

STATE OF MICHIGAN
COURT OF APPEALS

In re FOX, Minors.

UNPUBLISHED
June 24, 2021

No. 355789
Washtenaw Circuit Court
Family Division
LC Nos. 18-000095-NA; 18-000096-NA

Before: JANSEN, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-father appeals by right the trial court order terminating his parental rights to the minor children, GF and AF, under MCL 712A.19b(3)(b)(iii) (a nonparent causes physical injury and there is a reasonable likelihood a child will suffer abuse if placed in parent’s home), (j) (reasonable likelihood that child will be harmed if returned to parent), and (k)(iii) (battering, torture, or other severe physical abuse of the child or a sibling of the child and there is a reasonable likelihood the child will be harmed if returned to parent). We affirm.

I. BACKGROUND

The children at issue, GF and AF, are the children of father and nonrespondent mother.¹ Also living in the home was JS, mother’s older child by another father; JS suffered from a number of serious medical conditions. On October 20, 2018, the Department of Health and Human Services (DHHS) submitted a petition to remove the three children from the parents’ care and to terminate father’s parental rights to GF and AF. The petition alleged that father physically abused JS and hit AF hard enough to leave welts on his body, and that mother knew about the situation but did not report it or get help. The DHHS specifically alleged that father put his thumb into JS’s dialysis port wound, causing bleeding and bruising, and he choked JS, causing bruising. JS reported that this happened when mother was not home, and father had hurt him before. A medical

¹ Mother was initially a respondent, but the petition against her was dismissed.

examination showed evidence of physical abuse, including petechiae² around JS's neck that could have been the result of choking. Mother reported to the children's protective services investigator that two months earlier, JS told mother that father had choked him. Mother also reported that father had been physically abusive toward her. The petition alleged that mother failed to protect the children from home. At the time of the petition, father was in jail as a result of charges for his assault of JS. The trial court ordered that the three children be placed in the care of DHHS and that father's visits be suspended.

In an amended petition, JS further reported that, in previous incidents, father had put his nose into water so that he could not breathe, punched him in the stomach, and pushed on JS's stomach with his knee to cause JS to have a bowel movement. JS thought that father was trying to kill him. Father's criminal case resulted in an order that he have no contact with mother, JS, GF, or AF.

In November 2018, the trial court dismissed the petition against mother and returned the three children to her care. Tiffany Avery, of the DHHS, explained during a pretrial hearing that the children would participate in services at the Child Advocacy Center and that Avery would assist mother in her divorce process and in ensuring that the custody arrangement would protect mother and the children. Avery testified that the counselors at the Child Advocacy Center would address the loss that GF and AF were suffering in losing their father.

Throughout the next few months, father moved multiple times to adjourn his trial because of delays in his criminal case for his assault of JS. In July 2019, the judge in father's criminal case declined to follow a *Cobbs*³ agreement, and father decided to withdraw his no-contest plea. The prosecution objected to the delay, but the trial court adjourned the trial. In February 2020, father again moved to adjourn on the basis of a delay in his criminal jury trial. The prosecution again objected because of the impact on the children, who were waiting for finality in the case, but the trial court again adjourned the trial. Father requested another adjournment in August 2020, in order to have more time to review medical records, as they were not easily accessible to him when he was transferred to prison after his conviction by a no-contest plea. Father was also taking a class that would enable him to be eligible for parole, and the trial time interfered with that class. The prosecution and the L-GAL objected to the adjournment. The trial court amended the trial schedule to begin on the same date, but at a later time so as to not interfere with father's class.

During this time, workers from the DHHS and the children's L-GAL visited the children and reported that they were doing well with mother and were bonded with each other. Catherine Buck, of the DHHS, testified at one hearing that GF and AF were happy and thriving in mother's care. The L-GAL stated at one hearing that they were a "very bonded family unit," and he did not have any concerns.

² Petechiae are tiny red spots on the skin, possibly resembling a rash, caused by bleeding from very small blood vessels.

³ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

At father's termination trial, JS testified that on the day of the incident that resulted in the initial petition, father changed his diaper and then choked him and put his thumb in JS's "scab" that was a result of his dialysis line and port being removed. Father held his thumb in JS's wound for approximately 15 seconds, causing JS a lot of pain. When mother came home and father left the room, JS told her what father had done. JS also testified that father had choked him other times. Father had also put his knee onto JS's stomach and covered his mouth. Father told JS that if he told anyone, father would kill JS and mother.

Mother testified that on the day of this incident, mother came home and JS showed her that he was bleeding. Mother saw that JS had petechiae bruising on his chest, shoulders, back, ears, cheeks, and near his eyes. Mother and her friend took JS to the police station. She wanted to get GF and AF out of the house because she thought that father would know that the situation was coming to a "head," and she did not want him to hurt them now that she knew that he was abusing JS. The police went to get GF and AF, and mother took JS to the hospital.

Mother explained that JS was born at 29 weeks and had a number of medical complications, resulting in JS losing function in his legs. In 2018, mother donated a kidney to JS. Mother testified that when she met father after JS was born, he "seemed great" with JS. Mother and father then had GF and AF. Father worked for the first year after he and mother got married, but then only worked sometimes, so mother had to provide financially for the family. Father's behavior to mother changed, and he would give her the silent treatment and "gaslight" her. Mother explained that a cycle of abuse developed, in which father would have big outbursts and break things or hurt her or JS, and then he would make up for it. Mother testified that father had previously crushed her hand, choked her, thrown stuff at her, thrown her across the room, and intimidated her. Mother stayed with him because she did not see a way out of the situation, but she felt like she was "walking on eggshells" with him and that the entire family "revolved around [father]'s mood." Mother explained that father emotionally abused her and physically threatened her in front of the children more than 10 times. Father threw televisions and broke things in front of the children, and, one occasion, stopped the car that they were all in and "punched out the rearview mirror," which terrified the children.

Mother testified that in August 2018, approximately two months before the incident that resulted in the initial petition, JS told mother about father abusing him and showed her that he had petechiae bruising on the side of his neck. Mother testified that she believed JS, but that they needed to get through his upcoming transplant. Sometimes mother had seen bruises on JS, but he was on a medication that caused him to bruise easily, and father hid the abuse. JS was often upset when mother got home and never wanted her to leave, so she often needed to take JS somewhere else instead of leaving him alone with father. Whenever mother tried to ask father about what was happening, he would emotionally abuse her. When mother talked to father about him pushing on JS's stomach, he would "minimize" it and say that he was helping JS go to the bathroom and that he did not push hard. Mother testified that father told her that if she did anything to take GF and AF away from him, he would kill her.

Mother testified that she wanted to work at night to reduce father's stress from the children "because he would just act like everything was a strain," and he complained about being home with the children all the time. Father had previously admitted to spanking AF too hard on the bottom and leaving welts. In the summer of 2017, mother had to leave father, GF, and AF in

Kansas to go to Michigan with JS because his kidneys were failing. Mother thought that she was leaving GF and AF with father, but father ended up taking them to mother's aunt's home for the summer. Father did not provide for the children during that period.

On the second day of trial, Detective Jessica Lowry, of the City of Ypsilanti Police Department, testified that she met with mother and JS on the day of the incident. She saw the injuries on JS, and she went to speak with father, who denied that he injured JS. Father thought that JS had fallen on toys. Detective Lowry testified that JS used a wheelchair, so he would have had to have fallen from a sitting position. Father told Detective Lowry that he and mother were having relationship problems, but they were trying to make it work. In his criminal proceeding, father ultimately pleaded no-contest to child abuse and assault with intent to do great bodily harm.

The trial court found a preponderance of the evidence to support taking jurisdiction over the children. The trial then moved on to consider additional evidence for statutory grounds for termination and the best-interest factors.

Jennifer Overstreet, of the DHHS, testified that she was the ongoing worker for the three children. Overstreet testified that the children were doing very well with mother, and every time that she saw them, they were happy, laughing, and playing together. They were doing well in school, and Overstreet had no concerns when she went to their home. GF and AF had never asked Overstreet about father or talked about him until August 2020 when Overstreet was talking with JS about court. JS asked to see a picture of father, and AF said that he wanted to know what father looked like too. AF said that father was the "mean man." AF then walked away to play without more response or emotion. Overstreet testified that she had "no doubt" about mother's ability to keep the children safe, and she thought that mother could provide them with permanency.

Mother testified again on the fourth day of trial. She explained that father was often unemployed because he "got really bad anxiety, couldn't handle it." Mother testified that GF and AF were bonded to father before October 2018, but they were also afraid of him. The family had "walked on eggshells" around him because he yelled, screamed, intimidated, and threw things in front of them, which scared them. Mother also testified that father cycled between good and bad days and that he could not care for GF and AF while she was in Michigan with JS because of his "mental state." Mother also testified that GF and AF were happy and did not ask about father. She thought that the family was relieved to not be with father and that the children were very bonded with each other. Mother explained that she and the children were developing social supports and were involved in their community. Mother was afraid that if father did not have her or JS "to be his victim," he might physically injure GF or AF because he needed an outlet for his aggression.

The trial court found that there was clear and convincing evidence to support termination under MCL 712.19b(3)(iii), (j), and (k)(iii). The trial court also found that there was a preponderance evidence that it was in GF's and AF's best interests to terminate father's parental rights. The trial court acknowledged that there was a bond between father, GF, and AF, and that relative placement weighed against termination, but it also recognized that GF and AF needed closure and finality. The trial court explained that father engaged in a dynamic of control and moments of rage, and although it often advocated for alternatives to termination, it did not find any such alternatives to be appropriate in this case because of the "control issues" and because

father was a “ticking time bomb.” The trial court also noted that it was generally concerned about the overall incarceration rate in the United States and “the dynamics of why people enter into a no-contest plea,” but based on father’s plea and the trial court’s familiarity with the matter, it was convinced that JS was telling the truth about being battered by father. It noted that “what happens to one sibling affects all the others,” and it expressed concern that father would “do something to” AF and GF “to get back at the mother.” Furthermore, the children needed closure and finality, and they were doing well with mother.

An order terminating father’s parental rights was entered on November 24, 2020. This appeal followed.

II. STANDARD OF REVIEW

Father now argues that the trial court erred by finding that it was in GF’s and AF’s best interests to terminate father’s parental rights.⁴ We disagree.

This Court reviews for clear error a trial court’s finding that termination was in a child’s best interests. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Clear error exists when this Court is left with a definite and firm conviction that a mistake has been committed. *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). A trial court must find by a preponderance of the evidence that the termination was in the child’s best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

III. ANALYSIS

Under MCL 712A.19b(5), the trial court must find, in addition to statutory grounds for termination, that the termination is in the child’s best interests. The trial 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 Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). “The trial court may also consider a parent’s history of [committing] 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.” *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). Although a parent’s parental rights may not be terminated on the basis of being a victim of domestic violence, it is always appropriate to consider the parent’s perpetration of domestic violence. See *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011). The focus is on the child rather than the parent. *In re Moss*, 301 Mich App at 87. A trial court must explicitly consider the fact that a child is in the care of a relative at the time of the termination hearing because a relative placement weighs against termination. *In re Olive/Metts Minors*, 297 Mich App at 43.

Although the trial court recognized that father had a bond with the children before going to jail and had shown times of love and nurturing to them, mother also testified that the children were afraid of father. Further, the bond existed before father was incarcerated in October 2018, but in August 2020, AF asked Overstreet to see a picture of father in order to know what he looked

⁴ Father concedes the trial court’s finding of a statutory basis by clear and convincing evidence.

like, and then referred to him as a “mean man.” Father does not argue that reasonable efforts were not made to reunify, and father himself adjourned proceedings repeatedly because of his criminal case, but regardless of the reason for the length of time in which father did not see the children, AF no longer remembered what father looked like, nor did AF apparently care. Likewise, mother and Overstreet testified that GF and AF were happy and did not ask about father. Additionally, the trial court specifically thought that father could injure GF or AF in a moment of “rage” or to get back at mother. It also observed that GF and AF had been negatively affected by father’s abuse of JS. The trial court found these factors to be determinative of father’s parenting abilities. See *In re Olive/Metts Minors*, 297 Mich App at 41-42.

The trial court also appropriately addressed the children’s need for permanency, stability, and finality. See *In re VanDalen*, 293 Mich App 120, 141; 809 NW2d 412 (2011). Specifically, the trial court considered how the children were doing with mother and found that they needed closure. Mother testified about how “peaceful” the family was and how they were happy, bonded, and involved in their community. Mother also explained that they were developing social supports. Additionally, Overstreet testified that she had no concerns about the children after her visits in the home, and she knew that mother was taking care of them.

Further, the trial court explicitly considered that GF and AF were in a relative placement with their mother,⁵ which weighed against termination. The trial court explained why it was not recommending an alternative to termination, as it often would, because it found that father was a “ticking time bomb” with a history of committing domestic violence and control issues. See *In re Olive/Metts Minors*, 297 Mich App at 43; *In re Plump*, 294 Mich App at 273. Additionally, the trial court’s ability to hear from and see the different witnesses in finding facts is due deference, and the trial court specifically explained that it found mother’s and JS’s testimonies to be credible. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Moreover, father may be correct that it is “conceivable” that he could learn to manage his psychological problems and that he could get a job once he is no longer incarcerated, but this hypothetical possibility is unpersuasive in light of the evidence showing that before father was incarcerated, he committed domestic violence in front of the children, engaged in a significant battery of JS, did not consistently work because he “couldn’t handle it,” threatened to kill JS and mother if JS told anyone about father’s abuse of him, threatened to kill mother if she took the GF and AF away from him, and was often overwhelmed by his parenting role. Further, there was evidence that, at one point, father spanked AF so hard that welts were left on AF’s body. AF was only three years old at the time that father was arrested for his battery of JS, so father’s injury to AF occurred at a young, vulnerable age. Therefore, the trial court did not clearly err by finding that it was in AF’s and GF’s best interests to terminate father’s parental rights. See *In re Hudson*, 294 Mich App at 268.

⁵ However, we note that the trial court was not required to consider the children’s placement with mother because a biological parent is not considered a “relative” described in MCL 712A.13a(1)(j). See *In re Schadler*, 315 Mich App 406, 413; 890 NW2d 676 (2016).

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause