

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 21, 2012

In the Matter of BRANHAM, Minors.

No. 304767
Wayne Circuit Court
Family Division
LC No. 09-490724

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Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to their two minor children under MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), (k)(iii), (l), and (m). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The amended original petition in this matter requested that respondents' parental rights be terminated at the initial dispositional hearing. The petition alleged that respondent-mother's rights to three other children had been voluntarily terminated, respondents' youngest child had tested positive for marijuana when she was born, respondent-mother admitted using marijuana with respondent-father when she was pregnant, respondent-mother obtained a personal protection order (PPO) against respondent-father in 2008 for domestic violence, and respondent-father had an extensive criminal history for controlled substances and domestic violence. The trial court conducted an adjudication trial and an initial dispositional hearing at the same time. The court received the following evidence: the termination order for respondent-mother's older children; medical records for one of the older children who had suffered severe head trauma in respondents' care; medical records regarding the birth of the youngest child at issue; evidence of the positive marijuana test when respondents' youngest child was born; respondent-mother's admission to using marijuana off and on throughout her pregnancy; evidence of respondents'

history of domestic violence; evidence of respondent-father's convictions; and evidence of PPOs obtained against respondent-father for domestic violence. It was also reported that respondent-father admitted that he knew respondent-mother was pregnant and used marijuana with her.

The trial court exercised jurisdiction over the minor children and found grounds to terminate respondent-mother's parental rights under MCL 712A.19b(3)(m). However, the trial court found that it was clearly not in the best interests of the children to terminate respondents' parental rights. The trial court ordered respondents to comply with a treatment plan that included psychological evaluations, counseling, and parenting classes.

About eight months later, the guardian ad litem (GAL) filed a supplemental petition requesting that the trial court terminate respondents' parental rights. In addition to the allegations in the amended original petition, the supplemental petition alleged the following: (1) a psychological evaluation completed after the prior termination hearing concluded that termination should be considered if either parent was noncompliant in any way with their treatment plan; (2) respondent-father was frequently frustrated with the younger child and was seen both tossing her on a couch because she was crying and poking her where she had a pre-existing bruise; and (3) respondents had not made any progress despite counseling.

The trial court held another termination hearing. Respondents claimed that the doctrine of res judicata barred further proceedings, but the trial court stated that it did not apply and proceeded. Substantial evidence was presented regarding the serious injury to one of respondent-mother's other children, including testimony by Dr. Leena Dev, the medical director of the child protection team at Mott Children's Hospital at the University of Michigan who had treated the child, and police officer John Ashby. The child suffered a complex fracture of the left side of her skull, a small epidural hematoma under the scalp, discoloration of her eyes, and swelling of her head. Both Dr. Lev and Officer Ashby concluded that the injuries were not consistent with an accidental fall and that the child was the victim of child abuse. Officer Ashby noted that respondent-father was frequently "deceptive" throughout the investigation, and he believed respondent-father was responsible for the child's injuries. Officer Ashby testified that respondent-mother took and passed a polygraph test but that she later admitted that respondent-father did not have a good relationship with the child and did not like when the child cried or whined. Respondent-mother believed "deep down" that respondent-father had something to do with the child's injuries. She also told Officer Ashby that they did not take the child to the hospital initially because they thought it might lead to an investigation.

Substantial evidence was also presented regarding respondent-father's violent tendencies and the history of domestic violence between respondents. The children's paternal grandmother, who hosted at her home respondents' supervised visits with their children, testified that respondent-father became impatient when the baby cried, angry when the baby did not want to be held by him, and took personally the baby's conduct. The paternal grandmother twice saw him toss the baby approximately two feet onto the couch when the child was four to six months old. She also observed him place the then nine-month-old child down in front of him after the child would not stop crying and push her on the bottom with his foot, causing her to fall forward. When confronted, respondent-father brushed it off as if he had been playing. Further, she saw him push on a large bruise that the minor child had on her forehead. On all of these occasions, respondent-mother was present, although she may not have seen the tossing incidents. The

paternal grandmother also testified about numerous incidents of domestic violence between respondents and an incident where respondent-father was violent toward her, which caused her to obtain a PPO against him. She also saw respondent-father being verbally abusive toward one of his other children from a previous relationship and also toward respondent-mother's child who suffered the skull fracture.

