

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
July 17, 2012

In the Matter of FENNELL, Minors.

No. 307951
St. Clair Circuit Court
Family Division
LC No. 11-000380-NA

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Respondent appeals by right from a circuit court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), and (k)(iii). We affirm.

I. STANDARD OF REVIEW

“If the court finds that there are grounds for termination of parental rights and [then finds] 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.”¹ A trial court may terminate parental rights at the initial dispositional hearing if a preponderance of the evidence adduced at trial establishes grounds for the assumption of jurisdiction under MCL 712A.2(b) and the court finds on the basis of clear and convincing legally admissible evidence introduced at the trial or dispositional hearing that one or more facts alleged in the petition are true and establish grounds for termination under MCL 712A.19b(3).² Only one statutory ground for termination need be proved.³

This Court “review[s] 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.”⁴ “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

¹ MCL 712A.19b(5).

² *In re Utrera*, 281 Mich App 1, 16-17; 761 NW2d 253 (2008); MCR 3.977(E).

³ *In re CR*, 250 Mich App 185, 207; 646 NW2d 506 (2002).

⁴ *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

court's special opportunity to observe the witnesses."⁵ The lower court's best-interest determination is also reviewed for clear error.⁶

II. STATUTORY BASES FOR TERMINATION

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), and (k)(iii), which provide for termination of parental rights if:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(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.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

(iii) Battering, torture, or other severe physical abuse.

The trial court did not clearly err in finding that these statutory grounds for termination were each established by clear and convincing legally admissible evidence. The children lived with

⁵ *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

⁶ *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

their father and had parenting time with respondent. The children were at respondent's home on the weekend of October 8-9, 2011. On Monday, October 10, respondent took ten-month-old MF to the doctor where he was diagnosed with numerous injuries, the most serious being a fractured jaw and severe and extensive bruising to the left buttock and genitals. Far more force was necessary to fracture the jaw than could be accounted for by respondent, who attributed the injuries to the child falling onto a table and rolling around in his crib. More than one witness testified that the bruise on the buttock looked like a handprint. The color of the bruises indicated that the injuries had been inflicted within the previous 24 hours. Respondent admitted that she, her boyfriend, and her brother were home with the children during that time, but she could not offer a rational explanation for the injuries, which were diagnosed as nonaccidental trauma.

Under the circumstances, termination is proper even though it could not be definitively determined who inflicted the injuries. This Court recently held that where a child is clearly being abused in the home while in the custody of the parents, it is obvious "that at least one of them had perpetrated the abuse and at least one of them had failed to prevent it; consequently it [does] not matter which was which."⁷ Although the context here involves a child's abuse in the home while in the custody of a parent and a nonparent adult, we nonetheless believe that the rationale from *Ellis* applies here by analogy. In any case, the evidence supported a finding that respondent herself committed the abuse. After stating that she never struck MF, claiming that the bruise to the buttocks initially appeared to be a "tiny little mark," and trying to dismiss the bruise as "diaper rash," respondent eventually admitted to spanking MF. Although she only admitted to spanking him once, the trial court could properly conclude that she was simply trying to minimize her culpability.

Crediting the evidence that respondent inflicted such severe injuries on a helpless infant for no apparent reason, the trial court did not clearly err in finding that all of the children were reasonably likely to be abused if placed in respondent's home, and that termination of respondent's parental rights was warranted under MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), and (k)(iii).

III. BEST INTEREST OF THE CHILDREN

Respondent argues that termination of her parental rights was not in the children's best interest. We disagree.

Respondent's discussion of this issue refers to several principles of law, most of which are not relevant. First, respondent relies on the Child Custody Act, MCL 722.21 *et seq.* to argue that in a child custody dispute between a parent and an agency, it is presumed that the child's best interests are served by awarding custody to the parent.⁸ However, the Child Custody Act "does not apply to termination proceedings . . . which focus not on seeking to maximize a child's

⁷ *In re Ellis*, 294 Mich App 30, 35-36; ___ NW2d ___ (2011).

⁸ See MCL 722.25(1).

interest by deciding which of two competing parties should be awarded custody, but rather on the circumstances of a parent, the termination of whose rights is sought.”⁹

Second, contrary to what respondent asserts, petitioner was not required to prove that she would neglect her children for the long-term future, as held in *Fritts v Krugh*.¹⁰ The decision in *Fritts* predates the enactment of MCL 712A.19b(3), which now sets forth the criteria for termination of parental rights.

Third, respondent correctly observes that parents have “a significant interest in the companionship, care, custody, and management of their children[,]” which “has been characterized as an element of ‘liberty’ to be protected by due process.”¹¹ However, once a petitioner presents clear and convincing evidence to establish a statutory basis for termination under MCL 712A.19b(3), as the petitioner did in this case, the respondent’s liberty interest in the custody and control of his children is eliminated.¹²

Fourth, respondent misstates the applicable law governing the trial court’s consideration of a child’s best interests. Respondent refers to a prior version of MCL 712A.19b(5), which formerly provided that once a statutory ground for termination had been established, “the court shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is clearly not in the child’s best interests.” The statute was amended by 2008 PA 199, effective July 11, 2008, and now requires the trial court to affirmatively find that termination is in the child’s best interests before it can order termination.¹³ The evidence in this case, that respondent either severely physically abused her own child or allowed another person to do so without trying to intervene and then only sought medical attention for the child in a misguided attempt to forestall CPS involvement, amply supports the trial court’s determination that termination of respondent’s parental rights was in the children’s best interests. Therefore, the trial court did not clearly err in terminating respondent’s parental rights to the children.

Affirmed.

/s/ Peter D. O’Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan

⁹ *In re Barlow*, 404 Mich 216, 235-236; 273 NW2d 35 (1978) (citations and footnote omitted).

¹⁰ 354 Mich 97, 114; 92 NW2d 604 (1958), overruled on other grounds by *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

¹¹ *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993).

¹² *In re Trejo*, 462 Mich 341, 355-356; 612 NW2d 407 (2000)

¹³ See also MCR 3.977(E)(4).