

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 14, 2013

In the Matter of M. WILKERSON, JR., Minor.

No. 312197
Genesee Circuit Court
Family Division
LC No. 08-124316-NA

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Respondent M. Wilkerson, Sr., appeals by right the trial court's order terminating his parental rights to the minor child at the initial dispositional hearing pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), (k)(iii), and (k)(v). We affirm.

The child was placed in respondent's custody in 2009, after the child's mother's parental rights were terminated and services were provided to respondent. In July 2011, Child Protective Services (CPS) responded to a report that the child had been physically abused. The CPS investigator discovered a knot or contusion on the right side of the child's chin, with some abrasions in the middle of it, and swelling from underneath the child's right ear along the jaw line, with several breaks in the skin. The child also had a severe lip injury and had dried blood in the cavities of his teeth and on his lip. When the child's shirt was removed, scarring was observed on the back of his shoulders and lower back. The child was taken to the hospital and his injuries were deemed a classic case of child abuse. A medical examination also revealed signs of past injuries that were indicative of abuse. Respondent was criminally charged and pleaded guilty to third-degree child abuse. Petitioner filed a petition to terminate respondent's parental rights to the child at the initial dispositional hearing. Following a three-day hearing, the trial court terminated respondent's parental rights.

On appeal, respondent argues that the trial court erred by finding that the statutory grounds for termination were established by clear and convincing evidence and by finding that termination of his parental rights was in the child's best interests. We disagree.

We review for clear error the trial court's factual findings, as well as its ultimate decision that a statutory ground for termination has been proven. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Once a statutory ground for termination has been established, the court shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5). The trial court's best-interests decision is also reviewed for clear error. MCR 3.977(K). A finding is clearly erroneous when, 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 Mason*, 486 Mich at 152. Deference is given to the trial court's assessment of the credibility of the witnesses. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

The petitioner must establish at least one statutory ground for termination by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The trial court terminated respondent's parental rights under MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), (k)(iii), and (k)(v).

Respondent argues that the trial court's decision was improperly based on hearsay statements by neighbors regarding recurring abuse by respondent. Because petitioner sought to terminate respondent's parental rights at the initial dispositional hearing, MCR 3.977(E) required that clear and convincing, legally admissible evidence support the court's decision. See *In re Utrera*, 281 Mich App 1, 15-17; 761 NW2d 253 (2008). An out-of-court statement is not hearsay unless it is offered to prove the truth of the matter asserted. MRE 801(c). The trial court allowed petitioner to present evidence of neighbors' reports of abuse for the purpose of explaining why petitioner acted as it did, but the court expressly stated that such evidence would not be considered for its truth for the purposes of deciding the issue of jurisdiction or the existence of a statutory ground for termination. Thus, the record does not support respondent's claim that the trial court's decision was based on hearsay accounts.

We also reject respondent's argument that his conviction of third-degree child abuse provided the only admissible evidence that the child had been abused, and that the evidence was insufficient to establish a statutory ground for termination. Respondent pleaded guilty to third-degree child abuse, which is committed when a "person knowingly or intentionally causes physical harm to a child" and "[t]he person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child." MCL 750.136b(5). When respondent pleaded guilty, he admitted that he struck the child on the neck and hands with a belt. In addition to the evidence of respondent's guilty plea, the caseworker testified that he spoke to respondent and that respondent admitted responsibility for the child's injuries. Although respondent disputed the circumstances of those injuries, petitioner presented medical evidence showing that the injuries indicated a "classic case" of child abuse and that the child's injuries were not consistent with respondent's explanations. Petitioner also presented medical evidence that the child had other, unexplained injuries that were indicative of past abuse. Respondent testified that he sometimes used a belt on the child's legs or back when disciplining the child, and he also stated that he allowed his girlfriend to discipline the child with spankings and once with a belt.

In *In re Ellis*, 294 Mich App 30, 35-36; 817 NW2d 111 (2011), this Court held that "termination of parental rights under MCL 712A.19b(3)(b)(i), (b)(ii), (j), and (k)(iii) is permissible even in the absence of definitive evidence regarding the identity of the perpetrator when the evidence does show that the respondent . . . must have either caused or failed to prevent the child's injuries." Respondent's guilty plea, admissions, and the medical evidence provided clear and convincing proof that the child had been subjected to severe physical injury or abuse at respondent's hands, or at the hands of respondent's girlfriend. Even if respondent did not actually cause the injuries or abuse, given the evidence that respondent admittedly allowed his girlfriend to physically discipline the child, including at least once with a belt, and the evidence

that the child had older scars consistent with past abuse, the trial court properly found that respondent had the opportunity to prevent the child's injuries or abuse and failed to do so. Further, petitioner presented evidence that respondent had been provided with past services, which were ineffective in preventing the abuse. The trial court did not clearly err by finding that the child was reasonably likely to suffer from injury or abuse in the foreseeable future if returned to respondent's custody. Thus, termination was warranted under §§ 19b(3)(b)(i) and (b)(ii).

Clear and convincing evidence also supported termination of respondent's parental rights under § 19b(3)(g). Regardless of whether respondent directly caused the child's injuries, it was apparent from the evidence that he failed to provide proper care or custody by allowing the child to remain in an abusive environment.

Similarly, the evidence supported termination of respondent's parental rights under § 19b(3)(j) and (k)(iii). Again, the evidence clearly indicated that respondent abused the child himself, or that he failed to protect the child from abuse. See *In re Ellis*, 294 Mich App at 35-36. It was therefore reasonably likely that the child would again be harmed if returned to respondent's home. Moreover, the medical evidence clearly supported a finding that the child was severely physically abused and that the injuries received on July 3, 2011, were not an isolated incident.¹

We reject respondent's argument that he was not given the opportunity to demonstrate that he had benefited from the limited services he received before his parental rights were terminated. The evidence showed that he was provided with services in 2009, which included parenting classes, anger management classes, and participation in a family reunification program. Despite those services, the child was subjected to severe and ongoing abuse while in respondent's care. There was clear and convincing evidence that respondent had not benefited from past services, and there was no reason to believe that any additional services could protect the child.

Respondent also challenges the trial court's determination that termination of his parental rights was in the child's best interests. Respondent complains that the trial court's best-interests decision was "perfunctory," and failed to address whether his participation in services had improved his parenting skills. He argues that because he participated in services, he should have been given a chance to demonstrate what he had learned. A court is only required to make "[b]rief, definite, and pertinent findings . . . on contested matters[.]" MCR 3.977(I)(1). Respondent fails to cite the full context of the trial court's best-interests decision. Contrary to respondent's assertion, the trial court did address whether his participation in services was likely to improve his parenting skills, but found that any benefit was unlikely because respondent had

¹ We question whether there was sufficient evidence to prove the statutory ground set forth in § 19b(3)(k)(v), which requires evidence of a "[l]ife-threatening injury." However, because only one statutory ground for termination is required, and the evidence supported termination under the remaining statutory grounds, any error in relying on § 19b(3)(k)(v) was harmless. *In re McIntyre*, 192 Mich App at 50.

not benefitted from past services. The court's findings on this issue were sufficient to satisfy MCR 3.977(I)(1).

Respondent also argues that the trial court improperly shifted the burden of proof by essentially requiring him to prove that returning the child to his custody was in the child's best interests. The record does not support this claim. The trial court did not state that respondent had any burden to prove anything, and none of the court's findings was predicated on respondent's failure to present evidence. The court simply concluded, after making factual findings from the evidence presented, that termination of respondent's parental rights was in the child's best interests, consistent with the requirements of MCL 712A.19b(5).

The evidence supports the trial court's determination that termination of respondent's parental rights was in the child's best interests. As explained previously, the child had been exposed to severe and ongoing physical abuse, and past services had already failed to prevent the abuse. Because petitioner was seeking to terminate respondent's parental rights at the initial dispositional hearing, it was not obligated to offer respondent a home study, or to provide visitation after respondent was released from jail. See MCL 712A.19b(4). The trial court did not clearly err by finding that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ Kathleen Jansen
/s/ William C. Whitbeck
/s/ Stephen L. Borrello