

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of WB, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JAMIE BAKER,

Respondent-Appellant,

and

JULIE BAKER,

Respondent.

In the Matter of SEB, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

JAMIE BAKER,

Respondent-Appellant,

and

JULIE BAKER,

Respondent.

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

UNPUBLISHED

September 13, 2002

No. 238613

Saginaw Circuit Court

Family Division

LC No. 01-026904-NA

No. 238614

Saginaw Circuit Court

Family Division

LC No. 01-026905-NA

In these consolidated cases, respondent Jamie Baker appeals as of right from the family court order terminating his parental rights to the minor children, WB and SEB, under MCL

712A.19b(3)(b)(i), (j), and (k)(ii).¹ This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

I. Basic Facts And Procedural History

In 1998, the Family Independence Agency (FIA) became involved with respondent and his wife at the time, Shannon Downs, after authorities investigating a neglect charge found the parties' home to be filthy. The FIA placed SEB with respondent while the proceedings were pending. The family court ultimately dismissed those proceedings. Respondent and Downs subsequently divorced, and respondent was granted custody of SEB.

Respondent met Julie Mae Baker² in September 1998. At that time, respondent had custody of his daughter, SEB, and Baker also had one child, CN. By the end of the year, respondent, Baker, and their respective children had moved into respondent's trailer in Marquette. Respondent married Baker in September 1999. Baker gave birth to their son, WB, in November 1999, with Baker acting as the children's primary caretaker. Later, the family moved to Saginaw County and lived in a camper next door to a trailer occupied by Baker's mother, Darlene Munro.

In early December 2001, Baker became frustrated with SEB and hit her with a wooden spoon. Respondent, a trucker who was working out of town, returned unexpectedly about a week later. After seeing the bruises on SEB, respondent decided to inform the authorities of the incident.

An officer from the sheriff's department visited Baker's aunt, Vicky Stevens. Stevens reported that SEB accused respondent of touching her. When respondent asked SEB if he had touched her, she said, "No, Henry did," referring to Stevens' boyfriend. Respondent then followed the officer and took SEB to United for Kids to have her marks and bruises examined. While SEB was interviewed, respondent spoke to Valerie Daly, explaining to her the bruises on SEB inflicted by his wife and recounting the Stevens' accusations. When respondent spoke to Ben Frazier, a protective services worker for the FIA, about the physical abuse, he added that SEB might accuse him of touching her.

SEB was unruly and uncooperative during her first interview on December 15, 2000. Dr. Harry Fredericks, the examining physician, found several "lacerations to the left frontal area, left facial cheek and left thigh and buttocks [which] were consistent with inflicted injuries." During a second interview at United for Kids, the sexual abuse allegations were explored, but SEB was again uncooperative. Neither interview either substantiated or negated the allegations of sexual abuse.

¹ The family court also terminated the parental rights of Shannon Downs, SEB's biological mother and respondent's ex-wife, to SEB pursuant to MCL 712A.19b(3)(a)(ii). Downs is not party to this proceeding.

² There are two Julie Bakers in the instant case, respondent's wife and respondent's sister. To avoid confusion, we refer to respondent's wife as Baker and to respondent's sister as Julie Baker.

On the night of December 15, 2001, a police detective approached Baker concerning the physical abuse matter, and Baker admitted that the incident occurred. On January 5, 2001, the police arrested Baker. She was released five days later on bond. On January 10, 2001, Baker appeared in court, pleaded guilty to assault charges and was put on probation for eighteen months.

Frazier, the protective services worker, subsequently filed a petition for temporary custody of SEB and WB on January 19, 2001, alleging physical abuse. The petition noted respondent's statements that he was often on the road as a truck driver and that Baker, who had caused the bruises on SEB, was the children's primary caretaker. During his investigation, Frazier did not find anything supporting the allegations of sexual abuse against respondent. The petition did not allege neglect or abuse by respondent.

After reporting Baker to the authorities, respondent, knowing he would be on the road for work, placed SEB in the care of his sister, Julie Baker, even though he admitted to Frazier that he had a strained relationship with her. During Frazier's investigation of the physical abuse to SEB by Baker, Julie Baker alleged that SEB was acting out sexually. Frazier recommended that Julie Baker take the child to a hospital to be examined.

