

STATE OF MICHIGAN
COURT OF APPEALS

In re MASSEY/MCINTYRE, Minors.

UNPUBLISHED
March 17, 2020

No. 350741
Wayne Circuit Court
Family Division
LC No. 19-000829-NA

Before: STEPHENS, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court’s order terminating her parental rights to her minor children, LCM and ASM. We affirm.

I. FACTUAL BACKGROUND

On April 26, 2019, petitioner, the Department of Health and Human Services (DHHS), filed a petition requesting that the court take jurisdiction over the minor children under MCL 712A.2(b)(1) and (2), and terminate respondent’s parental rights. According to the petition, LCM had been sexually abused by Michael Jordan, respondent’s live-in boyfriend. Jordan molested LCM and made several attempts to orally penetrate her. Respondent admitted that LCM told her about the sexual abuse in February 2019, but did not do anything with the information because LCM, who was nine-years-old at the time, did not give respondent enough details. According to respondent, she first learned about the extent of the sexual abuse when Child Protective Services (CPS), became involved. Respondent nevertheless continued to allow Jordan to stay in the house even after learning that he sexually abused LCM.

The minor children have a prior CPS history. In 2016, the minor children were made temporary court wards because respondent failed to protect the minor children from abuse. FM, LCM’s father, was arrested for sexually abusing the cousins of the minor children. The minor cousins that were sexually abused by FM sexually abused ACM. The minor children remained in respondent’s care and custody while respondent completed a parent-agency treatment plan. Despite FM’s criminal conviction for criminal sexual conduct with a minor, respondent continued to allow contact—through telephone calls—between the minor children and FM.

On May 2, 2019, Leticia Madlock conducted a Kids Talk Interview with LCM. During LCM's Kids Talk Interview, LCM said Jordan made several attempts to orally penetrate her and would rub his penis against her vaginal area. LCM told Madlock that she told respondent about the sexual abuse in November 2016. Respondent did not believe LCM when LCM tried telling respondent that Jordan was sexually abusing her and accused LCM of lying. LCM said that the sexual abuse began when she was five years old and that the sexual abuse happened “ ‘[a] lot.’ ” Before the start of trial, petitioner sought to admit LCM's statements during the Kids Talk Interview under MCR 3.972(C) as substance evidence of Jordan's abuse. After the referee conducted a hearing to determine whether the statements were admissible, it admitted the statements under MCR 3.972(C)(2)(a). The videorecording of the Kids Talk Interview was also admitted.

The referee concluded that there was a preponderance of the evidence that the minor children came within the court's jurisdiction under MCL 712A.2(b)(1) because respondent presented a substantial risk to the well-being of the minor children. The referee also determined that the minor children came within the court's jurisdiction under MCL 712A.2(b)(2) because of neglect, cruelty, criminality, or depravity on respondent's part. Regarding statutory grounds, the referee concluded that there was clear and evidence to terminate respondent's parental rights under MCL 712A.19b(3)(b)(ii) and (j). The referee relied on respondent's testimony that LCM told respondent about Jordan's sexual abuse in February 2019 and that respondent failed to take any steps to remove Jordan from the house. The referee noted respondent's failure to protect the minor children was particularly significant because the minor children were previously exposed to sexually-inappropriate conduct and subject to a prior CPS proceeding. The referee also determined that it was in the best interests of the minor children to terminate respondent's parental rights despite the minor children's current relative placements. The trial court adopted the referee's conclusions and entered an order terminating respondent's parental rights.

II. TENDER YEARS

Respondent first argues on appeal that the referee abused its discretion when it admitted LCM's statements under MCR 3.972(C)(2)(a) and accompanying DVD under MCL 712A.17b. We disagree.

This Court reviews evidentiary rulings in a termination proceeding for an abuse of discretion. *In re Martin*, 316 Mich App 73, 80; 896 NW2d 452 (2016). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *In re Brown*, 305 Mich App 623, 629; 853 NW2d 459 (2014). Preliminary questions of law affecting the admission of evidence such as whether a statute or rule of evidence bars admissibility are reviewed de novo. *In re Martin*, 316 Mich App at 80.

At the outset, respondent's argument is convoluted and fails to differentiate between the applicable law governing the admission of the DVD of the May 2, 2019 Kids Talk Interview and the law governing the admission of LCM's statements through Madlock. MCR 3.972(C)(2)(a) and MCL 712A.17b “work in tandem,” but are relevant at different stages of a termination proceeding. *In re Martin*, 316 Mich App at 82. MCR 3.972(C)(2)(a) expressly applies at the adjudication stage, whereas MCL 712A.17b expressly does not apply at the adjudication stage. *Id.*

When the referee admitted LCM's statements to Madlock from the May 2, 2019 Kids Talk Interview, it relied exclusively on MCR 3.972(C)(2)(a). MCR 3.972(C) "permits a trial court to receive as substantive evidence of abuse what would otherwise be deemed inadmissible hearsay evidence." *In re Brown*, 305 Mich App at 630. MCR 3.972(C) provides, in relevant part:

(2) Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (g), (k), (z), or (aa), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

Accordingly, at the adjudication, a statement of child under 10 years old that concerns and describes an act of sexual abuse performed on the child by another person may be admissible "through the testimony of a person who heard the child make the statement," regardless of the child's availability, but only if the court finds at a hearing before trial "that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." *In re Martin*, 316 Mich App at 80, quoting MCR 3.972(C)(2)(a).

Contrary to respondent's assertion, Madlock, the forensic interviewer who heard LCM's statements that she was sexually abused by Jordan, testified at the tender years hearing regarding those statements. LCM was nine years old when she told Madlock about the sexual abuse. LCM's statements concerned acts of sexual abuse perpetrated by Jordan. Before the referee admitted LCM's statements to Madlock under MCR 3.972(C)(2)(a), she concluded that LCM's statements provided adequate indicia of trustworthiness. The referee determined that LCM's requests to stop the Kids Talk Interview were due to LCM's discomfort rather than dishonesty. The referee also explicitly stated that LCM's statements were admissible "for the purposes of adjudication. Respondent does not claim that the Kids Talk Interview did not follow proper protocol, and therefore, the statements were properly admitted at the adjudication. Moreover, the referee did not rely on LCM's statements during the Kids Talk Interview outside of the adjudication. When the referee ruled on statutory grounds and best interests, she expressly stated that it was relying on respondent's own testimony.

The DVD of LCM's May 2, 2019 Kids Talk Interview was also properly admitted. MCL 712A.17b concerns "videorecorded statements made by a witness under the age of 16 in a forensic interview undertaken by the state in connection with proceedings concerning the alleged abuse and neglect of the witness." *In re Martin*, 316 Mich App at 81. "[V]ideorecorded statement[s] shall be admitted at all proceedings except the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5). Following the tender years hearing and ruling on the admission of LCM's statements under MCR 3.972(C)(2)(a), the referee admitted the DVD of LCM's May 2, 2019 Kids Talk Interview. Although the referee did not cite MCL 712A.17b, she recognized that

the DVD was admitted for the purposes of everything except for the adjudication stage, which would be consistent with MCL 712A.17b(5). When the referee concluded that the minor children fell within the court's jurisdiction, she did not specify the evidence that she was relying on; the referee only cited MCL 712A.2(b)(1) and (2). However, the referee presumably did not rely on the DVD given that she recognized that the DVD was inadmissible at the adjudication stage. Accordingly, the referee did not abuse her discretion when she admitted LCM's statements during the May 2, 2019 Kids Talk Interview and the accompanying DVD.

III. JURISDICTION

Respondent next argues that the referee erred when she exercised jurisdiction over the minor children because her "actions or inactions" did not create an unfit environment for the minor children. We disagree.

An issue regarding an adjudication error raised after the trial court has terminated parental rights is reviewed for plain error. *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Because respondent did not challenge the referee's conclusion that there were statutory grounds to exercise jurisdiction over the minor children until after parental rights were terminated, she must establish that "(1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected [he]r substantial rights." *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). And, the respondent must show that the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *In re Ferranti*, 504 Mich at 29, quoting *Carines*, 460 Mich at 763.

"The question at adjudication is whether the trial court can exercise jurisdiction over the child[ren] (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15. The trial court may exercise jurisdiction over the children if the petitioner proves the allegations in the petition at trial. *Id.*, citing MCR 3.972. "[T]he petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition." *In re Sanders*, 495 Mich 394, 405; 852 NW2d 524 (2014), citing MCR 3.927(E). The petitioner may seek jurisdiction under MCL 712A.2(b)(1), which concerns allegations of abuse of neglect or refusal to provide proper or necessary support, or under MCL 712A.2(b)(2), which concern allegations regarding the parent's lack of fitness.

In this case, the referee determined that the minor children came within the court's jurisdiction under both MCL 712A.2(b)(1) and (2). There was evidence that Jordan sexually abused LCM through molestation and repeated attempts to orally penetrate her. As a result of the sexual abuse, LCM contracted chlamydia. Although there is some disagreement over the exact date that respondent learned of the sexual abuse, it is undisputed that respondent was aware of sexually-inappropriate conduct between LCM and Jordan at least two months before the petition was filed. As LCM's mother, it was respondent's responsibility to seek out more information and take steps towards protecting her children. Respondent's lack of urgency is particularly egregious given that the minor children previously had been exposed to sexual abuse. Respondent's failure to take LCM to the hospital, remove Jordan from the house, and report Jordan to the police created a substantial risk of harm to both minor children.

Even after respondent learned about the full extent of the sexual abuse, she allowed Jordan to come around the house while the minor children were home. CPS worker Kelly Whittaker saw Jordan on the front porch of respondent's house after the petition was filed. On May 15, 2019, respondent admitted that she still allows Jordan to stay at her house. Respondent also permits contact between the minor children and a convicted sex offender. Accordingly, jurisdiction was proper under MCL 712A.2(b)(1) and (2).

IV. STATUTORY GROUNDS

Respondent argues that the referee erroneously found that there was clear and convincing evidence of statutory grounds to terminate respondent's parental rights. We disagree.

This Court reviews the trial court's findings regarding statutory grounds for clear error. MCR 3.997(K); *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012). A finding is clearly erroneous if the reviewing court is "left with the definite and firm conviction that a mistake has been made." *In re Gonzales/Martinez*, 310 Mich App 426, 430-431; 871 NW2d 868 (2015). This Court must defer to the trial court's special ability to judge the credibility of witnesses. *In re Gach*, 315 Mich App 83, 93; 889 NW2d 707 (2016).

Where permanent termination of parental rights is sought, the petitioner has the burden of showing that the allegations in the petition establish a statutory basis for termination by clear and convincing evidence. MCR 3.977(A)(3); MCR 3.997(E)(3); MCR 3.977(F)(1)(b); MCR 3.977(H)(3)(a); *In re Trejo*, 462 Mich 341, 350, 355; 612 NW2d 407 (2000), superseded by statute on other grounds in *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). Under MCL 712A.19b(1), the trial court must make findings of fact, state conclusions of law, and specify the statutory basis for an order terminating a respondent's parental rights.

A. MCL 712A.19b(3)(b)(ii)

Respondent's parental rights were terminated under MCL 712A.19b(3)(b)(ii), which concerns abuse of a child. Termination of parental rights is appropriate under MCL 712A.19b(3)(b)(ii) if "[t]he parent who had an opportunity to prevent the . . . sexual abuse of the child . . . 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."

