STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DYLAN TYLER HALL, BRANDI NICOLE HALL and FELICITY JASMINE FILBRANDT, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KIMBERLEE FILBRANDT,

Respondent-Appellant.

UNPUBLISHED
January 29, 2009

No. 285683
Kalkaska Trial Court
Family Division
LC No. 07-003955-NA

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Respondent-mother appeals as of right from a court order terminating her parental rights under MCL 712A.19b(3)(b)(ii) [the parent who had the opportunity to prevent the physical or sexual abuse of a child failed to do so and a reasonable likelihood exists that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home], and (j) [given the parent's conduct or capacity, the children likely would suffer harm if returned to the parent's custody].[1] We reverse and remand.

I. Basic Facts & Underlying Procedure

These child protective proceedings began after respondent reported to the police that her husband, Garrett Filbrandt, had sexually abused respondent's oldest daughter, BH.[2] Two days after respondent contacted the police, petitioner filed a petition seeking termination of respondent's parental rights to her three children. The petition also sought to terminate the parental rights of Filbrandt and Jeffrey Hall, the children's fathers. Regarding respondent, the

[1] The trial court also terminated the parental rights of the fathers of the children, but they are not parties to this appeal. The term "respondent" thus refers only to respondent-mother.

[2] Garrett Filbrandt is the stepfather of two of the involved minors, BH and DH, and the father of the third, FF.

petition alleged that: (1) in 1996, she pleaded guilty to stealing or retaining a financial transaction device, and in 2006 was convicted of uttering and publishing; (2) in 1998, petitioner opened a protective services case because Hall, the father of the two oldest children, had physically abused DH; (3) in 2001, petitioner opened a protective services case "due to neglect" of DH and BH and respondent's failure to "follow[] through on services for her son [DH] who reportedly has a mental illness"; and (4) she failed to protect BH from sexual abuse. The facts detailed in the petition concerning respondent included the following:

> On or about 9/17/07 [respondent] went to the police and reported that her husband Garrett Filbrandt had inappropriately touched her daughter [BH]. She reported that [BH] had told her three weeks prior that Garrett had touched her privates. [Respondent] confronted Garrett. She stated that [BH] also confronted Garrett at which time Garrett said he was sorry and began to cry. [BH] then sat on his lap and told him she forgave him. Garrett left the home and a short period later came back and reported he would stop drinking or at least slow down. At that time [respondent] remained in the home with the children, until 9/17/07 when she discovered Garrett highly intoxicated again. At this time Garrett and [BH] were alone again.

On the day that petitioner filed the petition, a referee ordered the children placed in protective custody.

On October 4, 2007, petitioner filed an amended petition, again seeking termination of respondent's parental rights. The amended petition added the additional allegation that "[Garrett Filbrandt] admitted to touching [BH] two years ago at which time [respondent] also confronted him. [BH] supported there had been an incident two years ago as well, where Garrett had touched her privates." At a preliminary hearing conducted on October 4, 2007, respondent waived a probable cause determination. A referee determined that "reasonable efforts shall not be made to preserve and reunify the family because it would be detrimental to the children's health and safety."[3] On January 23, 2008, Filbrandt voluntarily relinquished his parental rights to FF, and subsequently pleaded guilty to fourth-degree criminal sexual conduct. On March 11, 2008, Jeffrey Hall voluntarily relinquished his parental rights.

On March 28, 2008, the trial court conducted an adjudication jury trial regarding petitioner's allegations involving respondent. Shortly before the trial commenced, respondent's counsel objected to the introduction of hearsay evidence of BH's statements, which petitioner intended to offer pursuant to MCR 3.972. Respondent argued that the trial court's failure to hold a hearing regarding the trustworthiness of the statements, as required by MCR 3.972(C)(2)(a), prohibited the admission of this evidence. The trial court then conducted a brief "tender years" hearing, at which Barbara Cross, a therapist at the Maple Clinic, provided testimony. Cross described her experience conducting forensic interviews with children, and explained that she had forensically interviewed BH on October 10, 2007. According to Cross, BH stated that "on multiple occasions" Filbrandt had entered her room at night and fondled her. Cross continued,

[3] The parties did not order a transcript of these proceedings.

"She told me she told her mother each and every time it happened." At the request of the prosecuting attorney, the trial court qualified Cross as an expert witness. The trial court ruled that it would admit Cross's testimony concerning BH's statements, explaining, "And I'm satisfied based on Barb Cross' interview with [BH] that the circumstances surrounding that interview and the giving of those statements by [BH] that there was an adequate indicia of trustworthiness about that whole interview."

Kalkaska police officer Brian Peacock testified that on the day respondent first reported the sexual abuse, he met with BH and received her written statement.[4] According to Peacock, BH described only one episode of sexual abuse, which occurred "three weeks prior." Respondent told Peacock that BH "had advised her that her stepfather Garrett had touched her inappropriately in her private area in the bedroom of their residence approximately three weeks prior," and that respondent had confronted Filbrandt and "demanded to know what [the] hell he was doing." Peacock recalled respondent reporting that she had left the household the night she reported the abuse. Scott Griffith, a Kalkaska County deputy sheriff, interviewed BH the day after respondent's report of the sexual abuse. Griffith described that BH related another incident involving "inappropriate touching" that had occurred "in Cedar a couple years ago."

The prosecutor then presented Cross's testimony. Cross described the method she utilized to conduct forensic interviews, and over respondent's objection, the trial court again qualified Cross as an expert witness. Cross explained that during her interview with BH, BH told her that Filbrandt had "touched her multiple times over the years." According to Cross, the typical scenario described by BH involved Filbrandt's entry into her bedroom at night, followed by him lying on her bed with her and fondling her "private parts." Cross averred that BH described that "on one occasion—at least one occasion, he took her hand and had her fondle him."

With respect to respondent, Cross recounted that BH "told her mother about being touched." According to Cross, BH reported that "at least two years ago she first told her mother when they lived in Cedar." Cross continued, "She told me that she told her mother every time that he did something. 'Daddy's touching me.'" In response to questioning by the prosecutor, Cross volunteered additional information regarding BH's disclosures, including, "Garrett's got an alcohol problem, and they all feel sorry for Garrett because he's got an alcohol problem. And that he has cried and begged her for forgiveness and that kind of thing." Cross revealed that BH had expressed, "It's my fault" that Filbrandt had to leave the house, and that BH "felt sorry for him."

Under cross-examination by respondent's counsel, Cross admitted that her written report of the interview reflected that BH "reportedly told her mother about [the abuse] on several occasions." When asked "how many times is 'several' to you," Cross responded, "More than twice." The court-appointed guardian ad litem then questioned Cross with respect to BH's statements about her younger sister, FF. Respondent's counsel objected on relevancy grounds,

[4] BH was nine-years-old when respondent reported the abuse. BH's statement to the police is not contained in the record.

but the trial court allowed the questioning because FF "is part of the petition." Cross read aloud from her report as follows:

> [BH] shared a bedroom with her sister [FF] on Dresden Street and has asked if someone could talk to [FF], because, "He might have touched her, too." When asked to explain why she suspected this, she told me, after he would touch her—meaning BH—she heard him going to FF's bed and hearing the bed move. This needs further exploration to determine if FF has become a victim, as well.[5]

The guardian ad litem elicited further testimony from Cross regarding respondent:

> *Cross*: BH has told me several different stories about her mother confronting him, about prior—just prior to this disclosure, the mother seeing that he was intoxicated, highly intoxicated with the neighbor next door, who apparently was a heavy drinker. And that Mrs. Filbrandt, apparently, rounded the kids up late at night one night because she feared he would molest her again because he was so drunk. And they went to a friend's house, a friend of the mother's house, who persuaded the mother to go to law enforcement.
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> *Guardian ad Litem*: And prior to that night, did she indicate whether or not Ms. Filbrandt had taken any affirmative actions to ensure that that wouldn't happen prior to that particular night? Did she do anything to—did BH indicate to you that on prior occasions regarding alcoholism and Mr. Filbrandt—did she ever indicate to you that she had done anything else to protect them from some kind of harm?
>
> *Cross*: Actually, BH told me that her mother told her on one occasion—and I don't know where this occurred, what location—the mother told her allegedly, "If he does that one more time, he's just going to have to go." Now, this is over a two-year, at least, period of time that this child experienced some acts of molestation because he did not leave.
>
> The other thing BH has shared is that mom—"Mom kept Garrett around for one reason, because she couldn't handle DH." And Garrett apparently could handle DH, the older son, who's got multiple behavior problems.