The mother of respondent-father's older children testified about respondent-father's behavior around her and indicated that he was abusive with her numerous times. She testified about an incident where he held a gun to her head and a knife to her throat; however, she never saw him physically abuse their children. She obtained two PPOs against respondent-father: one in 2006 and one in 2007. She admitted that, in 2006, respondent-father swore at and called their five-year-old child names because she had her shoes on the wrong feet and that he was very critical with this child. In addition, she admitted that their children witnessed respondent-father's abuse of both her and respondent-mother and that her oldest son was afraid of him.

The children's maternal grandmother testified that she saw respondent-father being physically abusive with respondent-mother and that he was abusive with her once as well, leaving bruises on her arm. Respondent-mother shared with her that respondent-father punched her in the stomach when she was pregnant. The maternal grandmother saw bruises on respondent-mother five or six times, the most recent time in December 2010. She urged respondent-mother to leave respondent-father numerous times, but respondent-mother stated that she loved respondent-father. The maternal grandmother also testified that respondent-mother was also abused by the father of her other children.

Respondents attributed the bruises on respondent-mother's arm in 2010 to playful wrestling. Respondent-mother claimed that she did not think respondent-father intentionally hurt their youngest child. She testified about domestic violence in the beginning of their relationship but not recently. She acknowledged that, during the proceedings involving her three older children, she was told that if she wanted the children back she needed to separate from respondent-father. Respondents admitted to having a lock on the outside of one child's bedroom door to lock her in when they wanted her to go to sleep, but they stated that they unlocked it when she fell asleep.

After the presentation of the evidence, respondents again argued that res judicata barred the proceedings on the supplemental petition. But, the trial court rejected the argument, stating that there were substantially new facts from the prior termination hearing: inconsistent testimony by respondents, substantial evidence of the injuries sustained by respondent-mother's older child, and substantial evidence of respondent-father's domestic violence. The trial court then terminated respondents' parental rights to the minor children.

II. RES JUDICATA

On appeal, respondents contend that the doctrine of res judicata barred the second termination proceeding and that the trial court erred in ruling otherwise. This Court reviews de novo the application of a legal doctrine such as res judicata. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "In order for a prior judgment to operate as a bar to a subsequent proceeding, three requirements must be satisfied: (1) the subject matter of the second action must

be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must have been on the merits.” *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991). “[T]he subject matter is the same in both proceedings if the facts are identical or the same evidence would support both actions.” *Id.* However, when the facts change or new facts develop, the dismissal of a prior termination proceeding does not bar a subsequent termination proceeding. *Id.*

We find that the three requirements above were not met; therefore, *res judicata* did not bar the proceedings. New evidence and changed circumstances justified the pursuit of the second termination proceeding. See *id.* The supplemental petition filed by the GAL alleged facts in addition to those alleged in the amended initial petition: the results of a psychological evaluation; respondent-father’s frustration and actions toward the younger child, including tossing her on a couch and poking her on an obvious bruise; and respondents’ lack of progress despite counseling. The evidence presented included significant testimony and exhibits on five specific issues beyond the scope of the first termination hearing: (1) the injuries to one of respondent-mother’s other children and the identity of the perpetrator of those injuries; (2) respondent-father’s previous and recent violent tendencies, including violence toward his own mother who obtained a PPO against him; (3) the previous and recent domestic violence between respondents; (4) respondent-father’s actions toward the younger child during supervised visitation in respondent-mother’s presence and her defense of his actions; and (5) the results and recommendations of the psychological evaluation.

Respondents argue that the new evidence presented was not significant because the trial court stated that the recent incidents involving respondent-father’s abusive conduct toward the youngest child may not have been enough to rise to the level of termination of parental rights. However, these events did not occur in a vacuum. Rather, they occurred against the backdrop of respondent-father’s significant domestic relations history involving respondent-mother, the mother of his two older children, his own mother, and his mother-in-law. In addition, the trial court found that respondent-father was responsible for the injuries sustained by one of respondent-mother’s older children, and this Court is not in a position to find otherwise. The incidents involving respondents’ youngest child occurred during supervised visitation with respondent-mother present at the home, and she again failed to protect one of her children.

Accordingly, *res judicata* did not bar the additional proceedings or the termination of respondent’s parental rights because there were new facts in evidence.

III. STATUTORY GROUNDS FOR TERMINATION

A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the DHS has proven at least one of the statutory grounds for termination by clear and convincing evidence. MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours Minors*, 459 Mich 624, 632; 593 NW2d 520 (1999). We review for clear error a trial court’s decision terminating parental rights. MCR 3.977(K); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); *In re Sours Minors*, 459 Mich at 633. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-

210; 661 NW2d 216 (2003). We give regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

B. ANALYSIS

The trial court did not clearly err when it found the evidence clear and convincing to terminate respondent-mother's parental rights pursuant to MCL 712A.19b(3)(b)(ii), (g), (j), and (m)(iii)¹ and respondent-father's parental rights pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(iii).²

There was extensive evidence regarding the serious domestic violence issues between respondents, including several PPOs and a conviction. Respondents had engaged in domestic violence in front of their children, and respondent-father continued to be violent with respondent-mother as evidenced by finger-shaped bruises on her arm. Respondent-father had also been involved in violence with the mother of his two older children, the maternal grandmother, and his own mother. In addition, respondent-mother was aware that respondent-father had verbally abused his older daughter and had observed his frustration with their children crying. Respondent-mother's older daughter had suffered a skull fracture while in respondents' care. The examining physician, a specialist in child protection, concluded that this injury was not accidental and that the child was physically abused. The police officers who investigated the injuries believed that respondent-father physically abused that child based on the inconsistent recitation of the facts by respondents, respondents' failure to immediately take the child to the hospital when the injuries were discovered, respondent-father's violent history, and respondent-mother's statement that she suspected respondent-father had something to do with the injuries. In addition, respondent-father treated the youngest child at issue here in an abusive manner. There was testimony that he tossed her two feet onto a couch when she was four to six months old, pushed her on the bottom with his foot causing her to fall when she was about nine months old, and pushed on an obvious bruise on her forehead.

¹ MCL 712A.19b(3)(m) was amended by 2010 PA 7, effective September 4, 2010, and no longer permits termination in a circumstance involving the mere voluntary termination of parental rights to another child after the initiation of proceedings under MCL 712A.2(b). Instead, one of the aggravating factors set forth in new §19b(3)(m)(i) though (viii) must also be present. The amended statute was in effect at the time the trial court in this case terminated respondent-mother's parental rights. While the trial court did not articulate which subsection applied, it expressly stated that the prior voluntary termination "involved a battering, torture, or severe physical abuse, life threatening injuries" to respondent-mother's oldest child, which fits under §19b(3)(m)(iii).

² The trial court terminated both respondents' parental rights pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), (k)(iii), (l), and (m) without distinguishing which statutory subsection applied to which respondent. Because neither respondent had previously had parental rights terminated involuntarily, the court erred in relying on MCL 712A.19b(3)(l).

Based on this evidence, the trial court did not clearly err in concluding that respondent-father inflicted physical abuse on respondent-mother's older child, causing severe injury. He continued to be violent based on how he treated respondents' youngest child. Respondent-mother was aware of respondent-father's violent tendencies, was the victim of physical abuse by him, and was also aware of how he treated their children. She had an obligation to protect her children, and she did not. She continued to stand by him and defend his conduct, testifying that she had no concerns about leaving the children in his care. As the trial court stated, the respondents' failure to acknowledge and take any responsibility for the severe abuse that occurred to respondent-mother's oldest child and their constant minimization of respondent-father's inappropriate treatment of the children established that respondents had failed to provide proper care and custody for their children and that there was no reasonable likelihood that they would be able to do so within a reasonable time considering the children's young ages.

Finally, clear evidence established that respondent-mother had relinquished her parental rights to three other children after child protection proceedings were initiated in another county because respondent-mother's oldest child suffered a severe, unexplained head injury. Therefore, the trial court did not clearly err in finding that MCL 712A.19b(3)(m)(iii) was established with regard to respondent-mother.

IV. BEST INTERESTS OF THE CHILDREN

"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 parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19(b)(5).

The trial court did not clearly err in finding that termination of respondents' parental rights was in their children's best interests. The minor children were just 3½ and 1½ years old when the termination order was entered. They were entitled to live in a home where there was no violence and where they would be protected. Respondent-father had been involved with domestic violence with respondent-mother, the mother of his older children, his own mother, and his mother-in-law. One of respondent-mother's older children had suffered a skull fracture while in respondents' care, and there was significant evidence that respondent-father was responsible. He exhibited abusive behavior toward the younger of the two children at issue here in the presence of respondent-mother. She defended respondent-father and failed to protect her children. Termination of respondents' parental rights was in the best interests of these young children.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering