STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 15, 2012

In the Matter of E. MICHEAU, Minor.

No. 305467
Delta Circuit Court
Family Division
LC No. 11-000611-NA

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), (j), and (k)(*iii*). We affirm.

Respondent is the mother of the infant child at issue. She and her husband, the child's father, resided together with the child and were the child's primary caretakers. When the child was just over three months old, respondent brought her to the emergency room after noticing burns and blistering on the child's buttocks. The burns were severe, second-degree burns covering a large portion of the child's buttocks. The child also had an injury to the top of her lip. Respondent initially claimed that the child must have sustained her burns when the child's father gave her a bath; subsequently, respondent stated she may have accidentally burned the child when she was holding the child over the sink while running dangerously hot water to generate steam in an attempt to relieve the child's congestion. The hospital contacted law enforcement and Children's Protective Services, and the child was removed from the parents' care. At the time of the child's removal, respondent admitted their home was unfit for the infant child.[1]

Because of her need for specialized treatment, the child was eventually transferred to Children's Hospital in Milwaukee, Wisconsin. While at Children's Hospital, the child was examined by Dr. Alice Swenson, a physician specializing in pediatric child abuse, who observed that the child had a torn frenulum,[2] a "typical" injury in child abuse of infants occurring "when a

[1] The apartment was very cluttered, dirty, had an odor of garbage, had cigarette butts all over, and had garbage on the floor, the bathtub had eight to ten inches of water that would not drain, the sink had dirt on the bottom, and the pillowcase on the child's pillow had "lots of dried blood" on it in different spots.

[2] The frenulum is the piece of tissue connecting the upper lip to the gums.

frustrated caregiver pulls violently on the lip or aggressively forces an object or finger into the infant's mouth." Dr. Swenson observed that it also appeared that the child's frenulum had been burned, "possibly from a very hot item being shoved in the child's mouth," which was "highly specific for child abuse." Dr. Swenson also noted that the child had second-degree or partial thickness burns on her buttocks, which was "very concerning for inflicting trauma" on an infant but could have been accidental. Based on these injuries, Dr. Swenson recommended a skeletal survey, a CT scan, and laboratory testing, which revealed that the child had multiple fractures in varying stages of healing, including a fracture to her forearm, a fracture to her clavicle, and numerous fractures to her anterior and posterior ribs.

According to Dr. Swenson, posterior rib fractures in infants do not occur in accidental cases, require a "significant amount of force" caused by a "very violent incident," and are "very specific" for child abuse. Dr. Swenson indicated that the fractures could have occurred on more than one occasion. Further, according to Dr. Swenson, the child's arm fracture was likely caused by a forceful bending of the arm, like when one snaps a pencil. Dr. Swenson concluded that the child's multiple fractures, in the absence of any history of severe accidental trauma such as a high-speed motor vehicle collision, were "diagnostic of physical child abuse," the "clinical picture is highly specific for inflicted trauma" caused by a "significant amount of violence" beyond what one would expect in the routine care of an infant, and, "with a very high degree of medical certainty" the child "was the victim of at least one and possibly multiple episodes of significant, massive, potentially life-threatening child physical abuse." Dr. Swenson further opined that the child was "clearly at great risk for further significant injury or even death if she remains in the same home environment."

Neither parent provided a plausible explanation for the child's severe injuries, with the exception of the burns to her buttocks, which respondent admitted could have occurred accidentally while in her care, and they did not implicate another caregiver in the abuse. Respondent blamed the father, who handled the child aggressively and roughly, for the fractures. Also, the father had a substance abuse problem and always cared for the child while he was under the influence of drugs. Testimony revealed that respondent had a history of assaultive behavior, had slapped the child's face on one occasion, and tossed her on the bed during a fight with the father. There was no explanation for the injury to the child's frenulum.

After the extent of the child's injuries was discovered, petitioner immediately filed a petition requesting termination of both parents' parental rights to the child at the initial dispositional hearing. Thereafter, the court assumed jurisdiction over the child on the basis of the father's voluntary plea, during which he admitted that he had a substance abuse issue that impaired his ability to adequately protect the child, their home was unfit for the child to live in, and the child was injured while in his and respondent's care. The court then immediately proceeded to terminate the father's parental rights, and, after conducting a dispositional hearing, terminated respondent's parental rights. This appeal ensued. [3]

[3] In exchange for his plea in this case, the father was given immunity from criminal prosecution for any alleged abuse of the child. He is not a party to this appeal.

I. ADJUDICATION

Respondent first claims that the trial court's assumption of jurisdiction over the child based solely on the father's plea without adjudicating her parental fitness erroneously deprived her of her right to a jury trial. We disagree. Her claim primarily presents a legal question and involves court procedure, issues which are reviewed de novo. *In re CR*, 250 Mich App 185, 200, 203; 646 NW2d 506 (2001).

Both parents initially demanded a jury trial on the issue of jurisdiction pursuant to MCR 3.911(A) as was their right under MCL 712A.17(2) (providing a right to a jury at the adjudicatory trial). Subsequently, over respondent's objection, the court assumed jurisdiction over the child based solely on the father's plea and his supporting testimony, which provided sufficient basis for the court to assume jurisdiction under MCL 712A.2(b). The court then proceeded to the dispositional phase of the proceedings without conducting an adjudicatory trial concerning the allegations made against her, despite her request for a trial.

A parent has a right to demand a jury trial during the adjudicative phase, but jurisdiction over a child can also be acquired by a plea of admission, or a plea of no contest. *In re PAP*, 247 Mich App 148, 153; 640 NW2d 880 (2001). When the family court acquires jurisdiction, it may after a dispositional hearing take measures "against any adult." MCR 3.973(A); *In re LE*, 278 Mich App 1, 17; 747 NW2d 883 (2008). "The court need not separately ascertain whether it has jurisdiction over each parent." *Id*., citing *In re CR*, 250 Mich App at 202-203.

Here, once jurisdiction over the child was properly established under MCL 712A.2(b) by the father's plea admitting neglect, the court was not required to hold an adjudicatory trial to substantiate the allegations of abuse and neglect against respondent before proceeding to disposition. *In re LE*, 278 Mich App at 17; see also *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). Respondent, therefore, was not entitled to a separate adjudication and the trial court did not err in assuming jurisdiction over the child solely based on the father's plea admissions adequately establishing a statutory ground for jurisdiction under MCL 712A.2(b).

II. EVIDENTIARY ISSUES

Respondent raises two claims regarding the admissibility of evidence.[4] We review a trial court's ruling on the admissibility of evidence for an abuse of discretion, but we review de novo whether as a matter of law a court rule or statute precludes admission of evidence. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). A trial court abuses its discretion when its decision results in an outcome outside the range of reasonable and principled outcomes. *Id.*

First, respondent claims that the trial court abused its discretion in admitting the child's medical records from her initial emergency room visit under MRE 803(6). We disagree.

[4] Legally admissible evidence is required to prove the statutory grounds for termination where termination is sought, as here, at the initial dispositional hearing. MCR 3.977(E)(3).

The medical records at issue were admitted through Amber Mayers, a risk manager employed by the hospital. Mayers testified that (1) she had knowledge of the record-keeping procedures at the hospital; (2) she was authorized to sign out records, (3) the medical records at issue were used and prepared in the ordinary course of business by doctors, nurses, and hospital staff at or near the time of the occurrence for the matter set forth by them; (4) the medical records were kept in the ordinary course of business in a locked unit at the hospital; (5) the custodian of the records gave her a sealed envelope purportedly containing the medical records from the child's emergency room visit, which were subject to a subpoena; (6) she brought the sealed envelope to court in its entirety, and (7) she could authenticate the signatures of doctors and nurses. We find that Mayers's testimony clearly established the foundational requirements set forth in MRE 803(6), i.e., that the child's medical records were "made at or near the time by, or from information transmitted by, a person with knowledge," "kept in the course of a regularly conducted business activity," and "it was the regular practice of that business activity to make the . . . record."

Although, as respondent points out on appeal, Mayers was not the custodian of the records, MRE 803(6) also allows testimony by an "other qualified witness" to establish its requirements. *People v McLaughlin*, 258 Mich App 635, 652; 672 NW2d 870 (2003). Here, Mayers was a hospital employee who clearly had "knowledge of the business involved and its regular practices" necessary to establish a proper foundation for the admission of the medical records under MRE 803(6). *People v Vargo*, 139 Mich App 573, 580; 362 NW2d 840 (1984). There is nothing in Mayers's testimony to indicate that "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." MRE 803(6). Accordingly, we conclude that the trial court did not err by finding that Mayers' testimony laid a proper foundation for the admission of the child's medical record under MRE 803(6).

We further find that Mayers' testimony properly authenticated the child's medical records. MRE 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See also *Meagher v Wayne State University*, 222 Mich App 700, 724; 565 NW2d 401 (1997).

Mayers's testimony clearly established that the records she brought to court were, in fact, the child's medical records from her emergency room visit, and thus, were properly authenticated under MRE 901(a). During her testimony, Mayers was able to attest to the chain of custody of the medical records, i.e., that they were prepared and kept in the ordinary course of business and stored in a locked unit; she signed out the child's records from her emergency room visit, and the custodian provided the records to her pursuant to a subpoena. Mayers was also able to identify the hospital's identifying mark on the records, the forms contained in the record as the hospital's forms, and the signatures of the various doctors and nurses contained in the record. Furthermore, the nurse who treated the child in the emergency room testified that the nurse's notes included in the medical record were, in fact, her notes and signature. Because there was a sufficient foundation under MRE 803(6) and MRE 901(a) to admit the records, the trial court did not abuse its discretion in admitting them. *Yost*, 278 Mich App at 353.

Respondent next claims that the court improperly allowed the admission of the report and expert testimony of Dr. Alice Swenson, a physician specializing in child abuse pediatrics who

consulted in the treatment and diagnosis of the child, because the facts and data that formed the bases of her opinion were not in evidence as required under MRE 703. We disagree.

MRE 702 governs the admissibility of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 703 further provides that the "facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." "This rule permits 'an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony."' *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011), quoting staff comment to the 2003 amendment of MRE 703. "It necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). An expert witness "must have a sound evidentiary basis for his or her conclusions," and an opinion is "objectionable if it is based on assumptions that do not accord with the established facts." *Id.*

The trial court recognized Dr. Swenson as a qualified expert in child abuse pediatrics in accordance with MRE 702, and Dr. Swenson provided expert testimony regarding the child's injuries. Dr. Swenson's report, containing the results of radiological studies, her physical examination, and laboratory studies, was also admitted into evidence. In rendering her opinion, she relied on her personal observations and physical examination of the child, the x-rays and CT scans showing multiple fractures, radiology reports, laboratory results, notes by nurses, physicians, and social workers, and records from the hospitals who treated the child before her admission to Milwaukee Children's Hospital, where Dr. Swenson personally examined the child and participated on the team who treated and diagnosed the child.

Dr. Swenson's expert testimony regarding the cause and nature of the child's external injuries, i.e., the second-degree burns to her buttocks and burns to her back, the injury to her mouth (the torn frenulum), and the bruise on her cheek was based on her own personal observations and physical examination of the child's injuries, which she described in her testimony. Additionally, photographs taken during her physical examination of the child at the hospital depicting the child's external injuries were admitted into evidence. Dr. Swenson's personal observations and the photographs clearly formed an evidentiary basis for her expert opinion regarding the nature and cause of those injuries.

Dr. Swenson's expert opinion regarding the cause and nature of the child's multiple fractures, however, was based on radiological studies, which admittedly were "very important"

to the formation of Dr. Swenson's opinion.[5] Although the reports completed by the radiologist were not admitted into evidence, the x-rays and CT scans showing the child's multiple fractures were admitted into evidence. During her testimony, Dr. Swenson, who has experience evaluating x-rays and CT scans, regularly evaluates and interprets radiological studies, and understands what x-rays show, was able to identify the fractures in detail from the radiological studies admitted into evidence and ascertain that the child's bones, with the exception of the fractures, appeared normal. It is also noteworthy that Dr. Swenson clearly had personal knowledge of the radiological studies as well as the lab results. Specifically, Dr. Swenson was the physician who recommended the radiological and lab studies, and the results of those studies were provided to her. In fact, she personally observed the fractures on the "films" themselves and reviewed them directly with the pediatric radiologist. Accordingly, Dr. Swenson's expert opinion regarding the cause and nature of the child's multiple fractures was based on facts and data in evidence, i.e., the radiological studies, as well as her personal knowledge and review of the studies. We find under these circumstances, that MRE 703 was adequately satisfied through the admission of the radiological studies. Although it may have been ideal to have the radiology reports admitted into evidence in addition, the radiological studies admitted into evidence provided a "sound evidentiary basis for . . . her conclusions." *Unger*, 278 Mich App at 248. Accordingly, we conclude that the trial court did err in allowing Dr. Swenson's expert testimony and admitting her reports summarizing the results and her opinion.

III. STATUTORY GROUNDS

Respondent next claims that petitioner failed to establish by clear and convincing evidence a statutory ground for termination. We disagree.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350, 355; 612 NW2d 407 (2000). We review "for clear error a trial court's factual findings as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). This Court must give regard to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); MCR 2.613(C); MCR 3.902(A).

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*i*) and (b)(ii) (child suffered injury or abuse caused by the parent's act and/or the parent failed to prevent the physical injury or abuse and a reasonable likelihood exists that the child will suffer injury or abuse in the foreseeable future if placed in parent's home), (g) (parent failed to provide proper care and custody, and there is no reasonable expectation that the parent will be able to do so within a reasonable time), (j) (reasonable likelihood that the child will be harmed if returned to the parent's home), and (k)(*iii*) (the parent abused the child, including

[5] Dr. Swenson did not note any fractures during her physical examination of the infant, which is not uncommon.

battering, torture, or severe physical abuse). The trial court did not clearly err finding that statutory grounds for termination were established by clear and convincing evidence.

The infant child suffered unexplained, serious, non-accidental injuries highly specific for child abuse while in the primary care and custody of her parents. In fact, the medical evidence was uncontroverted that the child's injuries were the result of severe and violent abuse. The parents provided no plausible explanation for the child's injuries, except for the burns, which respondent admitted might have occurred accidentally while in her care. Neither parent implicated another caregiver, indicating that either parent or both parents likely perpetrated the abuse on the child, or at a minimum, failed to adequately safeguard the child from injury or abuse. The extent, seriousness, and abusive nature of the child's injuries, especially the multiple fractures and torn frenulum that are highly specific for child abuse, indicates a pattern of abuse in the child's home and clearly shows that the child, an infant, would be at a substantial risk of future injury or abuse if returned to respondent's care. This is especially so considering the ongoing uncertainty surrounding the circumstances of the child's severe and abusive injuries and the testimony indicating that the parents, who were the child's primary caretakers, would likely remain together. In that regard, it is significant that less than one month before the dispositional hearing, respondent professed her love for the father despite her previous statements to a police officer indicating that she believed the father's conduct caused the child's fractures. This clearly indicates that respondent, at a minimum, would be unable to adequately safeguard the child from harm or abuse in the future and the infant child could not safely return to her home.

On this record, we find that the evidence clearly and convincingly established a reasonable likelihood of harm if the child returned to respondent's home. MCL 712A.19b(3)(j). Although petitioner only needs to prove one statutory ground by clear and convincing evidence to terminate a parent's parental rights, we find that the same evidence clearly and convincingly established that there was no reasonable expectation that respondent would be able to provide proper care and custody for the child within a reasonable time. MCL 712A.19b(3)(g). Although the evidence did not clearly and convincingly implicate one of the parents in the abuse and neither parent admitted intentionally injuring the child or implicated any other caregiver, termination under subsections (g) and (j) "is permissible even in the absence of determinative evidence regarding the identity of the perpetrator, where the evidence shows that respondents must have either caused the intentional injuries or failed to safeguard the children from injury." *In re Vandalen*, 293 Mich App 120, ___, ___ ; ___ NW2d ___ (2011). See also *In re Ellis*, ___ Mich App ___, ___; ___ NW2d ___ (2011), slip op at 2, where this Court found that "[w]hen there is severe injury to an infant, it does not matter whether respondents committed the abuse at all, because under these circumstances there is clear and convincing evidence that they did not provide proper care."

We further agree with the trial court that the same evidence established grounds for termination of respondent's parental rights under MCL 712A.19b(3)(b)(*i*) and (b)(*ii*). In light of the child's serious burns and the unexplained multiple fractures and torn frenulum that are highly specific for child abuse, there was clearly a reasonable likelihood that the child would suffer physical injury or abuse in the foreseeable future if placed in respondent's home due to the her abuse or neglect of the child or her failure to adequately safeguard the child. Although the child's injuries clearly constituted "severe physical abuse," considering the lack of determinative evidence regarding the identity of the child's perpetrator, we cannot conclude that petitioner

established a ground for termination under MCL 712A.19b(3)(k)(*iii*) by clear and convincing evidence. This error, however, is harmless, because other statutory grounds for termination were established by clear and convincing evidence, and only one statutory ground need be established to support termination of parental rights. *Trejo*, 462 Mich at 350, 355.

IV. BEST INTERESTS

Finally, we find no clear error in the trial court's finding that termination of respondent's parental rights was in the child's best interests. MCL 712A.19b(5); *Trejo*, 462 Mich at 356-357. Considering the unexplained, severe, and life-threatening abuse sustained by the child as an infant, it could not be reasonably assured that the child would be safe in respondent's care and custody. *Vandalen*, 293 Mich App at ___. Under these circumstances, it would be unfair to delay the child's permanency any longer, especially where, as here, the child was highly adoptable and doing well in foster care. The court did not clearly err in terminating respondent's parental rights. *In re Mason*, 486 Mich at 152.

We affirm.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey