

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 14, 2010

In the Matter of M. SANTOS, Minor.

No. 296351
Oakland Circuit Court
Family Division
LC No. 09-756821-NA

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(b)(i), (g), and (j). For the reasons set forth in this opinion, we affirm.

The child at issue was removed from respondent's care after multiple burns were discovered on his legs, which physicians opined were intentionally inflicted and caused by some type of metal object that had been heated and placed on the child's skin. Additionally, medical testimony indicated that the burns varied in age and some were days and even weeks old. It was eventually alleged that respondent's boyfriend, who had cared for the child while respondent worked, had perpetrated the abuse on the child. Respondent initially attempted to cover up her boyfriend's role in the abuse by lying to the treating physician, a Child Protective Services worker, and a police officer about the circumstances surrounding the child's injuries. Respondent continued to deny any pre-existing knowledge of the extent of the minor's injuries and continued to mislead authorities as to the causes and the person involved with the extensive physical and psychological injuries inflicted on the child. Petitioner sought termination of respondent's parental rights at the initial disposition under MCL 712A.19b, primarily alleging a failure to protect her child. The trial court found that the evidence sufficiently supported statutory grounds to assume jurisdiction over the child and to terminate respondent's parental rights under MCL 712A.19b(3)(b)(i), (g), and (j). The court subsequently found that termination was in the child's best interest under MCL 712A.19b(5) and proceeded to terminate respondent's parental rights. This appeal ensued.

I.

The first issue raised by respondent on appeal was that the trial court clearly erred in terminating respondent's parental rights. Respondent argued that the evidence failed to clearly and convincingly establish a reasonable likelihood that the child would suffer injury, abuse, or harm in the foreseeable future if returned to respondent's home as required for termination under

subsections (b)(ii) and (j) and that there was no reasonable expectation that she would be able to provide proper care and custody for the child within a reasonable time as required for termination under subsection (g). For the reasons set forth below, 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 Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993), citing *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). “Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child’s best interests.” *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000); MCL 712A.19b(5). We review the trial court’s determination for clear error. *Trejo*, 462 Mich at 356-357. A finding is clearly erroneous if, although there is evidence to support it, we are 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), citing *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Under the circumstances of this case, we are not left with a definite and firm conviction that the trial court made a mistake in terminating respondent’s parental rights. *JK*, 468 Mich at 209-210. It is evident that respondent clearly knew that her child’s abuser, her boyfriend, had a propensity for violence and was capable of physical abuse because he had physically assaulted her in the past in the presence of the child. Despite her knowledge of his violent tendencies, respondent never sought assistance or removed her child from the grave risks that her boyfriend presented to both her and her child. The record reveals that respondent continued to leave the child alone with her assaultive boyfriend the night before she observed a suspicious mark on the child, which, by her own admission, she neglected to investigate further. Her observation of a mark on the child, especially in light of her boyfriend’s recent abuse of her, should have, at a minimum, given her heightened concern for her child’s welfare and prompted her to inspect his body further, seek timely medical treatment, and not allow the child to remain in her boyfriend’s care. Rather than attending to the immediate needs of the child, respondent ignored the injuries, seemingly fearing that seeking treatment would anger her boyfriend. These facts clearly established that respondent, having repeated opportunities to do so, failed to protect her child from her boyfriend, whom she knew had violent tendencies and was capable of physical abuse. MCL 712A.19b(3)(b)(ii).

Respondent’s serious, past failure to protect her child coupled with her subsequent attempts to cover up the abuse and protect his abuser by lying to doctors, a Child Protective Services worker, and the police about the circumstances surrounding the child’s injuries showed a complete lack of insight, awareness, or parental judgment necessary to protect a child from harm. Her main concern throughout the initial stages of this investigation and legal proceeding was to protect her boyfriend. We cannot glean from the record any evidence that respondent undertook any actions to protect or even seek treatment for her injured child. The only reason the child was taken to the hospital is due to the fact that the minor revealed the burns to respondent’s mother who forced respondent to take the child to the hospital. While seeking medical attention for the child, respondent engaged in a lack of honesty with investigators and doctors which could have produced dire consequences for her child.

Further telling of respondent’s inability to protect the child from future harm, injury or abuse, was that she minimized her role in the abuse in failing to protect her child. Specifically,

by the time of the termination trial, three months after the incident, although she now admitted she knew her boyfriend burned her child, respondent still indicated that she never observed the burns on the child's body. However, the record photographs revealed that the marks were numerous, large, and clearly noticeable. As the trial court pointed out, respondent's story that she never inspected the child after initially noticing a red mark she apparently believed was a rash or noticed the other multiple marks on his legs, even though she dressed the child on the morning that the child was treated at the hospital, changed the child's diaper the night before, and told the officer that she bathed the child the night before, was nothing short of "incredible." Her minimization of her role in failing to protect the child evidenced a failure to accept responsibility for her conduct and that she would likely conceal future harm or abuse to the child's detriment, making it unlikely that she would be able to adequately protect the child from future abuse, injury, or harm.¹ Her denial that she used marijuana, despite her positive screen, also further evidenced an inability to accept responsibility for her conduct.

The best evidence provided to the trial court to ascertain whether a reasonable likelihood existed that the child would again suffer injury were the past actions of respondent, most of which clearly portrayed an individual who would, at best, continue to place her needs before those of the child, and who, at worst, would facilitate, ignore and lie about harm suffered by her child. Under these circumstances and in light of the trial court's superior ability to evaluate respondent's credibility, it was reasonable to conclude that she would likely place the child in danger again if he were returned to her care. We must afford deference to the trial court's special opportunity to judge the credibility of the witnesses who appear before it. MCR 2.613(C); *Miller*, 433 Mich at 337. Accordingly, we fail to find clear error in the trial court's determination that a reasonable likelihood exists that the child would suffer injury, abuse, or harm in the foreseeable future if returned to her care. MCL 712A.19b(3)(b)(ii) and (j). *Trejo*, 462 Mich at 356-357. The same evidence indicating that she would not likely be able to protect the child from injury or abuse in the future, equally indicates that there is no reasonable expectation that she would be able to provide proper care or custody for the child within a reasonable time considering his tender age. MCL 712A.19b(3)(g). Although we are cognizant that respondent had not participated in any counseling or evaluative services before the trial on the initial petition to terminate, which might have provided the court with additional insight about her future ability or capacity to protect the child, see *In re Rood*, 483 Mich 73, 98; 763 NW2d 587 (2009), we find that the totality of her conduct which directly led to the harm suffered by the child, coupled with her efforts to conceal and aid those responsible for the harm, supported the trial court's findings.

II.

Respondent next argues that she was fully aware of her parental shortcomings, was willing to work with services, and was motivated to change to become a good parent. In fact, she was successfully addressing her deficits with services to be able to parent the child in the

¹ It is also noteworthy that respondent had already been involved in two abusive relationships before she became involved with the boyfriend who abused her and the child.

near future. As a consequence of these factors, respondent argues that termination in this case was premature and contrary to the child's best interests.

Under MCL 712A.19b(5), “[i]f 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.19b(5), as amended by 2008 PA 199, effective July 11, 2008. This Court reviews the trial court's determination regarding the children's best interests for clear error. *Trejo*, 462 Mich at 356-357. 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. *JK*, 468 Mich at 209-210. Further, to be clearly erroneous the decision must be “more than just maybe or probably wrong.” *Trejo*, 462 Mich at 356.

The evidence against a finding that termination was in the child's best interests was testimony at the best interests hearing, held approximately seven months after the trial on the initial petition to terminate, indicating that the child and respondent shared a bond and that respondent now had a willingness and motivation to improve her parenting ability by participating in services, which she sought out on her own. It was also evident that respondent had made some effort and showed a willingness to improve her parenting ability by seeking out and participating in parenting classes, substance abuse services, and domestic violence counseling. The service providers all indicated that respondent actively participated in services and was making some progress. Respondent also admitted at the best interests hearing that she had lied to the court many times and expressed guilt about the circumstances leading to the child's removal, however respondent testified that she had changed, was learning a lot from her services, had learned to put her child's needs first, was determined to be a better parent, and that it was in the child's best interests to return to her home.

However, while respondent's efforts toward improving her parenting ability were commendable, in considering the best interests, the focus should be on the child. *Trejo*, 462 Mich at 356. Unfortunately, respondent placed the child at a significant risk of harm in the past by leaving him with her abusive boyfriend, failing to seek timely medical treatment for him, and repeatedly covering up the circumstances of the abuse to protect her boyfriend, which clearly indicated that she placed her needs before the child's needs, to her child's detriment. Unfortunately, besides respondent's problematic conduct in failing to protect her child from abuse and then attempting to protect her abuser, respondent's psychological evaluation, conducted approximately six months after the child's removal from her care, indicated a pattern of deceitful and untrustworthy behavior, that she would not be able to rectify her issues in the foreseeable future, and a concern for the child's safety if he was returned to her care given her tendency to protect others who might be abusive to herself or her child, to externalize blame unto others, to be less than truthful and cover up problems, to protect and defend herself and others, and to not accept responsibility for her actions. In fact, the evaluation concluded that reunification efforts should be discontinued as respondent did not present as a parent who was motivated or eager to be reunified with her child.² Further telling to the evaluating psychologist

² It was also revealed during the psychological evaluation that, one month after learning of the extent and nature of her child's burns and after his removal from her care, she lied to the
(continued...)

was that respondent indicated during her psychological evaluation that she still had feelings for her boyfriend, despite that he was the suspected perpetrator of the child's serious abuse. Clearly, the psychological evaluation was damaging to respondent's case and provided strong evidence that she would not be able to protect the child from harm or abuse in the future. Further damaging and evidence of her continued untruthful conduct was that, after the trial on the initial petition to terminate and when the child was under the court's jurisdiction and respondent was being monitored for drug use, she was arrested for and subsequently convicted of a felony for obtaining controlled substances by falsifying prescriptions. It should be noted that respondent's co-defendant in the case was a friend of her boyfriend, and, during the psychological evaluation, she tried to cover up for the friend and herself by lying about the circumstances leading up to her arrest. The psychological evaluation also revealed that she overused her prescription opiate medication and continued to use her opiate medication even after she learned of her pregnancy. Further, the psychological evaluation revealed past and current mental health issues, including depression, which were untreated. It is also noteworthy that, at the time of the best interests hearing, respondent was unemployed and pregnant and could not physically support the child without her mother's assistance, with whom she had a "rocky" relationship.

Taking into consideration the testimony presented, we cannot find that the trial court clearly erred in finding that termination was in the child's best interests, especially in light of the trial court's superior ability to assess respondent's credibility, which the court clearly found to be problematic. *Trejo*, 462 Mich at 356-357; *Miller*, 433 Mich at 337.

III.

The Lawyer-Guardian ad Litem claims that termination was improper because petitioner failed to make reasonable efforts to prevent the child's removal from her home and to reunify the family. "Generally when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re HRC*, 286 Mich App 444, 462; 781 NW2d 105 (2009), citing *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005); MCL 712A.18f(1). However, where, as here, aggravated circumstances were present, mandating a petition requesting termination at the initial disposition, reasonable efforts to prevent the child's removal or reunify the family were not required. See *Rood*, 483 Mich at 99-100 n 37; *HRC*, 286 Mich App at 462-465; MCL 712A.19a(2); 42 USC 671(a)(15)(B) and (D); MCR 3.965(D). In this case the record clearly revealed that respondent placed her child at an unreasonable risk of harm by failing to intervene and eliminate the risk posed by her boyfriend, resulting in severe physical abuse of the child, MCL 722.638(1)(a)(iii) and (2), aggravated circumstances were present, the initial petition requesting termination was mandatory, and reasonable efforts were not required. Therefore, petitioner's decision not to provide services to prevent the child's removal from respondent's home or to reunify her with her child in this case was justified.

We recognize that neither the court in its orders nor petitioner designated this case as one of aggravated circumstances. However, the court specifically found in its oral opinion following the trial on the initial petition to terminate, that reasonable efforts were not necessary in this case

(...continued)

prosecutor in her boyfriend's criminal case and again attempted to cover up his role in the abuse.

because respondent caused an unreasonable risk of serious physical abuse of the child by leaving him in the care of her abusive boyfriend after he physically assaulted her and she observed injuries on the child, which constitutes “aggravated circumstances” as defined in MCL 722.638(1)(a)(iii) and (2). Any error or omission in the court’s orders was harmless and does not require reversal. *HRC*, 286 Mich App at 465-466; MCR 2.613(A) (“a trial court’s error in issuing a ruling or order . . . is not grounds for this Court to reverse or otherwise disturb the judgment or order, unless this Court believes failure to do so would be inconsistent with substantial justice.”) Regardless, although petitioner did not provide respondent with any rehabilitative services during the proceedings, she sought out counseling and treatment on her own and participated and made progress in those services, and therefore, was not hindered by petitioner’s failure to provide services.

Affirmed.

/s/ Stephen L. Borrello

/s/ Mark J. Cavanagh

/s/ Donald S. Owens