

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of BB and BB, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LESLEY BEHM,

Respondent-Appellant.

UNPUBLISHED
February 22, 2002

No. 235683
Branch Circuit Court
Family Division
LC No. 00-001679-NA

Before: Whitbeck, C.J., and Markey and K. F. Kelly, JJ.

PER CURIAM.

Respondent Lesley Behm appeals as of right the family court's order terminating her parental rights to her two daughters pursuant to MCL 712A.19b(3)(c)(i) and (g). The family court also terminated Jeff Behm's parental rights to the children, but he does not appeal. We affirm.

I. Basic Facts And Procedural History

In August 2000, the Family Independence Agency (FIA) filed a petition for temporary custody of the girls. The FIA alleged that the older girl, who was six years old at the time, had informed a State Police Trooper that her father had sexually molested her when she was four and five years old, but Lesley Behm did not believe that her husband had molested her daughter. Further, Lesley and Jeff Behm purportedly indicated that the children had seen them having sex, while Jeff Behm added that he and Lesley Behm discussed sex in front of the children. Lesley Behm, however, denied these last two allegations, saying that she and her husband had never discussed sex in front of the children and that their children had inadvertently walked into their bedroom once when they were having sex.¹

¹ The record lacks any significant information concerning most of the proceedings before the termination hearing, including transcripts. However, the issues on appeal do not directly implicate those proceedings and most of this case's history was related in reports in the record or during the termination hearing, for which we do have the transcripts.

Following a jury trial, the family court took jurisdiction of the children, placed them in foster care, and ordered both parents to undergo a psychological evaluation and attend supervised visitation with the children. Evidently, the family court also ordered Lesley Behm to have no contact with her husband and to take steps toward being able to provide a suitable home for the children. At some time following the adjudication, the children were moved from their foster home to their grandparents' home.²

Approximately three months after filing the initial petition, the FIA petitioned the family court to terminate each parent's rights to the children, alleging that Lesley Behm still did not believe that her husband had molested her older daughter and that she continued to reside with her husband. The termination petition added that the older girl had seen a psychologist, who reported that the girl disclosed the abuse and that her behavior was consistent with the behavior of other children who have been sexually abused. Moreover, because Lesley Behm did not believe her daughter's claim of abuse, she could not provide necessary emotional support for the girl. The family court held a hearing on the petition on December 13, 2000, after which it decided to terminate Jeff Behm's parental rights, but declined to terminate Lesley Behm's rights to her children.

In May 2001, the FIA again petitioned the family court to terminate Lesley Behm's parental rights, citing MCL 712A.19b(3)(b)(i), (c)(i), (c)(ii), and (g) as statutory grounds for the action. In addition to the allegations that appeared in the petitions previously filed in the action, the FIA now alleged that Lesley Behm had reported breaking off all contact with Jeff Behm, but had been seen with him as recently as March 17, 2001, at a Wal-Mart store in Angola, Indiana. The petition also noted that Timothy Strang, Ph.D., Lesley Behm's psychologist, had concluded that her ambivalence about whether to believe her husband or her child made it unlikely that Lesley Behm would be able to keep her children away from Jeff Behm in the long run.

The first day of evidence in the termination hearing took place on June 20, 2001. The FIA first presented Vicki Hinshaw as a witness. Hinshaw, a child services worker for the FIA, was shopping at the Wal-Mart store in Angola, Indiana, on March 17, 2001, when she saw Lesley and Jeff Behm walking through the store with each other for approximately thirty minutes with a single shopping cart.³ Hinshaw knew Lesley Behm, who was living in Indiana at the time, and knew that she was not supposed to have contact with Jeff Behm. As a result, she contacted Kim McFellin, Lesley Behm's FIA case worker, the following Monday to report what she had seen over the weekend.

McFellin said that spoke with Lesley Behm on March 19, 2001, at which time Lesley Behm emphatically denied seeing Jeff Behm and demanded to know who had spread that lie about her. After discussing the matter further, Lesley Behm said that she had seen her husband

² This set of grandparents, Lesley Behm's father and step-mother, had taken care of the older girl for about 2½ years after she was born and subsequently fought Lesley Behm for the girl's custody, but lost.

³ Hinshaw secured a copy of the store surveillance tape and identified for the family court which of the people on the tape were Lesley and Jeff Behm. Though we have access to this tape as well, we do not have a description of the Behms and, therefore, cannot identify them on the tape.

approximately two weeks earlier to finalize papers related to their divorce, but McFellin then told Lesley Behm that Hinshaw had seen her that weekend. Lesley Behm became very upset and wanted to know how she could prove that she had severed her relationship with her husband. McFellin ended their conversation at that time, but spoke with Lesley Behm the next morning. At that time, Lesley Behm said that she had forgotten that she had run into Jeff Behm over the weekend and that their meeting was mere coincidence. She had gone to Angola to shop in a particular store, where she ran into him again later that day; she thought he followed her from Wal-Mart to the other store. McFellin informed Lesley Behm that she thought that she was lying.

As McFellin explained at the termination hearing, this supposedly chance meeting between the Behms was, in her mind, critical to Lesley Behm's progress. Though there was no question that Lesley Behm had secured adequate housing, steady employment, and had good parenting skills, McFellin believed that Jeff Behm still posed a danger to the children. Consequently, after the first termination hearing in December 2000, McFellin had informed Lesley Behm that she had to choose between her children and her husband; her only hope for being reunified with her children would be to cut Jeff Behm out of her life entirely. Though she knew that Lesley Behm filed for divorce on March 26, 2001, and had obtained a protective order against Jeff Behm, McFellin did not change her view of Lesley Behm's prospects for keeping Jeff Behm away from the children. As McFellin explained:

[Lesley Behm] had had the opportunity for seven months to do those things and chose not to. I felt that she felt that her back was against the wall and needed to take these steps now because she was notified that [the] goal [of the proceedings] was being changed to termination of parental rights.

McFellin believed that terminating Lesley Behm's parental rights was necessary because, after discussing the situation with Lesley Behm's counselors, McFellin thought that it would take too long for Lesley Behm to make sufficient progress in her therapy to be able to protect the children from sexual abuse in the future. McFellin said that Lesley Behm had to believe that Jeff Behm had abused their daughter before she could ever give her daughter the emotional support the little girl needed. Meanwhile, the children's lives had "been placed on hold long enough, and it's time for them to have some sense of permanency." Specifically, McFellin was referring to the children's feeling of uncertainty living in foster care and the guilt they felt because they believed that they had caused the problems leading to their removal from home.

Expert psychological testimony figured prominently in the termination hearing. Drs. Strang, Randall Haugen, and Janice Lazar each testified for the FIA. The recurring theme in each of their opinions was that Lesley Behm was "ambivalent," caught between believing her child and her husband. This matter was complicated by a number of factors, not the least of which was that Lesley Behm had a difficult time while a teenager, she alleged that her father sexually abused her,⁴ her mother did not believe this claim, and she left or was forced to leave

⁴ Asked to explain why she would leave her children with her father if he sexually abused her, Lesley Behm essentially said that she believed that the children were safe because her father had not acted inappropriately toward young children and also denied abusing her.

home at a relatively early age and ended up living in foster care and with friends. She became involved with Jeff Behm during this difficult time and had come to depend on him throughout their relationship. Nevertheless, after the FIA became involved in this case, Lesley Behm was instructed to cut off contact with her husband and was not allowed to discuss the proceedings at all with her older daughter. As Lesley Behm expressed to her therapists more than once, she felt that she did not have enough information about what had happened to “prove” her daughter’s allegation, though she understood that the bottom line was that she had to put her children first.

After conducting an evaluation in December 2000, which included administering psychological tests, Dr. Lazar concluded that Lesley Behm was quite defensive and was “likely to be a passive person.” This suggested to Dr. Lazar that Lesley Behm felt “a sense of powerlessness and a lack of assertiveness that would be necessary to protect one’s children and also necessary to confront and work through any kind of denial that these children need to be protected.” As a personality trait, this passive characteristic was unlikely to change, even if Lesley Behm gained insight. Dr. Lazar observed that Lesley Behm “did not seem to have an awareness of the child’s needs or seem to – she did not express motivation to protect these children.” Dr. Lazar was also concerned that, during the evaluation, she mentioned the prospect that the family court might terminate Lesley Behm’s parental rights, but the mother did not cry or “display any signs of being upset about that possibility.” She believed that Lesley Behm did not have a good bond with her daughters.

Dr. Strang was not concerned about Lesley Behm’s parenting skills, and was “encouraged” that she had filed for divorce and had found housing and employment. However, like Dr. Lazar, Dr. Strang had “serious concerns” that Lesley Behm would be unable to keep Jeff Behm away from the children because of her dependence on him, her “ambivalent feelings and certainly some of her deceptiveness.” He believed that the Behm’s meeting at the Wal-Mart called into question Lesley Behm’s ability to put her children’s needs ahead of her own needs. In Dr. Strang’s opinion, Lesley Behm would benefit from additional therapy and her prognosis was “fair,” but the therapy would be long-term, perhaps an additional two years, for her to be able to protect her children.

Dr. Haugen, who worked with both Lesley Behm and her older daughter, shared the same concerns about ambivalence that the other psychologists expressed. He said that she would need at least two years of therapy “to get her to believe the children, get her to understand the impact that’s occurred,” remarking that

a[t] no time during our sessions was the question asked, “How is this going to affect my children when they get older?” And that’s a marked concern. It was more of, “Why wasn’t I there?” It was a more of a self-oriented type. So she would have to switch her concern from herself to her children, and I don’t believe that’s a process that happens overnight.

Dr. Haugen believed that the older girl he was also treating had made great strides since being removed from her home. He commented that his experience dealing with children in foster care had taught him that leaving children in foster care for too long deprives them of a sense of permanence and does limit their development. Dr. Haugen did not believe that terminating Lesley Behm’s parental rights would be an insurmountable obstacle to her older daughter’s

recovery. In the end, Dr. Haugen indicated that he was unable to form a conclusion regarding whether Lesley Behm would be able to protect her children despite her questions about her husband.

Lesley Behm, however, sought out independent counseling with Kenneth Schlatter, a family therapist with a master's degree. He had a more optimistic view of Lesley Behm's prognosis, especially after a session at the end of March 2001 in which she said that she believed her older daughter's allegations, and was able to cite specific reasons for her changed perspective. Though Schlatter saw Lesley Behm "as a person that was under a lot of stress," he had no reason to believe that she was lying to him. His opinion was that Lesley Behm had "looked for the children's welfare above and beyond" Jeff Behm. Noting candidly that he could not predict the future, Schlatter said that though there was the possibility of a chance encounter between the Behms in the future, Lesley Behm was doing everything she possibly could for the children. As he said, "She has presented nothing to me that would show that she's not capable of taking care of the children." He believed that she was suffering from post-traumatic stress disorder, which had not resulted from a single traumatic incident, but was the product of her personal experiences with upheaval and sexual abuse. He agreed that Lesley Behm needed more therapy, but did not venture a guess at how long that therapy would be. In any event, he did not believe that she posed a danger to her children.

When Lesley Behm testified, she first emphasized that she believed her older daughter's allegation, which had crystallized after she spoke with her older daughter. She noted a number of reasons why she thought individuals involved in this case were lying or misapprehending the truth, which caused her to doubt her daughter's allegation at first. Lesley Behm indicated in no uncertain terms that she loved her children, her children loved her, and they had a good bond.

Lesley Behm said that she had not seen or had any contact with Jeff Behm since they were seen at the Wal-Mart in Angola. She had filed for divorce from him, a process she had started the previous December. She claimed that their relationship had ended on December 13, 2000, the day the family court terminated his parental rights, and that the chance meeting the next March had helped her gain "closure." She clarified that she thought she had always known that she would have to remove him from her life.

Lesley Behm thought she was making progress in her counseling. She agreed that both she and her daughters needed additional counseling, but for how long she did not know. She said that she knew that McFellin had filed the termination petition because she wanted to protect the girls, but did not understand why McFellin should be concerned about her. She denied lying to McFellin about meeting her husband at Wal-Mart, explaining that she simply had not been thinking about the incident when they spoke and that she had had memory lapses, a problem she was working on with a therapist. Although she did not state so explicitly, Lesley Behm had apparently interpreted the admonition not "to be with" Jeff Behm to mean that the two could not have a relationship; not that their lack of contact had to be so complete that she should leave a public place when, coincidentally, they were both there. However, she "willingly" abided by the requirement that she break her ties with him.

Lesley Behm's brother, two sisters, and parents all testified to her progress in setting up a household for her children. They believed that she was a good mother who loved her children,

and whose children loved her in return. They also thought that Lesley Behm would be able to protect her children in the future and that she had permanently severed all ties with Jeff Behm. Even though one sister, when pressed, conceded that she did not know whether Lesley Behm would eventually live with another man like Jeff Behm, she still said that Lesley Behm would place the children's needs above her own.

At the conclusion of the second day of testimony, the family court announced its findings from the bench. The family court found that the evidence was insufficiently clear and convincing to terminate Lesley Behm's parental rights under MCL 712A.19b(3)(b)(i) and (c)(ii). However, with respect to MCL 712A.19b(3)(c)(i), the family court found that

that statutory citation has been established by clear and convincing evidence. It is clear to me that this allegation of sexual abuse continues to be there, and that Mother, notwithstanding her lies to the contrary, continues to not believe that that is so.

In a similarly brief statement, the family court found clear and convincing evidence to terminate Lesley Behm's parental rights pursuant to MCL 712A.19b(3)(g):

And that [ground for termination] certainly beyond any reasonable doubt has been established. Even if we accepted Mother's premise, which I don't – but, if I did, how long would it take to fix this circumstance that we're presently in? It's argued that I could return these children to Mother. I would be shirking my responsibility and should be removed from office if I . . . returned children to a home where I believed they were at risk and not protected.

I'm not talking about regard to intent here. I don't think Mother intentionally – I think it's a game. I don't understand her make-up. I don't think she's under the thumb of Mr. Behm. I think she chooses to be there.

Turning to the children's best interests, the family court commented:

Is it, then in the best interest, after I've made the finding of statutory authority here? And that's a very difficult question. This family is split and has been for some time. And I don't have all of the history here and know what caused of that's [sic] been described here. I don't know.

I do know that children need permanence and they need stability. And that they have not gotten it over the period of time that they have been placed in their mother's care. What has happened is that she has placed them with her father for a period of time, until there was court to change that. And, following that, they were sexually abused by a man who had [sexual] appetites that Mother was aware of. We're not going to talk about the sex out in the open with the girls seeing that Mother at first and Mr. Behm talked about and then Mother subsequently denied, said it only happened once. And then there was talk about how they talked openly with their children about sex. And then that was denied. That was a lie and that didn't happen. Then I recall Mother's testimony when she caught her daughter [behaving in a sexually inappropriate manner] That she

blamed the neighbor children. The neighbor children must have been sexually abused, and that's what caused it. It's always someone else.

I find, from that set of circumstance, all of that set of circumstances, that placement outside Mother's home is in the best interest of these children.

On appeal, Lesley Behm solely challenges the family court's findings that there was sufficient evidence to terminate her parental rights.

II. Standard Of Review

As an appellate court, we review for clear error the family court's determination that the evidence clearly and convincingly supported a statutory ground for terminating Lesley Behm's parental rights.⁵

III. Conditions Leading To The Adjudication

A family court must have clear and convincing evidence of at least one statutory ground to terminate a parent's parental rights.⁶ One of the two grounds listed in MCL 712a.19b the family court cited for its decision 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:

* * *

(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 . . . :

(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.

The record demonstrates that, at the time of the termination hearing in June 2001, Lesley Behm had been a respondent in this child protective proceeding for more than 182 days since the family court entered the first dispositional order in October 2000.

As the family court noted, the reason the FIA initiated these proceedings was because Jeff Behm sexually abused his daughter. Lesley Behm points out that she had moved away from Jeff Behm and even sought a divorce. Therefore, she claims, that condition no longer existed at the time of the termination hearing. However, the initial petition also specifically alleged that Lesley Behm did not believe that Jeff Behm molested their older daughter. There is no dispute

⁵ *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

⁶ See *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991).

that Lesley Behm, though torn regarding whom she should believe, did not even articulate that she truly believed her daughter until the end of March 2001, almost eight months after the FIA removed the children from her care. As Drs. Strang, Lazar, and Haugen each testified, this was a matter of tremendous significance. If Lesley Behm did not believe her daughter, then she could not take whatever steps were necessary to prevent future abuse and give her children the emotional support they needed. That she acknowledged the abuse only after McFellin confronted her about her meeting with Jeff Behm apparently played a significant role in the family court's conclusion that Lesley Behm was not credible,⁷ and did not honestly believe her daughter. The three psychologists' testimony that Lesley Behm was conflicted regarding whom to believe and that she exhibited traits such as defensiveness, passiveness, and dependence that were unlikely to change, even with insight, supports the family court's finding. It was also a foregone conclusion that Lesley Behm would need additional therapy, though there was disagreement whether she needed this therapy to be able to prevent abuse to her children in the future or whether she was already able to do so. We can find no clear error in the family court's determination that this condition continued to exist.

Furthermore, while Drs. Strang, Lazar, and Haugen testified that it could take quite some time for therapy to be effective for Lesley Behm, perhaps two years, neither she nor Schlatter specifically contradicted that she would have to have long-term therapy. Dr. Haugen, who had experience working with children who have been abused, added that all children need permanence in their life and that the instability of foster care can be problematic. Though this was a difficult case, we do not see any *clear* error in the family court's conclusion that, because Lesley Behm had no meaningful understanding that the sexual abuse occurred and the effects that such abuse would have on her children, the condition leading to the adjudication was unlikely to be rectified in a reasonable time considering the children's young ages.

Lesley Behm also notes that Justice Levin would have granted leave to appeal in *In re Farley*,⁸ a case with similar facts, thus signaling that termination under these circumstances was inappropriate. Nevertheless, the reasons the Supreme Court articulates for denying leave to appeal are not precedential.⁹ Moreover, by definition, a dissent does not represent a majority of the Supreme Court and is not binding.¹⁰ Thus, it stands to reason that a single Justice's dissent to an order denying leave to appeal is not binding.

Additionally, though Lesley Behm has failed to present an issue for appeal concerning the best interests factor,¹¹ we note that the record supported the family court's findings. She presents no authority for the proposition that, with respect to this factor or any other relevant factor, the family court had an obligation to summarize *all* the testimony it heard or to give it

⁷ See *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991) (Court of Appeals defers to family court's credibility determinations).

⁸ See *In re Farley*, 437 Mich 992; 469 NW2d 295 (1991).

⁹ See MCR 7.321; *Tebo v Havlik*, 418 Mich 350, 363, n 2; 343 NW2d 181 (1984) (Brickley, J).

¹⁰ See *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

¹¹ See MCR 7.212(C)(5).

equal weight. That the family court found the FIA's evidence more compelling is apparent, but not erroneous in and of itself. Rather, the family court's minimum obligation is to give "[b]rief, definite, and pertinent findings and conclusions on contested matters," which is exactly what the family court did in this case.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly