

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BURTON, Minors.

UNPUBLISHED
January 2, 2014

No. 313448
Ingham Circuit Court
Family Division
LC No. 12-001053 - NA

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Respondent mother appeals as of right from an order terminating her parental rights to her three minor children pursuant to MCL 712A.19b(3)(c)(i) (conditions that led to the adjudication continue to exist), (g) (failure to provide proper care or custody) and (j) (likelihood of harm if returned). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arose following a May 2011 incident of domestic violence perpetrated by respondent's husband¹ against her while she was nine months pregnant. As part of the historical backdrop to this matter, the previous year respondent's husband accidentally shot and killed one of their children while exchanging gunfire with a home invader. The husband was not charged as a consequence of the shooting, although Ingham County Child Protective Services (CPS) believed the home invasion was related to the husband's drug-dealing activities. Respondent declined to press charges against her husband with respect to the domestic violence, and although charges were filed against the husband, they were ultimately dismissed when respondent did not appear.

Petitioner filed its initial petition in June 2011 as to three minor children, and at that time sought to terminate respondent's parental rights, those of respondent's husband (the father of two of the three children then at issue), as well as those of the biological father of the oldest child

¹ Respondent's husband is the biological father of the three minor children at issue in this appeal. A fourth, older child, who has a different biological father than the three at issue, also was initially the subject of these proceedings. For clarity, therefore, we will sometimes refer to the father of the three children at issue as respondent's husband.

who is not at issue on this appeal.² The trial court ordered that the children be taken into protective custody. Thereafter, following a June 3, 2011 preliminary hearing, the trial court authorized the petition, and in doing so referenced both the incident of domestic violence and the prior shooting death of the deceased child. The trial court allowed the children to reside in respondent's home, conditioned upon respondent not allowing the children to have any contact with respondent's husband, and not allowing respondent's husband into the home at any time. Thereafter, the trial court ordered that the children be removed from respondent's home because respondent was "denying domestic violence and [was] failing to protect the children from" respondent's husband.

In August 2011, the trial court authorized a Second Amended Petition, which eliminated the request to terminate the parental rights of respondent and of the biological father of the oldest child. The court held a hearing on August 15, 2011, at which respondent entered a plea to the allegations of the Second Amended Petition. Those allegations related to the domestic violence incident, as well as the prior shooting death incident, and the resulting risk to the children of threatened harm of injury or death.

In response to the trial court's inquiry regarding the basis for jurisdiction, the lawyer guardian ad litem (LGAL) responded that the jurisdictional basis was "failure to protect from the mother, failure to protect the children." The LGAL further indicated that "the allegations included domestic violence," and that "one of the reasons" for the filing of the petition was the "failure to protect the children who were in the home when these activities occurred." When asked by the trial court whether she thought that was a sufficient basis for jurisdiction, counsel for petitioner responded in the affirmative, and added that "in addition to the – the fact that [the deceased child] was shot and killed in the home, one of the children. So I believe there is a sufficient basis for jurisdiction."

The trial court accepted respondent's plea, found it to have been knowingly, understandably, and voluntarily made, and found that respondent had admitted sufficient facts for the court to find that the children came within the jurisdiction of the court. Upon inquiry of the LGAL as to the status of what he termed the "no-contact order between the mother and the father," the court noted that because the children were no longer placed in the home of respondent or her husband, they were not in danger of being exposed to domestic violence, so "you can have contact, I guess. But you're doing it at the risk of never getting your children back." The court authorized respondent's husband to have "supervised parenting time," but did not otherwise alter the previously entered order insofar as it required respondent to not allow contact between the children and respondent's husband.

At a subsequent dispositional hearing on January 11, 2012, the trial court indicated that, although reunification continued to be the goal, the domestic violence issue was a barrier to reunification. The court indicated that it was "concerned with treating the domestic violence so

² The youngest child at issue in this appeal was born in July 2012, after the filing of the initial petition. The oldest child, who is not at issue in this appeal, was the subject of the initial petition, but subsequently was placed with his biological father.

the family can be reunified or, conversely, placing the children for adoption if it isn't treated." Further, the court commented that "[t]his came under the jurisdiction of the court because Mr. Burton strangled Ms. Burton. So until that issue is addressed there will be no reunification."³

In July 2012, respondent gave birth to another child, and petitioner promptly filed a petition as to that child. The petition did not seek the termination of parental rights, but sought to remove the newborn child from respondent's home "because he is without proper care and custody due to the threatened harm resulting from the drug activities that [respondent's husband] and [respondent] were surrounding themselves with." The petition further described that respondent's husband had been pulled over in respondent's vehicle, that drugs and guns were seized during the arrest,⁴ that respondent had filed for divorce from her husband after this incident, that three other children had been removed from respondent's home approximately one year prior, based on concerns of domestic violence, and that there was concern that there had been insufficient time to address the issues of domestic violence adequately to ensure the safety of the newborn child. After a preliminary hearing, the trial court authorized the petition, referenced the existing foster care placements of the older children and respondent's husband's recent arrest for controlled substance and firearms offenses, ordered the newborn child removed from the home, suspended any parenting time of respondent's husband, and granted petitioner discretion to allow supervised or unsupervised parenting time to respondent.

In August 2012, petitioner filed a supplemental petition as to the three older children seeking to terminate the parental rights of both respondent and respondent's husband. The supplemental petition referenced the prior domestic violence and shooting death incidents, services provided subsequent to the commencement of the initial proceedings, that respondent "has continued in her relationship with her husband . . . over the duration of the case, and there is reason to believe that they continue to reside together," that respondent advised that her husband does spend the night on occasion, that respondent did not receive pre-natal care for four months prior to giving birth to the newborn child, that respondent's residence had been reported as a "drug house," that following the arrest of respondent's husband on drug and firearm charges, a narcotics search warrant was conducted at respondent's residence which revealed the presence of heroin, crack cocaine, marijuana paraphernalia, digital scales that field tested positive for cocaine, and firearm ammunition, and that there was reason to believe that respondent had been "untruthful regarding multiple aspects of the case." The trial court authorized the supplemental petition.

³ We view this passing comment by the trial court as expressing concern over the failure to address a serious issue that stood as a barrier to the goal of reunification, and not as limiting (to domestic violence only) the bases on which it had taken jurisdiction on August 11, 2011, particularly since the transcript of that earlier adjudication hearing reflects that the bases on which the trial court took jurisdiction included both the domestic violence incident and the earlier shooting death incident.

⁴ As a convicted felon, it was unlawful for respondent's husband to possess a firearm. MCL 750.224f.

In September 2012, petitioner filed a further petition as to the youngest child, seeking termination of parental rights as to both respondent and her husband, citing the same factors as in the earlier supplemental petition relating to the three older children. Respondent pleaded to the court's jurisdiction concerning the youngest child. The matter proceeded to trial in October 2012. Respondent's husband released his parental rights to the children. Following the trial as to respondent, the trial court found that respondent was not credible. An example was her claim that her husband had moved out of the home in July 2011; the court stated:

It is apparent that the [respondent and her husband] have continued to reside together for the duration of this case, including times when there were no-contact orders in place, parting only upon his incarceration September 7th.

Other examples of a lack of credibility included: (1) her claim that she did not know that her husband dealt and/or used drugs and had a gun; the court noted in part that she had the benefit of income in excess of her earnings, that he had a 2008 conviction for possession, which was after the marriage, and that paraphernalia, as well as marijuana in plain view, was found during the search; (2) her claim that her husband did not choke her during the May 28, 2011 domestic violence incident; (3) her claim that she did not use drugs; the court noted two diluted screens and a failure to appear for other scheduled screens, which caused the court to refer to respondent's participation in drug screening as "unsuccessful;" and (4) her claim that she intended to pursue a divorce of her husband, noting her failure to appear for a conciliation and his statement that they would be moving back in together when the case was over. The court concluded that petitioner had proved by clear and convincing evidence that grounds for termination existed under MCL 712A.19b(3)(c), (g), and (j). The court further found that termination was in the best interests of the children.

II. STATUTORY GROUNDS FOR TERMINATION

Respondent first argues that the trial court improperly found that there was clear and convincing evidence to establish statutory grounds for termination of her parental rights under MCL 712A.19b(3)(c)(i), (g) and (j). We disagree. A trial court's findings regarding the statutory grounds for termination are reviewed for clear error. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "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." *In re Jenks*, 281 Mich App 514, 517; 760 NW2d 297 (2008).

Under MCL 712A.19b(3)(c)(i), the court may terminate a parent's parental rights if

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

Here, petitioner initially requested child protective services in principal part because domestic violence was taking place in the home. However, petitioner also highlighted at that

time concerns about drug dealing and the risk it posed to the children. Also, in 2010, the father accidentally shot and killed respondent's seven-year-old daughter during a home invasion. Although the father was not charged in the death, petitioner suspected that the home invasion was related to his drug dealing activities.

More than one year after taking jurisdiction, and just two months prior to the termination trial, respondent was still in a relationship with the father. His belongings were found strewn about her home, and she admitted that he occasionally spent the night. Although respondent had filed for divorce, it was not clear that she intended to pursue the divorce and the filing did not occur until after a police raid on her house that turned up bullets, cocaine and heroin. The father was arrested for selling narcotics and possessing a gun. During the course of proceedings, he was not cooperating with social services or benefiting from counseling.⁵ Yet, respondent did not appear willing to separate from the children's father. Thus, there was no clear error in the determination that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that they would be rectified within a reasonable time considering the children's ages.

Although it is impermissible to terminate a respondent's parental rights "solely because he or she was a victim of domestic violence," *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011), that was not the case here. Respondent placed the children at risk by her involvement with a person who brought criminality and drug dealing into the children's home. That circumstance continued unabated throughout the proceedings below, culminating shortly before trial in the arrest of respondent's husband (on drug and gun charges) and the discovery, as a result of a search warrant, of crack cocaine, heroin, and drug paraphernalia at respondent's home. Moreover, evidence in support of a statutory ground for termination properly includes "the fact that respondent's own behaviors were directly harming the children or exposing them to harm." *Id.* Thus, in *Plump*, we affirmed the trial court's termination of parental rights (under the same three statutory grounds) where, in addition to the children's exposure to domestic violence, respondent's conduct placed the children at risk by exposing them to drug use and unsafe living conditions. *Id.* at 272. Here, the record shows that respondent continued to expose the children to danger from their father's criminal activities, including drug dealing and illegal possession of firearms. Termination under MCL 712A.19b(3)(c)(i) was therefore appropriate.

Under MCL 712A.19b(3)(g), the court could terminate parental rights if "the parent, without regard to intent, fails to provide proper care or custody for the [children] 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." Again, the father was involved in dealing cocaine and heroin. Twice he was found in possession of a firearm. He placed the children in danger from his drug dealing and criminal activity. Respondent, in turn, refused to end her relationship with him despite the risk posed to the minor children. Although respondent claims that she has now cut off ties with the father, the trial court found her testimony incredible. We defer to the

⁵ Respondent's husband voluntarily released his parental rights to the minor children at the permanent wardship hearing on October 10, 2012.

trial court's assessment of the credibility of the witnesses before it. See *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991). The father's belongings were found in her home just months before the termination trial, and she admitted that he occasionally spent the night. Thus, it was not likely that respondent would be able to fully end her relationship with her husband, so as to be able to provide proper care and custody, within a reasonable time.

Under MCL 712A.19b(3)(j), the court could terminate parental rights if “[t]here is a reasonable likelihood, based on the conduct or capacity of the parent, that the [children] will be harmed if he or she is returned to the home of the parent.” As noted above, the father posed a substantial risk to the children due to his issues with drug dealing and criminal activity. Because respondent failed to sever her relationship with him, there was a high probability that she would allow him to have contact with the children if the court ordered reunification and that they would be exposed to harmful influences deriving from the activities of respondent and her husband. This posed a real risk of danger to the children, one the trial court rightfully prevented by terminating respondent's parental rights.

III. BEST INTEREST DETERMINATION

Next, respondent argues that termination of her parental rights was not in the best interest of the minor children. We disagree. Because the trial court found a statutory basis for termination, it had to terminate respondent's parental rights if it found that termination was in the best interest of the children by a preponderance of the evidence. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 83; ___ NW2d ___ (2013). In making that determination, the trial court had to consider the record as a whole. *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000). It could consider respondent's parenting ability, as well as the children's need for permanency, stability, and finality. *In re Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012). Again, our review is for clear error. MCR 3.977(K); *In re Rood*, 483 Mich at 90-91.

As discussed above, respondent was unable to sever her ties with the father. Thus, there was a reasonable probability that reunification would lead to the children having contact with the father, subjecting them to a risk of harm from drug dealing and criminal activity. See *In re Plump*, 294 Mich App at 273. In addition, considering the very young age of the children, there was no error in the determination that it was in their best interest to move into a permanent household as soon as possible. See *In re Olive/Metts*, 297 Mich App at 42. Giving respondent even more time to end her relationship with the father would only create instability in the minor children's lives. Accordingly, there was no error in the best-interests determination.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark T. Boonstra