There was clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(b)(ii). Although respondent testified that she first learned about the sexual abuse in February 2019 and did nothing until CPS became involved in April 2019, LCM told Madlock during the May 2, 2019 Kids Talk Interview that Jordan started to sexually abuse her when she was five years old. LCM also told Madlock that she told respondent about the sexual abuse on her sixth birthday, which would have been November 17, 2016. LCM's statements to Madlock demonstrate that respondent knew about the sexual abuse for years and did nothing to protect LCM. Thus, there was clear and convincing evidence that respondent had an opportunity to prevent sexual abuse and failed to do so. Termination under MCL 712A.19b(3)(b)(ii) was therefore warranted.

B. MCL 712A.19b(3)(j)

There was also clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(j). Under MCL 712A.19b(3)(j), termination is appropriate if "[t]here 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."

The referee relied on respondent's testimony to conclude that there was clear and convincing evidence to terminate respondent's parental rights because respondent failed to take appropriate action upon learning that Jordan sexually abused LCM. There is no dispute that respondent knew that Jordan sexually abused LCM for a minimum of two months and did nothing to protect the child until CPS became involved. Without any logical explanation, respondent continued to allow Jordan to live in the house with her minor children despite knowing that Jordan was a sexual predator.

Further, respondent's history of exposing her minor children to sexual predators demonstrates that the minor children will be harmed if returned to respondent's care. In 2016, the minor children came within the court's jurisdiction because ASM was sexually abused by minor children that FM (LCM's father) sexually abused. The minor children remained in respondent's care, but respondent was required to complete a parent-agency treatment plan. Despite FM's criminal conviction for criminal sexual with a minor and despite respondent's counseling and parenting classes, respondent allowed FM to contact the minor children, further exposing them to a sexual predator. Even after respondent learned about the extent of the Jordan's sexual abuse of LCM, she continued to allow Jordan to stay at the house. Respondent has demonstrated that she lacks the parenting skills to protect her minor children from harm and will knowingly allow contact between the minor children and sexual predators. Therefore, the termination of respondent's parental rights under MCL 712A.19b(3)(j) was appropriate.

V. BEST INTERESTS

Respondent next argues that the referee erred by finding by a preponderance of the evidence that it would be in the best interests of the minor children to terminate her parental rights. We disagree.

This Court reviews a trial court's decision regarding a child's best interests for clear error. *In re Medina*, 317 Mich App 219, 226; 894 NW2d 653 (2016). See also MCR 3.977(K). "Even if the trial court finds that the [DHHS] has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children." *In re Gonzales/Martinez*, 310 Mich App at 434, citing MCL 712A.19b(5) and *In re Moss*, 301 Mich App at 90. The best-interests analysis focuses on the child rather than the parent. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016), citing *In re Moss*, 301 Mich App at 87. To determine whether the termination of a parent's rights is in the child's best interests, the trial court should weigh all of the available evidence, and consider the entire record, including any evidence introduced by any party, *In re Medina*, 317 Mich App at 237, citing *In re Trejo*, 462 Mich at 353. Factors that the trial court may consider in making this determination include "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 Medina*, 317 Mich App at 237, quoting *In re White*, 303 Mich App 701, 713–714; 846 NW2d 61 (2014).

In this case, the minor children were exposed to two sexual predators, in two different households, while in the care of respondent. The referee concluded that it would be in the best interests of the minor children to terminate respondent's parental rights, despite their relative placements, because respondent could not protect the minor children from harm. In 2016, respondent was required to complete a parent-agency treatment plan because she failed to protect the minor children from harm. Less than three years later, respondent again failed to protect the minor children from a similar type of harm. In both situations, respondent chose to allow further contact between the sexual predators—Jordan and FM—and the minor children. As the referee properly noted, it would be illogical to “subject children to a parent that will fail to protect their needs [or] be vigilant about their needs and particularly sensitive about children who have previously been exposed [to] sexual activity or behavior.” Therefore, the termination of respondent's parental rights was in the best interests of the minor children.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto