

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
October 16, 2012

In the Matter of TAMLYN, Minors.

No. 309103
Clinton Circuit Court
Family Division
LC No. 11-023279-NA

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating his parental rights to his four minor children, H.T., J.C., J.T. and S.T. We affirm.

After receiving allegations that respondent sexually abused the minor children, the court removed respondent from the home and held a bench trial to adjudicate the allegations against him. The investigation was touched off when H.T. presented a written note to a school counselor in which she had written that respondent "had been touching her in inappropriate places" and had told H.T. never to tell anyone about it. The counselor testified that when she asked where H.T. was touched, H.T. pointed to her breasts and genital areas. H.T. testified that respondent had touched her several times over the last two years, with the most recent incident occurring within the month prior to these proceedings. A Child Protective Services (CPS) investigator testified that H.T. made consistent and credible statements when interviewed. The CPS investigator noted that another of respondent's children, J.C., had expressed concern over respondent's touching of her inner thighs. The investigator reported that although H.T. expressed some confusion over whether respondent's touching was accidental or intentional, she never recanted her allegations. Finding H.T. credible, the trial court took jurisdiction over the minor children pursuant to MCL 712A.2(b)(1) (the minors are subject to a substantial risk of harm to their mental well-being) and MCL 712A.2(b)(2) (the home environment is an unfit environment due to the parent's criminality or depravity).

At the initial dispositional review hearing, a doctor accepted as an expert in pediatric care and child sexual abuse testified that H.T. reported that respondent's touching of her private areas was accidental and occurred while being tickled by respondent. The doctor expressed concern over why H.T. repeatedly emphasized the fact that the touching was accidental. He opined that her emphasis could have been "either because it was accidental or because she doesn't want to get anybody in trouble." The CPS investigator testified that he believed H.T. changed her testimony because her stepmother was coaching her, as the family was under significant financial

stress with respondent out of the home. A county sheriff's deputy who interviewed H.T. testified that she expressed confusion and frustration over the fact that respondent had touched her and told her to say nothing, notwithstanding the fact that he had previously instructed her to tell an adult if anyone ever touched her in her privates. The doctor testified that although he could not form a conclusion on the alleged assault, he noted he had concerns. In his report of his evaluation, he put it this way: H.T.'s "description of her dad only touching her on the bare skin when she doesn't have clothing on merits investigation. Also, it is remarkable that when he is tickling her, inadvertently he manages to touch her breast area, her buttocks and even her vulvar and inner thigh area." He testified that "anybody who would read that paragraph would understand that I'm expressing reservation there."

Respondent called several family friends as witnesses, all of whom testified that they were frequently in the home, witnessed the family regularly tickling and wrestling with each other, and never saw respondent inappropriately touch any of the children.

The trial court terminated respondent's parental rights based on MCL 712A.19b(3)(b)(i) (the parent sexually abused the child and it is reasonably likely that the child will suffer additional abuse in the foreseeable future if placed with the parent) and MCL 712A.19b(3)(j) (it is reasonably likely, based on prior conduct, that the child will be harmed if returned to the parent). The court found the complaining witness's testimony to be credible and consistent, notwithstanding her later confusion over respondent's motives. The court also found that termination of respondent's parental rights was in the best interests of the minor children.

Respondent first argues that the court erred in finding that sufficient statutory grounds existed to assume jurisdiction over the minor children. We disagree. This Court reviews for clear error the trial court's findings and determination that sufficient grounds existed under MCL 712A.2(b) to assert jurisdiction over minor children by a preponderance of the evidence. MCR 3.977(E)(2); MCR 3.972(C)(1); *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). A finding is clearly erroneous when it lacks evidentiary support, or although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). A "preponderance of the evidence" means evidence of a proposition that when weighed against the evidence opposed to the proposition "has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008).

In light of the above evidence, the lower court did not commit clear error in finding that statutory grounds existed to assume jurisdiction over the minor children because the sexual abuse allegations against respondent were proven by a preponderance of the evidence. We accord deference to the special opportunity of the trial court to determine the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich at 337; MCR 2.613(C). When considering the testimony of all the witnesses, within the context of the court's implied credibility assessments, we conclude the evidence establishes that respondent had inappropriately touched H.T. on her breasts and genital areas, both above and under her clothes. The evidence also showed that respondent had touched J.C. on the inner thighs in a manner that made the child uncomfortable. A parent's treatment of one child is indicative of his or her probable treatment toward the other children. *In re Foster*, 285 Mich App 630, 631; 776 NW2d 415 (2009). Accordingly, the trial court did not commit clear error in finding that the children were subject to a substantial risk of

harm to their mental well-being and that respondent maintained an unfit home environment for the children due to his criminality. MCL 712A.2(b)(1), (2).

Respondent next argues that the court erred by finding, by clear and convincing evidence, that statutory grounds existed to terminate his parental rights to his children. Again, we disagree. We review for clear error the trial court's factual findings and determination that a statutory ground for termination has been established by clear and convincing evidence. MCR 3.977(E)(3); MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

The trial court may terminate parental rights if the petitioner proves at least one ground listed in MCL 712A.19b(3) by clear and convincing evidence, *In re Trejo Minors*, 462 Mich 341, 355; 612 NW2d 407 (2000). Grounds for termination of parental rights include:

(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.

* * *

(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. [MCL 712A.19b(3).]

Clear and convincing evidence will create "in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009)(citation and internal quotation marks omitted).

In light of the evidence presented in the initial dispositional hearing and the family court's superior ability to assess the credibility of the witnesses appearing before it, we find the court did not commit clear error in finding that the above statutory grounds to terminate respondent's parental rights were proven by clear and convincing evidence. Contrary to respondent's assertion, H.T. never recanted her allegations. Rather, she merely expressed confusion over respondent's intentions in touching her. Further, petitioner presented several witnesses who corroborated H.T.'s testimony. Respondent's witnesses were of limited relevance because they were never present at the times or places where H.T. claimed that respondent had touched her. Based on the evidence of record, petitioner presented clear and convincing evidence that respondent sexually abused H.T. and that she would be at risk of additional harm or abuse in the future if she remained in respondent's care. MCL 712A.19b(3)(b)(i) and (j).

The court also noted that the other children were at risk of sexual abuse. J.C. also indicated concern over respondent's inappropriate touching, and respondent took steps to manipulate H.T. in order to conceal his sexual abuse. As a parent's treatment of one child is indicative of his or her probable treatment towards the other children, *In re Foster*, 285 Mich

App at 631, the court did not commit clear error in finding sufficient grounds to terminate respondent's parental rights to his other three children.¹

We also reject respondent's argument that the court clearly erred in finding that termination of respondent's parental rights was in the best interests of the children. MCR 3.977(K). Once petitioner establishes a statutory ground under MCL 712A.19b(3) to terminate a parent's rights, the lower court must do so if it finds that termination is in the best interests of the children. MCL 712A.19b(5); MCR 3.977(H)(3); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009). Here, the court found as follows:

So, I . . . do find that the statutory criteria's met, and it is in her [H.T.'s] best interest and the best interests of the other children that his parental rights be terminated.

The other children are in the home. [S.T.] is just a baby, but there were concerns that—and implications, although it isn't the basis—well, although these aren't being . . . pursued, but that the other teen-age girl in the home, [J.C.], was uncomfortable with [respondent's] actions.

So, I do find that between that and . . . the attempts to make [H.T.] feel guilty or that she should not continue to make those allegations, it is in the best interest of the children that his rights be terminated.

The court's implied finding that termination was in the best interests of all the children because respondent presented a continuing risk of harm to them is consistent with the record.

The evidence of record shows a home environment with respondent where the female children are at risk of sexual abuse and where all the children are subject to parental pressure to conceal such abuse. Although H.T. was initially reluctant to testify at the bench trial about her allegations, she did eventually testify that respondent touched her "breast" and "crotch area" both over and under her clothing. She stated that respondent touched her in her bedroom and that he would start tickling her if someone walked by while he was touching her improperly. H.T. also testified that respondent told her not to tell anyone about the touching. The CPS investigator testified that when interviewing J.C., the girl indicated that it made her uncomfortable when respondent was tickling her inner thigh. The investigator also testified to seeing H.T.'s stepmother yelling at H.T. outside the school on the day he had interviewed H.T. about her allegations, telling H.T. that "she should not have been talking to anybody before she talked to her." The investigator was also concerned about conversations between respondent and the stepmother that the children could overhear, in which the stepmother "was being supportive of"

¹ Although respondent claims that he would pose no harm to the children because he has cooperated with petitioner's services, the services he claims to have received did not address whether he presented a continuing risk of harm to his children. Further, he was not entitled to DHS services because reunification services are unnecessary "when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009).

respondent, and in which the children learned of the stepmother's financial struggles in respondent's absence. The school counselor stated that H.T. reported that she was becoming confused about her home life because respondent was the breadwinner in the family, and her stepmother did not previously have a job.

Respondent asserts that the trial court erred in not determining the best interests of each child individually. Specifically, he argues that his rights to J.T. should not have been terminated because J.T. had denied seeing any sexual abuse and because the child was not doing well since his removal from respondent's care. Although the court did not delineate its findings with respect to each child, the court did indicate in broad language that it had considered what was in the best interests of each. Whether J.T. had not observed the alleged sexual abuse² does not mean that it is in his best interests to remain with respondent. It is reasonable for the court to conclude that it is in J.T.'s best interests not to be subject to the control of a parent accused of child sexual abuse, who has also, the evidence supports, burdened all the children with concealing the abuse.

Citing MCL 712A.19a(6)(a) and *In re Mason*, respondent further argues that the trial court erred in not considering placing the children with relatives. The Court stated in dicta that

a child's placement with relatives weighs against termination under MCL 712A.19a(6)(a), which expressly establishes that, although grounds allowing the initiation of termination proceedings are present, initiation of termination proceedings is not required when the children are "being cared for by relatives." Thus the boys' placement with respondent's family was an explicit factor to consider in determining whether termination was in the children's best interests, yet placement with relatives was never considered in this regard. [*In re Mason*, 486 Mich at 164.]

There are several problems with respondent's argument. First, it assumes the court in the case at hand never considered placement with relatives because the court never explicitly stated it did. This is a non sequitur. Second, evidence of a possible relative placement would be only one factor as part of the whole record on which the trial court determines whether termination of parental rights is in a child's best interests. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 353 ("subsection 19b(5) permits the court to find from evidence on the whole record that termination is . . . in a child's best interests"); *In re Olive/Metts*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306279), slip op p 3. Third, the circumstances of *In re Mason* are markedly different from those in the case at hand. *In re Mason* involved the termination of an incarcerated father's parental rights. *In re Mason*, 486 Mich at 146-147. The Court concluded that in not considering placement of the children with the respondent's relatives, the trial court did not fully consider whether the respondent would "be able to provide proper care and custody within a reasonable time." MCL 712A.19b(3)(h); see *In re Mason*, 486 Mich at 161, 163-164. It is in the

² Respondent asserts that J.T. "denied having seen any abuse," but offers no record support. Indeed, in his statement of facts respondent only asserts that petitioner presented no evidence that J.T. had seen abuse, as alleged in the petition.

context of the necessity of the trial court to consider the care and custody of the children in the future pursuant to § 19b(h)(3) that the Court observed that the lower court did not consider how placement with the respondent's relatives could impact the determination. The circumstances of the current case are not analogous.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Deborah A. Servitto