Respondent testified that two years before making the police report, BH told her, "'I don't know if I was dreaming last night or not, … but I think daddy came in my bedroom and was trying to touch my privates, but he might have been trying to see if my pull-up was wet.'" During this same conversation, BH also stated that she recalled respondent "tickling [her] feet" while Filbrandt was in her room. Respondent recalled that she denied having tickled BH's feet, and BH then stated, "'Then I think I was dreaming.'" Respondent recounted that she

[5] A psychologist who later interviewed FF testified at the dispositional hearing that FF adamantly denied having been inappropriately touched by Filbrandt, and no evidence other than Cross's speculation at the adjudication trial supported that Filbrandt had assaulted FF.

nevertheless confronted Filbrandt and "made him leave." Filbrandt worked as a truck driver, and spent months at a time on the road, but returned to the home "every couple months." Respondent denied that BH reported any other sexual abuse by Filbrandt before the incident that triggered respondent's revelation to the police, and claimed no knowledge of other incidents of Filbrandt's abuse.[6] Respondent added that Filbrandt had been incarcerated, and she had served him with a complaint for divorce.

The jury found that the trial court had jurisdiction over all three minor children, and the court entered an order of adjudication. On May 15, 2008, the court conducted a dispositional hearing. Dr. Wayne Simmons, a licensed psychologist, testified regarding his evaluations of the three involved children. According to Simmons, DH, age 12, had been physically abused by Hall, his biological father, and "exposed to a high level of violence … inappropriate television and video kinds of things, terrifying movies and very exaggerated aggressive video games." While living with respondent, DH attended a special school for children with behavioral problems, participated in counseling, and regularly took several medications, including Adderall, Lithium, Lamictal and Seroquel. Simmons described as "remarkable" that DH "knew the dosages" of his medications, and opined that when the child lived with respondent, "he had a surprising and probably most would say an inappropriate level of control of himself" manifested by the child's assumption of responsibility for administering his own medications. In foster care, DH exhibited an explosive temper and a preoccupation with sexual themes. Simmons explained that DH had "been exposed to a lot of aggression, and now this knowledge that his sister's been victimized. And I think that he's just flooded by more than he can handle." Simmons recommended that the child enter a hospital for medication adjustments, then placed in a residential treatment facility.[7]

Simmons expressed "very, very guarded optimism, at best," that DH's problems could be rectified through counseling "in the home environment." On cross-examination Simmons conceded that because he had never evaluated respondent, "I don't have any way to know whether that can be remedied or not." Simmons admitted that DH felt "very close to his mother" and expressed sadness being away from her.

Simmons described BH as "a charming girl, concerned about her weight," who "certainly indicated that she had an attachment to her mother . . . ." BH presented as "very depressed," and also expressed that she wanted to return home and live with her mother. Simmons recommended

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[6] Paula Lipinski, a protective services worker, testified that she filed the petition based on the police report, and had not interviewed respondent or BH.

[7] Respondent introduced as an exhibit a Child Protective Services report dated July 24, 1998, reflecting respondent's report that Hall "is abusive and mean to their children," and had struck the children. The report states, "This worker viewed both children and they appeared to be healthy and well cared for. Also, their [sic] was plenty of food and diapers in the home. Further, the home had a healthy and safe environment for young children. [Respondent] seems to be the main caretaker for her children and she makes sure that they get everything that they need." A second report, dated August 21, 1998, indicates that respondent had "moved up north with her children to get away from their father Mr. Hall," and that the case had been closed "because there is no longer nay need for P.S. involvement."

that BH continue in therapy with Cross. Simmons characterized FF as "just overwhelmed" by the changes in her life, and that she had profoundly disrupted her foster care placement. According to Simmons's report, FF missed her parents "and is having a hard time processing and containing discouragement she had about having moved away from them." He described that FF "is very, very provocative because she's mad. And she's had a massive loss. She knows that her father did—her understanding is her father did something that he shouldn't have. And you know, she's been removed from her home and is in an environment that's foreign to her."

Simmons admitted that he had never interviewed respondent, and had "no idea" whether "what happened with the children [could] be rectified" within the foreseeable future. Simmons stated, "What I can say is what I have said and that is that the kids are profoundly disrupted, and it raised great concern. But I wouldn't say—I don't have any way to know whether that can be remedied on her part or not."

Petitioner's second witness, Cross, also admitted that she had not assessed or evaluated respondent, but opined that a "poor prognosis" existed regarding respondent's capacity to remedy her past deficiencies. According to Cross, respondent failed to intervene with respect to the sexual abuse and her husband's alcoholism, which made it unlikely that her parenting ability would improve:

> *Defense Counsel*: And you have no idea of the capacity of Ms. Filbrandt to prevent this from happening again or to allow it to happen again?
>
> *Cross*: Well, I don't know her, number one. Haven't assessed her or evaluated her. But, based on her past history and lack of doing anything, I have no reason to believe she wouldn't do that in the future. We have a duel [sic] problem in this family that she didn't take care of. And that's the sexual abuse and the alcoholism.

Petitioner presented no additional evidence regarding the statutory grounds for termination of respondent's parental rights.[8]

Three witnesses testified on respondent's behalf before she offered her own testimony.[9] Respondent claimed that BH had reported two episodes of abuse, one in Cedar and the event that led to the police report. Respondent repeated that the first time BH told her about being touched by Filbrandt, BH also volunteered that she may have been dreaming, and for that reason respondent had not reported the abuse allegation. Respondent claimed that she had confronted Filbrandt, and that he ceased living with her and the children for approximately a year. Respondent also described a class that she had taken at the Maple Clinic taught by Holly Blomquist, a psychotherapist, regarding "teaching kids to keep themselves safe." Respondent's counsel then attempted to introduce a letter written by Blomquist regarding her "knowledge" of

[8] The children's foster mother testified that she and her husband did not believe that their home would serve as the children's permanent placement.

[9] The three witnesses consisted of the children's preschool teacher and two family friends.

respondent. The prosecutor objected to the introduction of the letter "if this is being offered as some sort of expert or clinical opinion." Respondent's counsel replied, "It's not an expert opinion. … This is somebody … that knows [respondent]. She works at Maple Clinic. She's a friend of [respondent]. And it's talking about, I guess, her involvement with her. But . . . there's no expert opinion in this." The trial court refused to admit the letter, explaining that "the witness needs to be available, I guess, to question on something like this . . . ." Respondent then subpoenaed Blomquist.

In response to questioning by respondent's counsel, Blomquist testified that she worked as a licensed clinical social worker and psychotherapist for the Maple Clinic. Blomquist met respondent six years earlier at a "playgroup" in Kalkaska, and considered respondent "a friend." Blomquist described, "There's a number of parents there, and [respondent] was one of the primary parents I would choose to spend time with at those playgroups because of—you know, I thought a lot of her as a parent." The questioning continued, in relevant part as follows:

> *Q*. And do you think that there's anything where she would not be capable of—anything about her that would make her incapable of taking care of these children?
>
> *A*. In my experience with her, I do not have evidence to say she can't take care of her children.
>
> *Q*. And if the Court were to determine that there was a number of things that they wanted [respondent] to do, do you believe that she would do whatever was necessary to have the children back home and to have them safe?
>
> *A*. My personal opinion is that she would work very hard towards that.

During cross-examination by the prosecutor, Blomquist repeated that she offered her personal opinions as respondent's "friend," and not as a "professional," and emphasized that she had "worked hard to stay clear of [respondent's] involvement with the Maple Clinic and DHS." On recross-examination, Blomquist again stated, "I don't feel I'm here as a professional today. I feel I'm here as a friend."

At the conclusion of Blomquist's testimony, the trial court engaged in the following colloquy with her:

> *The Court*: I don't know. I guess I'm just kind of trying to understand how do you separate the two. I mean, you're here as a friend, but . . . I mean—you testify—you've testified in other cases, you know, as an expert. I don't know how you separate the two. I don't know.
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> *Blomquist*: I have really—
>
> *The Court*: You're trying to say you're just friend, but yet you're basing your opinion on your qualifications, your experience and everything else, so.

Blomquist: There's professional (Inaudible) I would say come into play in being her friend in this specific issue.

The Court: Okay. But don't you have a problem—

Blomquist: But I've worked really hard to stay out—

The Court: —doing this? I mean coming to court to get on the stand—

Blomquist: I have a real problem with being here today.

The Court: —and testify?

Blomquist: I have a real problem today being here contradicting, you know, Barb's beliefs in this case. But I've had a very positive relationship with Kimberlee, and I've been involved in many cases where children have been returned to the home for much more serious situations. And I'm not minimizing what's taken place in this case, but I really think that Kimberlee should have the opportunity to have her children returned.

The Court: Okay. But we're talking about specifically—I don't know what you're referencing in terms of kids being returned on less serious issues. This is a criminal sexual conduct area where you have experience in that area.

Blomquist: I'm saying very serious issues where kids are going home to mom because mom wasn't the offender. And this is the case where mom wasn't the offender. And she's, you know, in this situation that the possibility of not having her kids returned. I'm not able to make sense of that as a professional, where there's so many other cases that are so serious in nature, and the kids go right home to mom.

The Court: Okay. You don't see a problems with this one, where she kicks him out, you know, the first time it happens, and then . . . kicks him out of the house. Then takes him back, so she—you know, it's kind of—the evidence suggests to me she'll say one thing and do quite another. So what's to guarantee she's going to protect these kids? You're trying to tell me, I mean, standing here—sitting here on the stand as a friend of hers that she's going to do—she's going to protect those children when she's got a track record of not doing that.

Blomquist: And that's what I'm saying I haven't been involved with her professionally to give, you know, a professional opinion on that. But, as a friend, I have seen her protect her children. I have seen her deal with behavioral issues. I have seen her how distraught she's been in working towards—what can I do to make sure my kids are safe in the future. Obviously, I didn't handle this right before. I have to make sure that doesn't happen again. And she's showing me that sincerity that suggests that she would follow through on this.

The Court: Well—

Blomquist: But again, that's outside the professional setting.

The Court: But I don't know how you can separate the two. I mean, it almost calls into question your credibility as it relates to even other cases where you come to Court. I mean, I don't know. I mean, it doesn't seem like you should be here or even get involved in a situation.

Blomquist: I've worked really hard to stay out of it for specifically that reason. And I was subpoenaed to be here, so I didn't have a choice.

The Court: Okay.

Blomquist: I have—

The Court: Well, I mean, you wrote the letter. I mean, that's – this is being offered to us today, you know, as – on behalf of the mother's side of the case.

Respondent's counsel: Your Honor—

The Court: It just seems to me that you shouldn't even be getting involved in a situation like this.

Respondent's counsel: I think the reason the letter was written was at my request. So I believe I'm responsible. She had a very difficult time being here today.

The Court: Right.

Respondent's counsel: And I said that, well, in lieu of the subpoena, perhaps you can write a letter.

The Court: Okay. I mean, but you know—I mean, you know. She's appeared and testified as an expert on other cases. I mean, just handing this in without even the opportunity to cross-examine her on this is rather inappropriate. I mean, just to hand that to me or to the other attorneys and just say here you go is just not the way we do things. And you know that.

So I mean, . . . I don't know what to make of this. You know, and the thing that concerns me is that it kind of calls into question your ability to assess other situations, too, where I need to be able to rely on that testimony as being, you know, accurate and credible. And I'm just kind of wondering about—I mean, it raises issues of credibility now I think for you even in not only this case, but other cases as well.

Respondent's testimony subsequently concluded with her admission that she had "handled both situation[s]" involving BH's reports "in the wrong way," and her request for a second chance with her children.

The trial court then entertained argument from counsel. The guardian ad litem began as follows:

> *Guardian ad litem*: Judge, you know, Ms. Blomquist, qualified or not, she's an expert witness. And she's been qualified as an expert in this Court numerous times. And she pretty much vouched for Ms. Filbrandt, even if that wasn't her role today. And she has had personal experiences with Ms. Filbrandt. And, although I hold in high esteem the opinion of Ms. Cross, we now have two people who have been previously qualified as experts who don't agree. Ms. Blomquist specifically said that she thinks that the children should be returned home. That's a problem as it relates to the evidentiary standard.
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> *The Court*: You don't think her judgment is clouded?
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> *Guardian ad litem*: You're the arbitrator of—
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> *The Court*: Unbiased? She's giving me an unbiased opinion?
>
> *Guardian ad litem*: I am only saying that she has been qualified as an expert witness.
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> *The Court*: Well, she told us that she wasn't here in that professional capacity today. So . . . I don't know how she separates the two, but I mean, I don't know how you can—I—you know, her opinion is just—is not real credible here, you know, because she is—it seems like her view of things is just clouded. It's not . . . an accurate assessment of what's going on. You've got the other therapists who are totally unbiased and you're trying to advocate to me that her position—I should accept her position in what she's telling this Court when she's totally biased and her opinion is—she doesn't have all of the facts. And I should accept that over somebody else? Is that what you're suggesting?
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> *Guardian ad litem*: Judge, what I am saying is, is there were multiple professionals who testified. And you are the final arbitrator of who is credible and who is not. I can only say that what was said was said. You make the ultimate decision.
>
> Ms. Cross said that she didn't think that, you know, the children should be returned home. She said that she pretty much thought there'd be a danger if they were returned home.
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> Ms. Blomquist didn't quite see it that way.
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> Mr. Simmons said that, you know, he didn't have too much involvement with her, but, perhaps, if he did some kind of psychological evaluation, maybe that would give him some kind of insight.
>
> Ms. Filbrandt testified that, you know, if given an opportunity, perhaps, it's something that she could work on. She went to the classes.

