STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of D. M. O. MACKIN, Minor.

UNPUBLISHED
November 14, 2013

No. 316355
Manistee Circuit Court
Family Division
LC No. 12-000053-NA

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

PER CURIAM.

In this child protection proceeding, respondent appeals by right the trial court's order terminating his parental rights to the minor child.[1] We affirm.

In a previous case, the same court terminated respondent's parental rights to another child, Q. M. In this case, respondent argues that the court clearly erred in find statutory grounds under MCL 712A.19b(3)(i) and (3)(j), to terminate his parental rights based on purported evidentiary errors. He does not challenge the court's best-interest determination.

This Court reviews for clear error the trial court's factual findings and determination that a statutory ground for termination has been established by clear and convincing evidence. MCR 3.977(E)(3); MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). However, we review the trial court's evidentiary decisions for an abuse of discretion. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). The court abuses its discretion when it chooses an outcome that is outside the range of principled outcomes. *Id.* In addition, questions of law related to evidentiary decisions are reviewed de novo. *Id.*

The court may terminate parental rights if it finds by clear and convincing evidence at least one statutory ground exists to do so. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). The court found that petitioner proved the following statutory grounds:

> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

[1] The child's mother, whose rights were also terminated, is not participating in this appeal.

> (j) There 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. [MCL 712A.19b(3).]

Petitioner bore the burden of establishing statutory grounds for termination by clear and convincing evidence. *In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003). Clear and convincing evidence creates in the mind of the fact-finder "a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009). Because petitioner need only prove one statutory ground to uphold a termination decision, a court's erroneous finding on additional grounds is harmless and does not warrant reversal. *In re HRC*, 286 Mich App 459, 461; MCR 2.613(A).

Respondent first argues that the court erred by considering inadmissible evidence in making its findings on the pleaded statutory grounds. While partially correct, the court's factual findings were sufficiently supported by admissible evidence, thus rendering any error harmless. MCR 2.613(A).

When a petitioner seeks termination of a respondent's parental rights at initial disposition, the court must render its decision "on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing." MCR 3.977(E)(3). And when the court takes jurisdiction over the children based on the plea of a single parent, the rules of evidence apply in full force in the event that a petitioner seeks to terminate the other parent's parental rights. *In re CR*, 250 Mich App 185, 205-206; 646 NW2d 506 (2001) ("the petitioner must provide legally admissible evidence in order to terminate the rights of the parent who was not subject to an adjudication"). Therefore, petitioner was required to prove its case against respondent with legally admissible evidence.

Generally, all nonprivileged and relevant evidence is admissible in court. MRE 402. Evidence is relevant if it has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, hearsay; i.e., a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," is inadmissible, absent an applicable exception. MRE 801(c); MRE 802.

During the hearing, the court permitted, over respondent's objection, foster care worker Sarah Hubbell to quote from portions of a psychological report from Dr. Kerri Schroder. This report was prepared in 2010 and admitted into evidence during the prior case in which the court terminated respondent's parental rights to Q. M. This report was never admitted into evidence in this case. Dr. Schroder's psychological report facially qualifies as a business record that is admissible as a hearsay exception in MRE 803(6). But the contents of the report contained Dr. Schroder's diagnosis of, and treatment recommendations for, respondent. Although these statements qualify under the medical treatment and diagnosis hearsay exception in MRE 803(4), our Supreme Court recently recognized that allowing such testimonial statements from a nontestifying declarant violates the Confrontation Clause in the United States Constitution, and

is thus inadmissible. *People v Fackelman*, 489 Mich 515, 535; 802 NW2d 552 (2011). Thus, the court abused its discretion by allowing Hubbell to recite Dr. Schroder's statements from the report.

However, we find this error harmless because all of the contested evidence, including Dr. Schroder's report and witness testimony from the prior case, were subject to judicial notice, and was thus admissible. The court may take judicial notice of facts that are "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). "[A] circuit court may take judicial notice of the files and records of the court in which it sits." See *Snider v Dunn*, 33 Mich App 619, 625; 190 NW2d 299 (1971), citing *Knowlton v City of Port Huron*, 355 Mich 448; 94 NW2d 824 (1959). Here, the trial court acknowledged that the same court and sitting judge decided the previous case in which it terminated respondent's parental rights to Q. M. In its August 3, 2011, opinion from the previous case, the court adopted in large part Dr. Schroder's report, the testimony of the parenting skills supervisor, and the testimony of a policeman in making its factual findings that statutory grounds existed to terminate respondent's parental rights to Q. M. All this disputed evidence was submitted to the court in the previous case, and defendant had the opportunity to contest that evidence and confront the witnesses in that case. And the portions of Dr. Schroder's report recited by Hubbell during the hearing were included in the court's prior opinion, as the court directly quoted those statements in its prior opinion when deciding the instant case. Because the same judge sitting in the instant case also decided the prior case, the court's prior findings and supporting evidence were "not subject to reasonable dispute," and thus the trial court could properly take judicial notice of this evidence.

Respondent next argues that the court erred in finding that MCL 712A.19b(3)(i) justified termination of his parental rights to the minor child. Respondent is incorrect. The court reviewed its reasons for terminating respondent's right to Q. M. in the prior case, noting that respondent's problems were chronic and prevented him from being able to care for the child. The court acknowledged that respondent previously suffered from homelessness, unemployment, anger management, emotional instability, bonding difficulties, and inadequate parenting skills. The court also noted that respondent's prognosis for change was unlikely due to his minimization and denial. It also noted that he failed to demonstrate noteworthy improvement in these problems after being offered numerous services for almost two years. In considering the instant case, the court recognized that respondent admitted that he was again homeless. In addition, respondent's foster care workers from Bethany Christian Services testified that respondent had not provided documentation of his participation in services designed to address his outstanding needs. They also testified that he was resistant to sign disclosure forms with his mental health providers, which prevented his case monitors from tracking his progress or discovering whether he had improved since the prior termination. The court recognized that respondent's recent participation in counseling was insufficient to address his longstanding reunification barriers. Thus, the court had sufficient evidence to find, by clear and convincing evidence, that respondent's parental rights to Q. M. were terminated because of respondent's serious and chronic neglect of the child, and that the prior services offered to respondent did not successfully rehabilitate him. See MCL 712A.19b(3)(i).

As to this ground, respondent also argues that, in only finding statutory grounds under MCL 712A.19b(3)(g) and (3)(j) to terminate his parental rights to Q. M. in the previous case, the court never found that respondent abused or neglected the child so as to support the finding under subsection (3)(i) in the instant case. This argument is meritless. Failing to provide proper care and custody for a child is neglect, as is maintaining a home environment that is likely to result in harm to a child. By making findings on these statutory grounds, the necessary implication of these findings is that respondent's neglect was serious enough to warrant termination of his parental rights. And as noted above, the court had sufficient evidence, based on its own court records, to find that respondent seriously and chronically neglected Q. M. and failed to improve after being offered reunification services. In summary, the trial court did not err in finding that termination was proper under MCL 712A.19b(3)(i).

Respondent finally asserts that the trial court erred in finding that MCL 712A.19b(3)(j) justified termination of his parental rights to the minor child. This argument is also meritless. Under the doctrine of anticipatory neglect, "[h]ow a parent treats one child is certainly probative of how that parent may treat other children." *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973). Respondent failed to adequately care for Q. M. in the prior case, which resulted in termination of his parental rights to that child. The court noted that respondent's condition had not significantly changed since the prior termination, such that returning the child to respondent would place the minor child in an unstable and dangerous environment. The record supported this finding. On the date of the termination hearing, respondent admitted that he was homeless. Witness testimony established that respondent's previous live-in girlfriend had been substantiated by petitioner for criminal sexual conduct of a child, which resulted in termination of her parental rights. Respondent's foster care workers also testified that respondent refused to cooperate with petitioner and did not provide documentation of his progress in services. In light of respondent's chronic instability and homelessness, coupled with his limited parenting skills and minimization of his life circumstances, the court had sufficient evidence to find, by clear and convincing evidence, that there "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." MCL 712A.19b(3)(j); *In re Utrera*, 281 Mich App at 24-25 (noting that a parent's longstanding instability, poor judgment, inability to maintain parent/child bonds, and failure to improve after services supported a court's termination decision under § 19b(3)(j)).

We agree that the court erred in allowing a witness to recite portions of respondent's psychological report during her testimony; however, because the contents of the psychological report were largely subject to judicial notice, this error was harmless. We further find that the court had sufficient evidence to find, with clear and convincing evidence, that statutory grounds in MCL 712A.19b(3)(i) and (3)(j) justified termination of respondent's parental rights to the minor child.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering