

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
January 3, 2013

In the Matter of WELSH/MCGOWAN, Minors.

Nos. 309827, 309828
Wayne Circuit Court
Family Division
LC No. 10-493212-NA

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

In these consolidated appeals, respondent mother and respondent father appeal as of right the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i) and (ii). We affirm.

The minor children came to the attention of the court on allegations that respondent father sexually abused one of the respondent mother's 13-year-old daughters (whom he did not father), C.D. Allegations surfaced that respondent father had also sexually abused one of his own daughters (whom he did not have in common with respondent mother), J.M., as well as a 4-year-old daughter that the respondents had in common, C.M. Respondent mother's 13-year-old daughter and the respondents' 4-year-old daughter reported the abuse to respondent mother, who elected to dismiss the allegations as untrue and instead defend and remain with respondent father. Further allegations were made that both respondent mother and respondent father were heavy drinkers who frequently drank to excess while caring for the children. This appeal pertains only to the termination of respondents' parental rights with respect to C.M. and another child, G.A.

On appeal, respondents both first argue that the trial court erred by admitting the minor child's, C.M., out-of-court hearsay statements because the circumstances surrounding such statements did not provide adequate indicia of reliability and, therefore, these statements were not admissible under the "tender years" exception provided by MCR 3.972(C). We disagree.

This Court reviews a trial court's evidentiary decision in a child protection proceeding for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). A trial court abuses its discretion if its decision falls outside the range of principled outcomes. *Id.* "This Court, however, will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights." *In re Caldwell*, 228 Mich App 116, 123; 576 NW2d 724 (1998).

“Although the rules of evidence for a civil proceeding apply during [] a trial [in a child protective proceeding], hearsay statements of children pertaining to acts of child abuse are admissible at the trial if the criteria for reliability set out in MCR 3.972(C)(2) (formerly MCR 5.972 [C][2]) are satisfied.” *In re Archer*, 277 Mich App 71, 80; 744 NW2d 1 (2007) (internal citation omitted). MCR 3.972(C) provides, in relevant part:

(2) *Child’s Statement*. Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(21) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), 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.

Thus, “MCR 3.972(C)(2)(a) requires a child’s out-of-court statements concerning acts of child abuse to have adequate indicia of trustworthiness before they will be admitted at trial.” *Archer*, 277 Mich App at 82. In making this determination, the trial court looks to the totality of the circumstances surrounding the making of the statement. *Id.* “Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate.” *Id.*

A review of the tender years hearing in relation to the above factors reveals that the circumstances surrounding C.M.’s statements provided adequate indicia of trustworthiness. During C.M.’s first therapy session with her therapist, Sally Coffey (“Coffey”), C.M. disclosed that respondent father was “touching her pee pee” and that respondent father called it the “tickle game.” C.M. said that “at first it tickled” but then “he started to hurt me. And I told him to stop, and he wouldn’t stop.” During this conversation, C.M. physically demonstrated what the “tickle game” was by sitting back, pulling down her underwear and “very forcefully” moving her finger up and down at her vagina, touching her vagina. On various occasions, C.M. told Coffey and her foster parent that respondent father had played the “tickle game” with her and it hurt. C.M. exhibited hostile, angry, and other negative feelings when discussing respondent father. The therapist opined that C.M.’s actions and behaviors were consistent with those of a child that had been sexually abused. At the time of these statements, C.M. was about four years old and, according to Coffey, the vocabulary used was normal for a person of her age. Additionally, the disclosures were spontaneous and not the product of certain questioning or prodding into the specific subject matter of sexual abuse. While both respondents sought to show that others might have had a motive to fabricate the allegations, there was no showing that C.M. herself had such a motive. Given C.M.’s age, it would be difficult to find that C.M. was coached to make such statements or exhibit such behavior. Although it was also suggested that someone else could

have abused C.M., C.M. consistently identified respondent father as the person that “hurt” her. Overall, C.M.’s statements and actions provided indicia of trustworthiness to merit the admission of her statements under MCR 3.972. Accordingly, the trial court did not abuse its discretion in admitting these statements.

Respondents next argue that the trial court clearly erred in finding that statutory grounds existed to terminate their parental rights to the minor children. We disagree.

“In order to terminate parental rights, the [trial] court must find that at least one of the statutory grounds for termination . . . has been met by clear and convincing evidence.” *Matter of Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). This Court reviews a trial court’s factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). “A finding is clearly erroneous where the reviewing court has a definite and firm conviction that a mistake has been made.” *Jackson*, 199 Mich App at 25. “Clear error signifies a decision that strikes us as more than just maybe or probably wrong.” *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). In reviewing the trial court’s findings of fact, this Court gives due regard to the trial court’s special opportunity to judge the credibility of the witnesses. MCR 2.613(C); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

The trial court terminated respondent father’s parental rights under MCL 712A.19b(3)(b)(i), and terminated respondent mother’s parental rights under MCL 712A.19b(3)(b)(ii), after finding that these statutory grounds were established by clear and convincing evidence. MCL 712A.19b(3)(b) provides, in relevant part:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

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

In regard to respondent father, he inappropriately touched three children, including two of his daughters and a stepdaughter, in a sexual manner. At the beginning of the proceedings, his other daughter, J.M., and his stepdaughter, C.D., both alleged that respondent father inappropriately touched them, which resulted in the filing of two separate petitions to terminate his parental rights. Respondent father maintained his innocence and claimed that the allegations were pure fabrications. Meanwhile, respondent father was charged with criminal sexual conduct

in the fourth-degree and ultimately pled guilty to disorderly conduct. Regarding the petition involving C.D., the trial court found that there was inappropriate touching but decided to place respondent father on a treatment plan rather than terminate his parental rights to C.M. and G.A. After the treatment plan began, C.M. revealed that respondent father played the “tickle game” with her in which he, at the very least, touched her vagina with his finger. “Evidence of how a parent treats one child is evidence of how he or she may treat the other children.” *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). Further, the failure of respondent father to address these allegations supported the trial court’s finding that it has “received no reasonable assurance” that the abuse will not occur in the future to C.M. or her younger sibling. While respondent father denied the allegations and attempted to blame someone else for the abuse, the trial court apparently believed C.M.’s statements and this Court defers to such credibility decisions. *In re HRC*, 286 Mich App 444, 460-461; 781 NW2d 105 (2009). Therefore, the trial court did not clearly err in finding that MCL 712A.19b(3)(b)(i) was established by clear and convincing evidence.

Likewise, the trial court did not clearly err in finding that statutory ground, MCL 712A.19b(3)(b)(ii), warranted terminating respondent mother’s parental rights to the minor children. For most of the proceedings, respondent mother has failed to acknowledge the allegations against respondent father. After learning of J.M.’s and C.D.’s allegations, respondent mother took no real steps to ensure that the other children, including C.M., would not be abused or inappropriately touched. And, C.M.’s therapist testified that C.M. indicated that respondent mother witnessed at least one of the incidents of abuse taking place and merely swatted respondent father on the butt. Respondent mother only recently has acknowledged that there may be a possibility that C.M. was actually abused, but fails to exhibit any behavior that suggests that she is actually worried about the abuse and its effects on C.M. or the other children. Additionally, respondent mother has not demonstrated that she would actually be able to prevent such abuse in the future. For example, shortly after instituting a safety plan, which was shaped around her alleged uneasiness to leave the children home alone with respondent father, respondent mother admitted to violating the plan. This is also evidence that respondent mother has not benefited from her treatment plan, which required her to address her failure in preventing the inappropriate touching, and it is well-established that “a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent’s custody.” *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded by statute on other grounds MCL 712A.19(b)(5).

When viewing respondent mother’s actions, it becomes painfully obvious that she places her relationship with respondent father above the interests and safety of her children. Evidence was presented that respondent mother encouraged C.D. to recant her allegations. There was also evidence suggesting that respondent mother was encouraging C.M. to refrain from speaking with authorities and to also change her statement. Respondent mother divorced respondent father during the course of the termination proceedings but admitted that she did not want to do so and indicated to her therapist that she only did so because she thought it would help in her court case. When it appeared that it would not help, respondent mother immediately remarried him and stated at trial that she intended to remain married to him. Overall, respondent mother demonstrated that she was more concerned with preventing the filing of a petition to terminate parental rights than with preventing sexual abuse. Accordingly, the trial court’s finding that MCL 712A.19b(3)(b)(ii) was established was not clearly erroneous.

Lastly, respondents argue the trial court clearly erred by finding that termination of their parental rights was in the best interests of the minor children. We disagree.

“If the court finds that there are grounds for termination of parental rights and 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.” MCL 712A.19b(5). The determination of whether termination is in the best interests of the child is “made on the basis of the evidence on the whole record and is reviewed for clear error.” *In re LE*, 278 Mich App 1, 25; 747 NW2d 883 (2008).

“In deciding whether termination is in the child’s best interests, the court may consider 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 Olive/Metts, Minors*, 297 Mich App 35, ___; ___ NW2d ___ (2012) (slip op at 3) (internal citations and quotations omitted). While respondents made progress with their issues of alcohol abuse, respondents have failed to address the issues of sexual abuse even though there has been a history of inappropriate sexual touching. The failure to resolve or address the issue of sexual abuse demonstrates that respondents lack the parenting ability to provide a safe and stable home for the children. Further, the record shows that the minor children exhibit negative behaviors after having supervised visits with respondents. After visits, G.A. has been “a little bit more aggressive . . . punching, kicking, hitting” and C.M. has exhibited defiant behavior and “actually has been hitting a lot more lately.” Most alarmingly, C.M. recently became hysterical when talking about respondent father and has revealed that she is afraid of him. The children have been in foster care for two years and while respondents have received services during this time period, they have not signaled that they can provide a safe home for their children in the foreseeable future. In light of this evidence, the trial court did not clearly err in finding that termination of respondents’ parental rights was in the best interests of the children.

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro