship with a parent who would harm him."[4] The trial court also found that termination was in LM's best interests, based on several factors—LM's severe medical condition, respondent's consistent absence from LM's life, the lack of a bond between LM and respondent, and respondent's sexualized pattern of behavior toward children. The trial court later entered an order terminating respondent's parental rights to LM.

The adjudication bench trial and initial disposition of the petition for termination of respondent's parental rights to BW was held on October 6, 2020. The trial court initially held that it had jurisdiction over BW under MCL 712A.2(b)(1) and (2). During the dispositional phase, BW's mother testified that respondent had not provided support during her pregnancy and, after BW was born, respondent only saw BW once for about 20 minutes. The mother also explained that BW suffered from speech and sensory issues that required additional support. Caseworker Michelle Hartman testified that respondent had provided minimal assistance to the mother for the benefit of BW. Respondent, his mother, and his grandmother testified; each opined that respondent was a good father who saw his children often and had financially supported the family before his incarceration.

The trial court found that a statutory ground for termination of respondent's rights to BW existed under MCL 712A.19b(3)(j), reasoning that "[a] person who has the propensities to [sexually abuse] his own sisters, certainly is a danger to his own children should they be in a position that [respondent's] sisters were in." The trial court also found a statutory ground under MCL 712A.19b(3)(h), noting respondent's lengthy prison sentence and his failure to support the Children when he was not in prison. Finally, the trial court found a statutory ground under MCL 712A.19b(3)(m)(*i*), because respondent had been convicted of a listed offense and because respondent "has a propensity to prey on minors." The trial court determined that termination was

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[4] DHHS also sought termination under MCL 712A.19b(3)(b)(*i*) and (k)(*ix*)—each of these bases was rejected by the trial court.

in BW's best interests because (1) there was no bond between BW and respondent, (2) respondent failed to assist the mother throughout her pregnancy; and (3) respondent's inability to help with BW's special needs because of his incarceration. The trial court entered an order terminating respondent's parental rights to BW.

These appeals followed.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent argues that trial court clearly erred when it concluded that that there were statutory bases to terminate respondent's parental rights to the Children. We disagree.

We review for clear error a trial court's determination that at least one statutory ground for termination has been proven by clear and convincing evidence. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009) (quotation marks and citation omitted); MCR 3.997(K). A finding is clearly erroneous if this Court "is left with the definite and firm conviction that a mistake has been made." *In re Williams*, 286 Mich App at 271 (quotation marks and citations omitted). This Court defers to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). We review de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *Ellis*, 294 Mich App at 32.

Respondent argues, with respect to both of the Children, that the trial court erred by finding that the statutory grounds for termination in MCL 712A.19b(3)(j) existed. We disagree. Under MCL 712A.19b(3)(j), statutory grounds to terminate a respondent's parental rights exist when "[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." Regarding LM, the trial court stated that "[respondent] has a tendency to prey on children for his own sexual gratification. And, the Court finds that that creates a reasonable likelihood, based on his—[respondent's] conduct, that [LM] would be harmed if returned to [respondent's] home." Regarding BW, the trial court again noted respondent's sexual behavior toward TM and RW, stating that "[a] person who has the propensities to do that to his own sisters, certainly is a danger to his own children should they be in a position that his sisters were in."

Respondent's arguments as to MCL 712A.19b(3)(j) are substantially similar in both appeals. Essentially, respondent argues that the evidence shows that he never harmed either of the Children—rather, his criminal convictions arose from allegations relating to his conduct toward TM and RW. According to respondent, he should be given an opportunity to "prove" that he can adequately parent the Children. We disagree.

As an initial matter, we point out that under the plain language of the statute, the trial court was not required to find that respondent had harmed the Children in the past, rather, the statute

simply requires that the trial court consider the "conduct or capacity of the child's parent, that the child will be harmed . . . ." MCL 712A.19b(3)(j). Therefore, the mere fact that there was no evidence that respondent had harmed the Children in the past is not dispositive. Indeed, this Court has found statutory grounds for termination under MCL 712A.19b(3)(j) even though the respondent's conduct was directed at other children. For example, in *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011), we concluded that termination was proper as to MCL 712A.19b(3)(j) even though the respondent-parent's conduct was directed toward another child, reasoning that "[r]espondent focuses only on the potential of *physical* harm or abuse and ignores the fact that the children had been, and continued to be, at risk of *emotional* harm." (emphasis in original). In other words, even if there is no evidence that a respondent-parent's conduct physically harmed a child at issue, termination under MCL 712A.19b(3)(j) may still be appropriate because a parent's conduct may nonetheless harm the child emotionally. Here, even though there is no evidence that respondent ever physically harmed the Children, we cannot conclude that the trial court clearly erred by finding that they were at risk of harm if returned to respondent's care, because of respondent's predatory sexual behavior toward other minor family members. The record supports that LM was in the same house when respondent, the only adult present, sexually abused RW. Defendant's criminal charges show that, at a minimum, he is a serious danger to minor female children in his presence, including family members. If returned to respondent's care, the Children would be aware that their female friends and relatives were not safe in their father's presence, and could easily be subjected to severe trauma and emotional harm even if respondent never preyed on them sexually, which is far from certain.

The trial court therefore did not clearly err when it found statutory grounds to terminate respondent's parental rights to the Children under MCL 712A.19b(3)(j). We similarly conclude the trial court did not err when it found statutory grounds to terminate respondent's parental rights to the Children under MCL 712A.19b3 (m)(*i*). Under MCL 712A.19b(3)(m)(*i*), statutory grounds to terminate a respondent-parent's rights exist when the parent is convicted of one or more listed offenses and "the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child." Defendant admits that his CSC-II and CSC-III convictions are listed offenses, but argues that, because his criminal sexual conduct was never directed at male children, the trial court erred by determining that continuing the parent-child relationship would be harmful to the Children. We find that argument unpersuasive; at a minimum, the Children would be exposed to a substantial risk of emotional harm by continuing their relationship with respondent, as discussed. Moreover, there is no requirement under MCL 712A.19b(3)(m)(*i*) that a parent's conduct be directed toward a specific gender. We are not "left with the definite and firm conviction that a mistake has been made." *Williams*, 286 Mich App at 271.

Because "[o]nly one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights," *Ellis*, 294 Mich App at 32, we need not consider the trial court's additional determination that termination of respondent's rights to BW was also justified under MCL 712A.19b(3)(h).

III. BEST INTERESTS

Respondent also argues that the trial court clearly erred by finding that termination of respondent's parental rights to the Children was in the Children's best interests. We disagree. We

review for clear error a trial court's determination regarding best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). "A trial court's decision is clearly erroneous 'if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.' " *In re Olive/Metts Minors*, 297 Mich App 35, 41; 823 NW2d 144 (2012) (brackets omitted), quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

"Once a statutory basis for termination has been shown by clear and convincing evidence, the court must determine whether termination is in the child's best interests." *In re LaFrance*, 306 Mich App 713, 732-733; 858 NW2d 143 (2014), citing MCL 712A.19b(5). " 'The focus at the best-interest stage has always been on the child, not the parent.' " *In re Payne/Pumphrey/Fortson Minors*, 311 Mich App 49, 63; 874 NW2d 205 (2015) (brackets omitted), quoting *In re Moss*, 301 Mich App at 87. "Best interests are determined on the basis of the preponderance of the evidence." *In re LaFrance*, 306 Mich App at 733.

In determining the best interest of the child, the trial court should consider "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, [] the advantages of a foster home over the parent's home . . . the length of time the child was in care, the likelihood that the child could be returned to her parents' home within the foreseeable future, if at all, and compliance with the case service plan." *In re Payne/Pumphrey/Fortson Minors*, 311 Mich App at 63-64 (quotation marks and citations omitted). "In assessing whether termination of parental rights is in a child's best interests, the trial court should weigh all evidence available to it." *Id*. at 63.

Respondent first argues that he "has bonded" with LM. And respondent argues that termination was not in either of the Children's best interests because respondent's criminal appeal has not "run its course." We disagree. Respondent's argument that he "has bonded" with LM stands in contrast to the trial court's conclusion that LM "has no knowledge of who his father is at this point." That conclusion is supported by the record; LM's mother testified that LM had asked whether he even has a dad. Although respondent testified that he has a bond with LM, we defer to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Ellis*, 294 Mich App at 33. Here, given the mother's testimony, we are not convinced that the trial court clearly erred by concluding that respondent does not have a bond with LM.

Further, we disagree that it is not in the Children's best interests to terminate respondent's parental rights before respondent's criminal appeal has "run its course." In making this argument, respondent fails to recognize that at the best interest stage, "[t]he focus . . . has always been on the child, not the parent." *Payne/Pumphrey/Fortson Minors*, 311 Mich App at 63 (quotation marks and brackets omitted). Here, respondent's focus is squarely on himself rather than the Children. Indeed, respondent does not specifically explain how it is in the Children's best interests to let respondent's criminal appeals run their course; rather, he only argues that, if his convictions are overturned, he should be given the opportunity to parent them. This argument based upon a contingent future event that may never come to pass does not leave us with a definite and firm conviction that the trial court erred. *Ellis*, 294 Mich App at 33. The trial court was tasked with determining what was presently in the best interests of the Children, not with factoring in hypothetical future events.

We also find no error in the trial court's specific findings as to the best interests of the Children. Regarding LM, the trial court noted several factors showing that termination of parental rights was in LM's best interest. These included: (1) LM's need for substantial medical care as a result of his cancer diagnosis; (2) respondent's prolonged absences in LM's life, resulting in LM's confusion about whether he has a father (3) respondent's criminal convictions for sexual behavior toward RW and TM; (4) respondent's failure to follow through with the case service plan even when he was out of prison and able to engage in services; and (5) respondent's minimal parenting time visits with LM before his incarceration. As to BW, the trial court considered (1) the lack of bond between BW and respondent; (2) respondent's refusal to help the mother during her pregnancy with BW; (3) respondent's inability to assist with BW's special needs because of his incarceration; and (4) respondent's inability to provide financial or emotional support to BW while he is in prison. Given that each of these factors was supported by evidence in the record, we again are not left with a definite and firm conviction that the trial court clearly erred when it determined that termination was in the Children's best interests. *Ellis*, 294 Mich App at 33.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Cynthia Diane Stephens
/s/ Mark T. Boonstra