Julie Baker took SEB for medical examinations on two occasions. Dr. Jamie Leach examined SEB on January 11, 2001. When Dr. Leach told SEB that no one should touch her on her bottom, SEB stated "only my dad" and explained that he touched her bottom with "his hands and the 'poker thing.'" When asked to describe the poker thing, SEB stated it was "bloody," pointed to a cotton swab and indicated that it looked like the non-cotton end of the swab. Dr. Leach described SEB as generally cooperative with the physical exam, but when Dr. Leach tried to perform a genital exam with a swab, SEB became quite agitated and screamed that it was going to hurt. On February 5, 2001, SEB was again examined by Dr. Fredericks who indicated that there was some redness in the vaginal area, which he attributed to poor hygiene. In his summary of the examination, Dr. Fredericks noted that the absence of physical evidence of sexual abuse did not allow him to rule out the "possibility of prior sexual abuse up to and including penetration."

On February 23, 2001, the family court found the physical abuse allegations in the January 19, 2001, temporary custody petition true. Once the petition was authorized at the preliminary hearing, Frazier turned the matter over to Naomi Marshall, the assigned foster care case worker.

Marshall was not aware of the sexual abuse allegations until January 2001. On January 26, 2001, and on February 7, 2001, Marshall also received phone calls from Julie Baker and Munro ("Grandma Dar"), Baker's mother, respectively, raising allegations of sexual abuse. According to Marshall, in February 2001, SEB said that her father had touched her. Following a court appearance in March 2001, Marshall indicated, respondent held SEB in his arms and whispered something in her ear. Thereafter, Baker asked Marshall to listen to what SEB had to say. SEB then told Marshall that respondent had touched her, but that it was a mistake and she had lied. Julie Baker then accused respondent and Baker of whispering the statement into SEB's ear and tried to grab SEB. Respondent took SEB out of Julie Baker's arms, and the situation became chaotic.

At a visit after the March 2001 hearing, Marshall testified that SEB told her “Daddy told me to lie, but he really did.” Marshall believed respondent was trying to have SEB lie. The only time Marshall heard SEB state that her father had *not* touched her was after she had seen respondent whispering in SEB’s ear. Respondent denied whispering anything in SEB’s ear, but Marshall believed respondent had touched SEB in a sexual way, acknowledging that the medical evidence did not substantiate sexual abuse. Marshall also explored an allegation by CN that respondent had molested her, but concluded that CN sounded as if she had been coached.

Marshall contacted Frances Waters to arrange counseling for SEB in light of Julie Baker’s comments that SEB was acting out sexually. Waters, a therapist specializing in sexually abused and traumatized children and adults, evaluated SEB over the course of four separate meetings. Waters allowed Julie Baker to remain in the office during the meetings after SEB began to cry and cling to her aunt. According to Waters, Julie Baker was not intrusive. Waters felt her presence in the room helped SEB feel more comfortable and safe.

At Waters’ first meeting with SEB in March 2001, Waters attempted to establish a rapport with SEB and to make SEB feel comfortable. As Waters later explained, in evaluating SEB, she complied with the forensic evaluation protocol developed by the FIA and the prosecutor’s office to establish whether the child could differentiate the truth from a lie and to ensure that questions were not leading. At that meeting, SEB did not make any revelation regarding sexual abuse.

At their second meeting in March 2001, Waters established that SEB knew the difference between the truth and a lie. SEB explained to Waters that she was no longer living with respondent and his wife because they always spanked her and respondent always touched her. When Waters asked SEB to explain, using four-inch dolls, what she meant when she stated that her dad always touched her, SEB picked up a man doll, which she identified as respondent, and placed the man doll’s hand on the crotch of the little girl doll, which she had identified as herself, and moved the hand back and forth. SEB stated that this touching occurred at Munro’s home in CN’s room. Waters confirmed that SEB sometimes slept with her stepsister, CN, in Munro’s trailer, which was next to the camper trailer respondent resided in with his wife. She also confirmed that respondent often went into the trailer in the morning and spent about twenty minutes alone with SEB each morning. When Waters reiterated the importance of telling the truth, SEB spontaneously stated, “‘But my dad would tell a lie. He would. ‘I didn’t ever touch you.’ That’s a lie.’”

Waters met SEB a third time on April 16, 2001. This time SEB appeared much more hesitant and indicated to Waters that respondent had told her not to say anything. When Waters asked SEB how respondent touched her, SEB took the clothes off the girl doll, who she identified as herself, and again placed the hand of the man doll on the girl doll’s crotch. When Waters indicated to SEB that she, Waters, wanted to know the truth, SEB stated “My daddy said it didn’t happen, but it did and he . . . lied.”

At their last meeting, on April 18, 2001, Waters showed SEB anatomically correct drawings of a man, who she was told represented respondent, and a young girl, who she was told represented herself. Using terms she associated with anatomical parts depicted in the illustrations, SEB said that respondent had touched her genital area with his hand and penis, and suggested that respondent had penetrated her with his penis, referring to touching on the outside

and inside. To determine whether SEB could distinguish touching from penetration, Waters cupped her hand and touched the outside of her hand and then showed SEB the inside of her hand and SEB again stated that respondent's had touched her on the inside and on the outside. SEB also told Waters that it hurt, which Waters believed was evidence of penetration. SEB also reported that something had been discharged from respondent's penis, which SEB said looked like "pee but smelled like poop." Waters found this vivid description incorporating a sense of smell very significant. She felt that this added to SEB's credibility, and that it was unlikely that such sensory impressions could be described if anyone had tried to coach SEB into saying that respondent had sexually abused her. Waters believed that the detailed experience of being touched by genitalia of the opposite sex is unusual for a "normal" child. SEB also described to Waters how she had been spanked on the buttocks with a wooden spoon by her stepmother, Baker. Waters found it noteworthy that SEB was able to describe two types of pain, and could distinguish one as resulting from a spanking and the other as resulting from a touch.

Waters also believed that Dr. Leach's report supported her conclusion that respondent had penetrated SEB, citing SEB's reference to a Q-tip, which might be consistent with a child's description of a penis, as well as her fearful reaction to Dr. Leach's examination with a similar swab. In Waters' opinion, SEB's sexualized behavior, as reported by Julie Baker, provided additional corroboration that SEB had been sexually abused. Julie Baker had also reported to Waters that SEB refused to go to sleep alone, and often woke up from nightmares, screaming "no, no, no." When Julie Baker completed a Child Sexual Abuse Inventory, a standardized instrument, SEB scored significantly high on all three scales, indicating behaviors consistent with a child suspected of being sexually abused. On the basis of all the information she had, Waters concluded that SEB's behavior was very consistent with a child who has been sexually abused.

On June 11, 2001, the FIA filed a petition seeking to terminate respondent's parental rights to SEB and WB pursuant to MCL 712A.19b(3)(b)(i), (j) and (k). The petition alleged, among other things, that SEB had stated that respondent sexually abused her, that these statements were consistent with respondent penetrating or attempting to penetrate SEB with his hands (fingers) and penis, that SEB exhibited behaviors consistent with a child who has been sexually abused, and that SEB reported that respondent told her not to tell anyone about the sexual abuse.

At the termination hearing, the witnesses reiterated several interactions they had with SEB in which SEB reported that respondent had touched her inappropriately, despite alleging at the outset of the police investigation that Stevens' boyfriend had touched her, not respondent. Munro described the family's movements between their camper and her trailer, including SEB's stays with CN in the trailer and respondent's unmonitored access to SEB in the room. Though Munro's father, Frederick Stevens, who lived on a home on the property where her trailer and respondent's camper were located, had recently been charged with sexual abuse, Munro stated that SEB was never left alone with Stevens and did not refer to him as "Daddy," which is how she referred to the person who had allegedly abused her. Munro admitted telling Baker that she would lie in the instant proceedings if Baker would grant her custody of CN, but claimed she had only been joking.

Julie Baker, who had had custody of SEB since December 16, 2000, and was hoping to have custody of her in the future, kept a log of SEB's behavior. She recalled several incidents in

which SEB acted out sexually, explaining when questioned about her behavior that she was doing so because “[m]y daddy does it.” Julie Baker stated that SEB often cried during the night, on average five or six nights a month during the ten months she was in her care, and, on one occasion cried out, “No, no, I said no.” Julie Baker conceded that she did not receive any medical reports that substantiated the allegations of sexual abuse and that she had a strained relationship with respondent.

Respondent’s mother, Ollie Baker, testified that SEB told her on several occasions “Daddy touched me” and that respondent was the only person that SEB referred to as Daddy. She also recalled an incident when SEB was acting out sexually, and explained her behavior by saying “[m]y daddy does,” apparently referring to the act in question.

At the hearing, respondent denied that he had ever touched SEB in a sexual manner. Respondent admitted that he had touched SEB in the vaginal area when she was a baby to apply ointments to her rashes. Respondent stated that he loved his children and believed that they loved him as well. He believed that Julie Baker was prompting SEB to make accusations against him because she wanted custody of SEB. Respondent claimed that his wife’s mother, Munro, did not like him and that his own mother had SEB’s best interests at heart. As of the October 31, 2001, hearing date, respondent and Baker had reconciled and were living together as husband and wife. Baker also believed that respondent loved his children. She did not believe respondent sexually abused SEB.

The family court learned that respondent voluntarily submitted to a psychological evaluation conducted by David Breyer on February 24, 2001, to address the allegations that he sexually abused SEB. Breyer’s report stated that “[i]nformation obtained in the course of the evaluation did not provide any indications that [respondent] has or might engage in such behavior toward his daughter” and that “[t]here were no indications of a predisposition to act out sexually or to harm his children in any way.” The report concluded that there was no need to keep respondent away from his children unless there was other evidence supporting neglect or mistreatment.

SEB also testified at the hearing. Before questioning by counsel, the family court attempted to establish that SEB was able to differentiate the truth from a lie and to have her agree to state the truth on the record. When asked by petitioner’s counsel regarding why she no longer lived with respondent and his wife, SEB replied, “Because my momma spanked me and — and my — and my dad touched one of my — when I kept said stop, and — and he didn’t and — and he didn’t listen when — when I was trying to dress my baby.” The FIA’s attorney asked SEB to explain some of the special words she used to refer to anatomy. In explaining that she used those words to refer to a person’s “private” parts, she denied that anyone had touched her there, but then said, “No, except my dad did.” She said that he touched her with “[h]is fingers” while she was alone in CN’s room and was wearing clothing.

After considering all the evidence presented, the family court found that clear and convincing evidence supported terminating respondent’s parental rights to SEB and WB pursuant to subsections 19b(3)(b)(i), (j), and (k)(ii). In support of terminating respondent’s parental rights under subsection 19b(3)(b)(i), the family court found that respondent sexually abused SEB, and that there was a substantial likelihood that the abuse would continue if the child were returned to respondent’s home. The family court found that subsection 19b(3)(b)(i), which

also applies to siblings, supported termination of respondent's parental rights with respect to WB. In support of terminating respondent's parental rights under subsection 19b(3)(j), the family court found that respondent sexually abused SEB and that there was a propensity for such abuse to occur again. The family court expressed concern with respondent's statement that he wanted to stay with Baker, who had beaten SEB, and also wanted to amend the terms of her probation so that all of them could live as a family again. The family court also concluded that the evidence supported terminating respondent's parental rights to both SEB and WB under subsection 19b(3)(k)(ii), finding that there was "at a minimum, an effort, an attempt, at penetration" of SEB.

After the family court found that the evidence supported terminating respondent's parental rights to both SEB and WB under the three separate statutory grounds, Marshall testified that she was concerned that further sexual abuse would or could occur if SEB were placed in respondent's care. She was also concerned about WB because he was SEB's sibling. Marshall concluded that she believed it was in both children's best interests to have respondent's parental rights terminated. After considering Marshall's testimony, the family court found that terminating respondent's parental rights was not contrary to the children's best interests.

Respondent now challenges the evidence used to terminate his parental rights.

II. Standard Of Review

Appellate courts review a family court's decision to terminate parental rights for clear error.³

III. Clear And Convincing Evidence

The family court must find clear and convincing evidence on the record proving that at least one statutory ground for termination exists before it terminates parental rights.⁴ As a result, to terminate respondent's parental rights pursuant to MCL 712A.19b(3)(b), the family court needed clear and convincing evidence that SEB "has suffered . . . sexual abuse," that respondent's "act caused the . . . sexual abuse," and 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."

Respondent claims that no clear and convincing evidence exists to demonstrate that he sexually abused SEB. However, SEB gave direct testimony of abuse at the termination hearing, which was consistent with her statements to other relatives, with the exception of the single accusation against Stevens' boyfriend. Waters explained why SEB's behavior, which had overtly sexual aspects, was consistent with sexual abuse. Waters also noted the detailed anatomical descriptions SEB gave when recounting the abuse, which Waters believed reflected SEB's actual experience, not a fabrication. The standardized testing also tended to confirm for Waters that SEB had been sexually abused. Though respondent claims that SEB was not credible because of her young age (4½ years old at the termination hearing), the family court was aware of her age, maturity level, and ability to tell the truth, having inquired into the matter at the

³ *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 5.974(I).

⁴ MCL 712A.19b(3); see *In re IEM*, 233 Mich App 438, 450-451; 592 NW2d 751 (1999).

hearing. The family court was best positioned to be able to determine whether, under all the circumstances, including SEB's fairly consistent statements, it should believe SEB's allegations.⁵

The family court was also aware of respondent's contention that his sister, Julie Baker, had manipulated SEB into alleging that respondent sexually abused her. That the family court chose to believe Julie Baker, after Marshall independently reported that SEB mentioned abuse to her, rather than respondent was not clearly erroneous given the family court's proper role in weighing the evidence. Similarly, Waters informed the family court that Julie Baker had been in the room with SEB during her four sessions with the little girl, and had completed the sexual abuse inventory for SEB. Waters explained that it would have been virtually impossible for her to work with SEB without Julie Baker present, and that Julie Baker had been unobtrusive. Waters added that Julie Baker did not interfere with the evaluation or inappropriately guide her analysis, which allowed the family court to discount respondent's arguments concerning Julie Baker's credibility, and the possibility that her involvement in this case had shadowed the truth.

Respondent also argues that there was no medical evidence to support the finding of sexual abuse. He correctly notes that neither Dr. Fredericks nor Dr. Leach, who examined SEB on separate occasions for evidence of sexual abuse, concluded that SEB had been sexually abused. However, Dr. Frederick concluded in his report that the absence of physical evidence of abuse did not rule out the possibility of prior sexual abuse up to and including penetration. While Breyer's psychological evaluation of respondent weighed positively in respondent's favor, and against a finding that he sexually abused SEB, the family court accepted the report with the stipulation that this sort of evaluation had no bearing on whether a person would actually commit sexual abuse. Thus, the family court was free to weigh the inconclusive physical evidence and psychological report with the other evidence.

In sum, we see no clear error in the family court's findings regarding the abuse, including its decision to rely on SEB's allegations without physical evidence of abuse. This case was rife with conflicting evidence. By observing the testimony of the witnesses, the family court was able to consider factors that simply do not manifest themselves on a cold record, but that nevertheless tend to indicate which pieces of evidence are more believable than others. Our standard of review under MCR 5.974(I) compels us to give the family court the deference it is due because of this unique ability to take the testimony. Further, because MCL 712A.19b(3)(b) permits a family court to terminate parental rights with respect to a sibling of an abused child, the family court did not err in terminating respondent's rights to WB under subsection 19b(3)(b)(i). Having determined that there was clear and convincing evidence of at least one statutory ground to terminate respondent's parental rights,⁶ we need not address whether the evidence of the other grounds was sufficient.

Once there is clear and convincing evidence of at least one statutory ground for termination, the family court "must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests."⁷

⁵ See *In re BKD*, 246 Mich App 212, 220; 631 NW2d 353 (2001).

⁶ See *IEM*, *supra* at 450-451.

⁷ *Trejo*, *supra* at 354; MCL 712A.19b(5).

Respondent does not challenge the family court's finding that termination was not contrary to the children's best interests. In any event, Marshall's testimony supported the family court's findings on this matter.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly