

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of S.L.A., C.J.R., S.L.R., and N.R.R.,
Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

UNPUBLISHED
January 18, 2007

Petitioner-Appellee,

v

NICOLE MARIE FISCHER, a/k/a NICOLE
REITERMAN,

No. 269995
Oakland Circuit Court
Family Division
LC No. 04-694760-NA

Respondent-Appellant.

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Respondent Nicole Fischer appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(ii), (g), and (j). We affirm.

The children were removed in September 2005, and a permanent custody petition filed, following the tragic death of their brother, Ethan Fischer, at the age of 14 months. Ethan died from position asphyxiation; although the death was ruled accidental, the facts were consistent with the child getting stuck in his highchair and being unable to breathe. When Ethan was examined at the hospital at approximately 9:00 p.m. on September 14, 2005, he had been dead at least six hours. His skin was discolored, there were old bruises on his buttocks and chin, and rigor mortis had set in. Respondent had been busy with Girl Scouts, errands, and cooking, and her husband (Ethan's father), Shawn Fischer, was left in charge for most of the time beginning about 2:30 p.m. Fischer was on probation for a 2004 conviction of third degree child abuse in connection with physical abuse of Sabrina. At the time of the final hearing, Fischer was incarcerated on a two-year sentence for violation of probation. A heating service technician had reported Fischer striking and swearing at Cody in January 2005, and thought respondent had witnessed this event.

Fischer found Ethan's body at approximately 8:00 p.m. on September 14, 2005. He maintained that Ethan had been sleeping in his crib. But when police and emergency personnel arrived at about 8:40, Ethan's hair was wet and fluffy as though it had just been washed. His jaw

would not open and the body was already stiff and cold. Some of the other children had seen Ethan earlier that day, slumped over in his highchair and turning purple.

Respondent first claims that the trial court clearly erred in terminating her parental rights based on environmental neglect, when she was never offered services for that issue. This claim misstates the facts. Respondent was provided services when the case was opened by Children's Protective Services (CPS) in 2002 and 2004, and on at least one of these occasions, the services included help with homemaking and cleanliness. Respondent was also offered counseling, which presumably would have dealt with some causes of the clutter and filth, namely respondent's depression, hoarding problem, and lack of empowerment in her relationship with Fischer. Additionally, the environmental neglect was not the direct cause of Ethan's death. Finally, services were not required in 2005 because the permanency plan was termination and not reunification. MCL 712A.19f(3). Filing of a termination petition was appropriate because respondent was suspected of placing the child at unreasonable risk of harm by failing to intervene and eliminate the risk. See MCL 722.638(2).

Respondent next claims that the trial court clearly erred in terminating her parental rights based on environmental neglect, when there was no testimony that the home conditions adversely affected the children. Again, respondent misstates the facts. Environmental neglect was not the primary circumstance fueling the termination petition. Rather, that circumstance was Ethan's death and respondent's failure to protect Ethan, and also her failure to protect Savanna, Cody, and Sabrina from the trauma they suffered in connection with Ethan's death. As for the environmental neglect, the evidence showed a filthy, unsanitary environment that was unsafe for anyone to live in. Clothes, garbage, used diapers, and animal feces littered the home, and extension cords snaked around the floor. The electricity did not work on one side of the home, and the gas also was not functioning. Dirty dishes were piled in the sinks and bathtub, and the tub had grayish-black water covered with scum and gnats flying about. The toilet was extremely dirty, and the house had a foul odor like trash. These conditions would have taken some time to develop and would have posed a significant hazard to the children. Respondent herself testified that the younger children could not walk around because of the clutter, and that she neglected the children when she became depressed. Respondent had failed to benefit from services in both of these areas. The record supports the trial court's finding that respondent was incapable of providing a safe, clean environment for the children. See MCL 712A.19b(3)(g), (j); *In re King*, 186 Mich App 458, 463-464; 465 NW2d 1 (1990).

Respondent further contends that the trial court erred in terminating her parental rights based on her husband's alleged abuse of the children or her alleged failure to protect, when there was no evidence that she caused or contributed to Ethan's death, or was or should have been aware that Fischer was abusing the children. We disagree. Because of Fischer's conviction for child abuse, respondent certainly should have been aware of his propensity to mistreat or neglect children. She argues that she did not know that a condition of probation prohibited him from being alone with the children, and that she did not witness the January 2005 incident with Cody described by the heating service technician. The trial court found her testimony and Fischer's testimony "incredible and inconsistent," and we agree. We further conclude that the trial court was in the best position to evaluate witness credibility. See *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Here, even by respondent's and Fischer's accounts, Ethan was left in his highchair or crib for most of the time from 6:00 or 7:00 a.m. until he died on September 14, 2005. Respondent left Ethan with Fischer several times that day, although Fischer was watching several other children including two-year-old Nathan. The older children were still traumatized by Ethan's death and were not provided counseling until January 2006. Under the doctrine of anticipatory neglect or abuse, respondent's neglect of Ethan could be used to predict probable treatment of the other children. See *In re Powers*, 208 Mich App 582, 588-593; 528 NW2d 799 (1995). In sum, clear and convincing evidence supported termination of respondent's parental rights under MCL 712A.19b(3)(b)(ii), (g), and (j). See MCR 3.977(E), (J); *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000).

Finally, we find no clear error in the trial court's ruling that termination was not clearly contrary to the children's best interests. See MCL 712A.19b(5); *Trejo, supra*.

Affirmed.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Bill Schuette