

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AVERY MAJOR, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

LORI LYNN SCOTT,

Respondent-Appellant,

and

RUSTY NEAL MAJOR,

Respondent.

UNPUBLISHED

August 25, 2005

No. 258535

Wayne Circuit Court

Family Division

LC No. 03-424301-NA

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

COOPER, P.J. (*dissenting*).

I must dissent from the majority opinion of my colleagues. Respondent-appellant's parental rights were terminated based upon hearsay allegations. Respondent-appellant's attempts to challenge the accuracy of those allegations on cross-examination were answered with further hearsay. This evidence was unfair, unreliable, and untrustworthy. I would, therefore, find that these errors require reversal.

Polly Wilson, a foster care worker with Evergreen Children Services, was assigned to respondent-appellant's case. Ms. Wilson ceased working for that agency before the termination proceeding. Following Ms. Wilson's departure, Carolyn Rayford, a foster care supervisor at Evergreen, had minimal contact with the respondents.¹ Even though Ms. Rayford had no

¹ Ms. Rayford had no direct contact with respondent-appellant until August 12, 2004. The only direct contact she had with Mr. Major was to arrange for a final visit with the child.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

personal knowledge of the case, petitioner failed to subpoena Ms. Wilson to testify. Ms. Rayford's testimony at the termination proceeding was based solely on her review of the records compiled by Ms. Wilson. However, Ms. Wilson *was* available and in the area. In fact, Ms. Rayford testified that she spoke with Ms. Wilson during the week of the termination proceeding.

The use of Evergreen's records was clearly hearsay. The records were compiled by an individual who was not present at the proceeding to testify regarding their contents. As noted by the majority, however, a trial court may consider otherwise inadmissible hearsay evidence at the dispositional phase of a termination proceeding.² The evidence must be "fair, reliable and trustworthy."³ "The parties must be afforded an opportunity to examine and controvert written reports so received and *shall be allowed to cross-examine individuals who made the report when those individuals are reasonably available.*"⁴

Respondent-appellant's counsel challenged the accuracy of the records on cross-examination. She questioned Ms. Rayford regarding visits with the child and telephone contacts between respondent-appellant and Ms. Wilson that were not included in the file. Rather than testify from personal knowledge, Ms. Rayford indicated that she spoke with Ms. Wilson that week and she "asked [Ms. Wilson] when did she recall was the last visit and she stated that she recalled that the parents last visited in January. She did not indicate that there were more visits." That response was classic hearsay. Without Ms. Wilson's presence at the trial, respondent-appellant was denied the opportunity to adequately test the information in Evergreen's records and to challenge the allegations against her. Ms. Wilson was reasonably available and should have been subpoenaed for the hearing. Accordingly, I would reverse the trial court's termination order.

/s/ Jessica R. Cooper

² MCR 3.977(G)(2); *In re Gilliam*, 241 Mich App 133, 136-137; 613 NW2d 748 (2000).

³ *In re Ovalle*, 140 Mich App 79, 82; 363 NW2d 731 (1985).

⁴ MCR 3.977(G)(2) (emphasis added).