

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* LILLY/MUSHATT/CHATMAN, Minors.

UNPUBLISHED  
November 20, 2014

No. 322183  
Ingham Circuit Court  
Family Division  
LC No. 13-001274-NA

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Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

The circuit court terminated respondent-mother's parental rights to all three of her young children under MCL 712A.19b(3)(b)(i) (physical injury to child), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood of harm), following the near-fatal bathtub drowning of her 15-month-old son, EC. Because petitioner presented clear and convincing legally admissible evidence in support of these grounds and established by a preponderance of the evidence that termination was in the children's best interests, we affirm.

I. BACKGROUND

In June 2013, the Department of Human Services (DHS) filed a petition requesting that the circuit court take jurisdiction over respondent's three children, all of whom were under the age of three. Police had been called to respondent's home when the father of respondent's middle child, JM, punched respondent during an argument, threatened to kill her, and then lunged at her with a butcher knife while JM was sitting on her lap. Child Protective Services (CPS) assisted respondent in obtaining a personal protection order (PPO) against JM's father and making a safety plan, which included respondent taking herself and the children to a location unknown to JM's father. Respondent later admitted, however, that she did not serve the PPO and continued her relationship with JM's father. Respondent pleaded to grounds supporting court jurisdiction, allowing the DHS to provide services to respondent. The children remained in respondent's care at that time.

Respondent submitted to a court-ordered psychological evaluation. The evaluating psychologist expressed concerns about respondent's ability to benefit from a service plan. Specifically, the evaluator believed respondent had low intellectual functioning and suffered from a paranoid personality disorder. These elements manifested in respondent's defensive attitude that impaired her ability to accept instruction. The evaluator recommended close supervision of respondent's case while the children remained in her care. Following the

evaluation, respondent participated in counseling and parenting classes. Although respondent completed her parenting classes, she did not appear to integrate the lessons into her everyday life. And respondent discontinued counseling because she felt she needed assistance only with domestic violence and did not feel that the counselor was adequately addressing that issue.

On February 22, 2014, CPS filed an “emergency removal petition” with the court. According to that petition, respondent “left [JM] and [EC] in the bathtub alone for ‘2-5 minutes.’” The petition continued that respondent “stated she found [EC] face down in the tub because she noted it was too quiet in the bathroom and checked on the boys.” An officer responding to the scene, however, reported that respondent’s “friend” found EC “face down in the tub” and indicated that the children “were in the bathroom alone for approximately an hour.” A seven-year-old visitor in the home told the officer that she found EC and summoned respondent. Despite that it was a Saturday, the court immediately conducted an emergency removal hearing. Respondent did not admit any ground stated in the emergency petition. However, her counsel indicated that respondent “agree[d] that there is probable cause for removal.”

At a March 5, 2014 dispositional review hearing, the CPS investigator who prepared the emergency removal petition indicated that EC was then in the pediatric intensive care unit (PICU) at Sparrow Hospital. She further noted that during the child protective proceeding, other concerns had been raised regarding respondent’s inadequate supervision of her children. The court retained the children in foster care and ordered supervised visitation for respondent.

The next day, petitioner filed a petition seeking termination of respondent’s parental rights. Although not marked as a supplemental petition, the document actually sought termination on new grounds and circumstances not raised at the adjudicatory phase.<sup>1</sup> The petition was based solely on EC’s injury while in respondent’s care and sought termination based on the potential harm to all three children.

On May 28, 2014, the circuit court conducted a “permanent wardship bench trial,” which was actually a termination hearing. Respondent’s counsel noted on the record that the prosecutor had yet to determine whether to charge respondent in connection with EC’s injury. Respondent then expressed her intent to raise her Fifth Amendment right against self-incrimination and not answer questions relating to the bathtub incident. The following colloquy ensued:

*Q.* Did [EC] and [JM] take a bath together on February 22nd, 2014?

*A.* Yes.

\* \* \*

*Q.* Did you put [EC] and [JM] in the tub together?

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<sup>1</sup> At a March 19, 2014 dispositional review hearing, petitioner’s counsel acknowledged that this was a supplemental petition.

A. I exercise my Fifth Amendment Right.

Q. Did you have any concerns for [EC's] safety when you put him in the bathtub with [JM]?

A. I exercise my Fifth Amendment Right.

Q. Did you leave the bathroom?

A. I exercise my Fifth Amendment Right.

Q. Did you leave the bathroom door open?

A. I exercise my Fifth Amendment Right.

Q. Where did you go?

A. I exercise my Fifth Amendment Right.

Q. What did you do?

*The Court:* . . . Here's the question of the hour, ma'am. Did you leave your two children, ages fifteen and two-and-a half months old (sic) alone unattended in the bathtub, for which I believe you would be asserting your Fifth Amendment Right, but I want to make sure?

\* \* \*

*The Witness.* I exert (sic) my Fifth Amendment Right.

The court informed respondent that it would infer that any withheld answers would not be favorable to her.

Melissa Ingles testified on behalf of CPS. She became involved in this case as of EC's injury on February 22. Ingles testified that respondent had discontinued therapy but continued in parenting classes after the removal of her children. Ingles noted that respondent was "defensive and maybe not reciprocal [sic receptive?] to information or areas that needed to be addressed." Ingles further noted that respondent "doesn't feel that she needs any direction with her parenting skills." When asked whether respondent had accepted responsibility for EC's injuries, Ingles asserted, "She has acknowledged that it was an awful accident, and she states that it was an accident." Given respondent's defensive attitude and reluctance to continue therapy, Ingles did not believe that respondent could provide a safe environment for her children.

Moreover, based on respondent's tendency to become overwhelmed during two-hour visits with her older children and lack of a family support system, Ingles did not believe respondent could provide the level of care needed for EC in the future. And the older two children were both engaged in special education due to developmental delays. Ingles testified

that respondent's inability to cope with these difficult issues was demonstrated when she engaged in an act of "self-harm" in April 2014, before a scheduled court hearing.

Dr. Stephen Guertin, the medical director at Sparrow Children's Center and director of the PICU, also testified at the termination hearing. Dr. Guertin treated EC. The doctor described that EC was comatose when he arrived at the hospital. The child's heart had stopped beating and his breathing had stopped. EC's lungs were "full of water and vomit," resulting in an "acute lung injury." EC suffered a heart attack, causing lasting damage. Due to the lack of oxygen, EC also suffered liver damage. He had also experienced hypothermia, either due to prolonged shock or exposure in the bathtub. Dr. Guertin could not ascertain with certainty how long EC's face had been submerged in water. However, he opined, "It had to have been at least 30 seconds to a minute, most likely considerably longer, somewhere in the three to five, maybe even ten minutes range." In relation to EC's future health, Dr. Guertin testified as follows:

A. In the short term, we assumed that he might progress to a state where his brain had shrunk or he developed cerebral palsy where he was most likely going to be blind, where he had seizures and would suffer profound developmental delay.

In the long term, we anticipated, because we had had to put a tracheostomy in him for his breathing, we anticipated the following, that he would have seizures, that he would have spastic quadriplegia, that he would likely be blind, that he would have profound development delay, that he would not be able to feed himself or walk. In other words, he would be confined to care by other people.

He would be a set-up to have recurrent infections in his lungs. Those were the long-term prognoses that we saw in him.

Q. Is a lifetime of special needs and care likely?

A. It's certain, I think.

The court then asked Dr. Guertin whether he could envision any scenario "that would justify leaving a two-and-a-half year old and a fifteen month old in a tub unattended." The doctor responded:

There isn't. I think that sometimes people are not aware of the danger. Although I think they should be. You simply cannot leave a child this age unattended in a tub. Literally an inch of water can kill them, and that's just the fact.

At the conclusion of the hearing, the circuit court found termination supported under MCL 712A.19b(3)(b)(i), (g), and (j). In doing so, the court determined that "the parent's act of leaving the two children alone in the tub caused this significant physical injury to the child [EC]." The court disagreed with respondent's assessment of the incident "as a tragic accident," instead finding "that this was a deliberate act of leaving the children alone in the tub." Accordingly, the court discerned a high risk of future danger to respondent's children. The court

noted that respondent “does not see that changes in her behavior are necessary” and relied on the following language from her psychological evaluation:

And the reason for this is outlined by the psychological report on page 8, which indicates that what the concern is, “. . . is that the overall level of functioning of individuals with similar personality dynamics often has significant fluctuations. When they find themselves in a situation which they find threatening to their emotional integrity, they may exhibit a rather profound defensive posture and they may act out impulsively, without considering the possible consequences of their actions on themselves and other[s], including their children; and their overall level of functioning may deteriorate significantly. Currently the prognosis must be seen as guarded at best and likely poor.” [Omission in original.]

The court further determined that termination was in the children’s best interests despite the parent-child bond because her “parenting ability is woefully inadequate” and that “[n]o one with any level of parenting ability would ever leave a two-and-a-half year old and a fifteen month old alone in a bathtub for a moment.” Given the children’s need for permanency and their young ages, the court determined that termination of respondent’s parental rights was in the children’s best interests.

## II. STATUTORY GROUNDS FOR TERMINATION

Respondent argues that the circuit court erred in finding statutory grounds in support of termination. Pursuant to MCL 712A.19b(3), a trial court “may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence” that at least one statutory ground has been proven. The petitioner bears the burden of proving that ground. MCR 3.977(A)(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review a circuit court’s factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). “A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court’s special opportunity to observe the witnesses.” *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (quotation marks and citation omitted). “Clear error signifies a decision that strikes us as more than just maybe or probably wrong.” *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). While the rules of evidence generally do not apply at termination hearings, MCR 3.977(H)(2), the termination decision must be based on “clear and convincing legally admissible evidence” where, as here, the court’s decision is based upon “one or more circumstances new or different from the offense that led the court to take jurisdiction.” MCR 3.977(F)(1)(b); *Rood*, 483 Mich at 101-102 (CORRIGAN, J.).

Respondent challenges the circuit court’s finding that she left her children in the bathtub unattended. She claims there was no evidence, let alone legally admissible evidence, that she was present during the incident, that she was the one who left the children in the bathtub, or for what length of time the children were left alone. Respondent concedes that the circuit court was permitted to draw an adverse inference from her exercise of her Fifth Amendment rights, but denies that such an inference qualifies as legally admissible evidence. As respondent’s negligence in this regard was the sole basis for the termination decision, respondent contends that the circuit court’s decision must be reversed.

In *Phillips v Deihm*, 213 Mich App 389, 400; 541 NW2d 566 (1995), this Court held that although a parent may invoke his or her Fifth Amendment right to silence in a civil action, “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” However, this does not relieve the petitioner of its duty to present clear and convincing evidence in support of a statutory ground for termination, and “[t]he burden of producing evidence of a fact cannot be met by relying on this ‘presumption.’” 2 McCormick, Evidence (6th Ed), § 264, p 225. See also MRE 301:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Respondent’s refusal to respond did create an adverse inference that she placed the two toddlers in a bathtub and then left them unsupervised. However, the circuit court relied on more than this adverse inference in concluding that clear and convincing evidence supported a ground for termination. The emergency removal petition revealed that there were two adults in the home at the time of EC’s injury, suggesting that respondent might not have placed the children in the bathtub. This does not excuse respondent from culpability. The identity of the adult leaving the children in the bathtub is insignificant. As noted by this Court in *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011):

The most significant and interesting argument respondents raise is that it is impossible to determine which of them committed this heinous abuse of the minor child. That would be an extremely relevant, and possibly dispositive, concern in a criminal proceeding against either or both of them, but it is irrelevant in a termination proceeding. When there is severe injury to an infant, it does not matter whether respondents committed the abuse at all, because under these circumstances there was clear and convincing evidence that they did not provide proper care.

Respondent’s failure to supervise her children or decision to delegate supervision to an irresponsible caretaker are both evidence that she did not provide proper care. As noted by Dr. Guertin, there simply is no justification for leaving children as young as JM and EC alone in a bathtub because of the extreme danger of drowning. And respondent’s failure to acknowledge a need for improvement in her parenting skills tends to establish that similar dangers could face her children in the future. As a result, the circuit court did not clearly err in finding grounds for termination.

### III. BEST INTERESTS

Respondent also challenges the circuit court’s determination that termination of her parental rights was in the best interests of the children. Pursuant to MCL 712A.19b(5), “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." A circuit court must determine by a preponderance of the evidence that termination is in the child's best interest. *Moss*, 301 Mich App at 83. "In deciding whether termination is in the child's best interests, the 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*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of 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 701 (2014).

Respondent first contends that the circuit court failed in its duty under *Olive/Metts*, 297 Mich App at 42, to consider the best interests of each child individually. Respondent's oldest child, four-year-old TL, was never placed at risk by respondent's actions and shared a strong bond with her mother, respondent argues. In *White*, 303 Mich App at 715-716, this Court held that lower courts are not required to explicitly specify each child's best interests unless their interests differ significantly:

*In re Olive/Metts* stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests. It does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests. [Emphasis added.]

While the circuit court did not differentiate and separately analyze the best interests of each child, respondent's inability to adequately supervise her children and provide for their needs applies equally to each of her young children. The circuit court accurately concluded that respondent had demonstrated inadequate parenting ability and had placed two of her children in significant danger. Respondent's lax parenting style presented a danger to TL as she was not much older than her brothers. A parent-child bond cannot overcome a parent's inability to adequately care for and protect her children.

Respondent also complains that the circuit court inadequately addressed the various factors outlined in *Olive/Metts* and *White* when conducting its best-interest analysis. Yet, the "factors" referenced in *Olive/Metts* and *White* are not mandatory considerations. Rather, they are merely discretionary factors for the court's consideration. *Olive/Metts*, 297 Mich App at 41. In any event, the court considered numerous factors in making its decision: the parent-child bond, respondent's parenting ability, the children's need for permanency, and respondent's lack of compliance with court-ordered counseling. Together, these factors painted a bleak picture of

respondent's ability to improve her parenting skills in a timely fashion so she could safely care for three young children, one with extreme special needs. Accordingly, we discern no error in the termination decision.

We affirm.

/s/ Mark T. Boonstra

/s/ Pat M. Donofrio

/s/ Elizabeth L. Gleicher