The children had indicated through testimony that they want to be returned home, that they all want to go home.

I just—I mean, Judge, you're the arbitrator of who's credible and not. She said what she said, and she's been qualified as an expert. And I can honestly say that I don't always agree with Ms. Blomquist and Ms. Cross, but I've never found either one of them to be unfair or unreasonable. I've never questioned their credibility. I might not agree with their opinion, but I've never said, you know, Ms. Blomquist is unfair. I've never said Ms. Cross is unfair. It's quite the contrary.

And I . . . understand that you're saying. But, as an attorney, I still have an ethical obligation, even if one of my clients is a friend, I wouldn't lie for them simply because they're my friend. And I would assume that she has the same ethical obligation. I just think that's problematic, Judge, that's all.

The Court: Okay. So you're leaving it up to me, is that what you're telling me?

Guardian ad litem: I take no position.

The trial court commenced its bench ruling as follows:

Okay. Well, you know, it's obvious to me in this case, I mean, that Dr. Simmons and Dr.—or Dr. Simmons' testimony and Barbara Cross' testimony is going to carry more weight here.

I mean, Holly Blomquist, you know, is a friend only. And she's appearing as a friend to testify. I think there's a huge conflict in interest in here, and this is probably something she shouldn't even have gotten herself in the middle of, because she's not had any involvement with this family. I think it only raises concerns in the future regarding her testimony on other cases because, as Mr. Metzger said, I mean, anything in the system we have some involvement with somebody that's a friend or, you know, anything I have, you know, a situation that involve people that work underneath me, I mean, I disqualify myself, because just even for the appearance of impropriety or because of the fact that they—we work together. You know, and it just seems to me that, as a therapist, I mean, that she would not have been making or rendering any opinion. I mean, I understand that she's a friend to the mother here and she's advocating for a friend. But clearly, I mean, her opinion is not unbiased here. I mean, I—and the credibility of that opinion is questionable at best, I mean in light of the other testimony that I've heard.

The trial court then reviewed the testimony of Dr. Simmons, and noted his opinion "that there was evidence of mental harm to these children. And that is a direct result of their being in the

care of their mother. . . . And he said that several different times. I mean, clearly, mother's environment contributed—has contributed to their disorganized state."[10] According to the trial court, Simmons expressed "guarded optimism at best" regarding whether the children could return to respondent's home. The trial court concluded that based on Simmons's testimony, "to return them back to that environment would clearly not be in their best interest."

The trial court then addressed Cross's testimony, recalling that Cross "had indicated that there was an open discussion in this family—it was an open issue about the sexual abuse, about the alcoholism. The abuse was known for at least two-and-a half years, and the mother did not . . . protect BH. There's no guarantee that she would protect the kids in the future." The trial court summarized the facts underlying its decision as follows:

> The abuse was known, and the mother basically acknowledged that she knew that he—that the father, Mr. Filbrandt, had done something wrong, and that he had abused [BH] and kicked him out of the house. And then took him back a couple of years later. And then when the abuse occurred again, she didn't report it right away to the police and only waited until he started drinking again, and then decided to report it.
>
> I think, you know, based on all of those facts, there's [sic] some real serious questions whether or not she would do the right thing and would protect these children in the future if given another chance. I mean, she's already been given that chance to protect the children. And the children need her to be the parent, not the other way around. I mean, it's her responsibility to make sure that the children are safe and protected.

The trial court opined that after learning of the abuse, respondent should not have allowed Filbrandt to return, and should not have delayed making a police report. According to the trial court, "evidence of abuse as to one child also is evidence of abuse to the other children, too." The trial court determined that Simmons's testimony indicated that "all [the children's] issues are directly related form the environment that they came from. And that environment, mother's environment had contributed to their disorganized state[.] And that there's evidence of mental harm that has been done to the children from being in her care and custody."

The trial court concluded that one or more of the allegations in the petition was true, and that a reasonable likelihood existed that the children would suffer injury or abuse in the future if placed in respondent's home.

> Clearly, this case is just so absolutely clear to me, I think, from the history of it, because the mother failed to do the right thing, you know, when she first found out about the abuse, and then let the perpetrator back in, and then failed to report again when she found out about it and delayed reporting again for another three weeks.

[10] As discussed *infra*, Simmons did not express any opinions that the children's emotional problems were caused by respondent.

> And given the previous history of the physical abuse with Mr. Hall, I mean there's a reasonable likelihood that these children would suffer from injury or abuse in the foreseeable future if placed back in her home. I have no guarantee that she's going to do the right thing in the future to protect these children and keep them safe.

III. MCR 3.972(C)(2)

Respondent first contends that the trial court erred by admitting Cross's testimony at the adjudication trial because it did not conduct before the trial the hearing required by MCR 3.972(C)(2)(a). In a child protective proceeding, MCR 3.972(C)(2) governs the admission of a child's hearsay statement during an adjudication trial. The court rule provides:

> (2) 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.

Contrary to respondent's argument, the record reflects that the trial court conducted a hearing before the trial commenced, and concluded that the circumstances surrounding BH's statements to Cross provided adequate indicia of trustworthiness. Nevertheless, Cross's trial testimony clearly exceeded the scope of MCR 3.972(2). We review de novo issues "concerning family court procedure under the court rules." *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002).

The trial court properly admitted Cross's testimony regarding BH's descriptions of Filbrandt's inappropriate touching, and BH's statement that "she told her mother every time that he did something." But Cross also testified regarding BH's statements that (1) "she feels like this is her fault," (2) Filbrandt "might have touched" FF, and (3) "she heard him going to FF's bed and [heard] the bed move." These hearsay statements do not qualify as descriptions of an act of abuse or neglect "performed with or on the child by another person," as required under the plain language of MCR 3.972(C)(2). However, we find this error harmless because a preponderance of the evidence established adequate grounds for the court's assumption of jurisdiction, and respondent subsequently acknowledged the propriety of jurisdiction under the circumstances presented in this case.

IV. Sufficiency of the Evidence Regarding Statutory Bases for Termination

Respondent next asserts that petitioner failed to present clear and convincing evidence supporting the termination of her parental rights. Specifically, respondent contends that inadequate evidence supported the trial court's determinations that (1) "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)(ii), and (2) there exists "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)(j).

The Michigan Court Rules provide that the trial court "shall" order termination of a respondent's parental rights at the initial dispositional hearing, and that additional efforts for reunification not be made, if:

> (1) the original, or amended, petition contains a request for termination;
>
> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
>
> (3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
>
> (a) are true, and
>
> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (*l*), (m), or (n);
>
> unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child. [MCR 3.977(E)(3)].

MCR 3.977(G)(2) provides in pertinent part that "[a]t the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value."

As already noted, we consider de novo issues "concerning family court procedure under the court rules." *In re CR*, *supra* at 200. We review for clear error the trial court's decision to terminate parental rights. MCR 3.977(J). The clear error standard controls our review of "both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A decision qualifies as clearly erroneous when, "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 JK*, 468 Mich 202,

209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes us as more than just maybe or probably wrong. *In re Trejo*, *supra* at 356.

The proof supporting a court's termination decision must qualify at least as clear and convincing. *Santosky v Kramer*, 455 US 745, 768-770; 102 S Ct 1388; 71 L Ed 2d 599 (1982). The clear and convincing evidence standard is "the most demanding standard applied in civil cases[.]" *In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995). Our Supreme Court has described clear and convincing evidence as proof that

> produces 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 factfinder to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*Id*. (internal quotation omitted, alteration in original).]

The trial court terminated respondent's parental rights after finding that the evidence supported termination under two statutory grounds: subsections 19b(3)(b)(ii) and (j). The plain language of both grounds requires a finding that "there is a reasonable likelihood" that the involved children will suffer harm or injury or abuse if returned to the parent's home.[11] In the trial court's estimation, Cross and Simmons supplied the evidence supporting that respondent would likely fail to protect her children if they were returned to her. The trial court viewed their testimony as substantiating "evidence of mental harm that has been done to the children from being in her care and custody." Regarding the likelihood of future harm, the court observed that respondent had failed to protect BH, allowed Filbrandt back into the home after becoming aware of the abuse, and "given the previous history of the physical abuse with Mr. Hall, I mean there's a reasonable likelihood that these children would suffer from injury or abuse in the foreseeable future if placed back in her home."

Our careful review of the record in this case leads us to conclude that the trial court clearly erred in finding clear and convincing evidence that the involved children would likely suffer harm if returned to respondent's care. Neither Cross nor Simmons had ever met or evaluated respondent, as both freely admitted. Contrary to the trial court's expressed factual findings, Simmons simply offered no testimony directly linking respondent's behavior to any mental health problems evident in the children. Simmons emphasized that his opinions regarding respondent had no basis in first-hand observations, but rested on speculation. For example, with respect to whether family counseling qualified as an option, Simmons stated, "Well, I don't know about that. I mean, I wouldn't necessarily say family counseling, because *what's being implied—and I have to say over and over I don't know whether this is so or not—but what's being implied* is deficits on the part of the mother, not conflict between the mother and the kids." (Emphasis supplied). When asked directly whether he believed "because of the way the kids are acting that she might have not been parenting properly," Simmons responded,

[11] MCL 712A.19b(3)(b)(ii) also includes the requirement that the injury or abuse is likely to occur "in the foreseeable future."

> I don't think that that's an unreasonable assumption to come to unless there's some other variable that has not been able to be brought out in terms of what would have an effect on them. But, as I said, that doesn't provide an ultimate answer. … She needs to be assessed by me or somebody to try to make a determination about where she's at and what her potential is, if she needs to change. … And I think it's appropriate that she be evaluated, try and help understand that.

Cross evaluated only BH, and also admitted that she lacked first-hand knowledge of respondent's capacity to prevent future harm to the children. The strongest statement Cross offered on this subject was, "[B]ased on her past history and lack of doing anything, I have no reason to believe she wouldn't do that in the future."

Although this testimony raises legitimate concerns regarding respondent's ability to parent, it does not constitute clear and convincing evidence that the children would likely suffer harm or abuse if returned to her care, particularly in light of the fact that she had divorced Filbrandt. Furthermore, the trial court's statement that "evidence of abuse as to one child also is evidence of abuse as to the other children, too," misstates the law that governed the court's evidentiary review. "How a parent treats one child is certainly probative of how that parent *may* treat other children." *In re LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973) (emphasis supplied). However, such evidence is not "conclusive or automatically determinative." *In re Kantola*, 139 Mich App 23, 28; 361 NW2d 20 (1984). Therefore, the trial court clearly erred by concluding that respondent's failure to protect BH conclusively evidenced her neglect of the other children.

We further observe that the trial court's decision to entirely disregard Blomquist's testimony also amounts to clear error. The trial court erroneously concluded that because Blomquist worked as a professional, she lacked competency as a witness. In fact, Blomquist supplied the only first-hand testimony offered during the proceedings concerning respondent's parenting abilities. Notwithstanding her Maple Clinic employment, Blomquist repeatedly emphasized that she was appearing only in her capacity as respondent's friend, and someone who had observed respondent interact with her children over the course of six years. Blomquist's observations of respondent and her children qualified as relevant, material, and competent evidence regarding respondent's capacity to parent. The trial court rejected Blomquist's testimony, stating, "[I]t's not an accurate assessment of what's going on," and further observing, "[Blomquist's] not had any involvement with this family." But the evidence indisputably establishes that Blomquist did have involvement with the family. Given that the trial court lacked any other nonspeculative evidence of respondent's capacity to parent, Blomquist's testimony constituted an assessment that the trial court should have considered along with all of the other legally admissible evidence presented during the proceedings.

We additionally express concern regarding several statements made by the trial court during the dispositional hearing. At the close of petitioner's proofs, respondent's counsel argued that the prosecutor had failed to present any evidence that the involved children would suffer injury or abuse in the foreseeable future if placed in respondent's home. In rejecting this argument, the trial court opined that the 2-1/2 year period that elapsed after BH's first report of abuse "in and of itself is going to be enough to say that there's a factual basis to find that there's

a reasonable likelihood that the children … could suffer from abuse in the future." The trial court continued,

> But I've been listening to everything and I guess I disagree with you. You're trying to suggest that there isn't any evidence upon which the Court can make those findings based on the facts of this particular case. And, if there's any case that could be more clear than this one, I don't know what it would be, because, whenever you have sexual abuse and it goes unreported for a number of years, you know, that's pretty clear that there's a reasonable likelihood that the children could suffer from abuse again in the future if that happens again.

The trial court also expressed strong opinions in rejecting Blomquist's testimony, including that "it doesn't seem like you should be here or even get involved in a situation," and "I'm just kind of wondering about—I mean, it raises issues of credibility now I think for you even in not only this case, but other cases as well." The trial court articulated these perceptions before respondent completed her proofs, and before hearing the arguments of counsel. When the guardian ad litem expressed serious reservations about terminating respondent's parental rights in the absence of more information regarding respondent's capacity to keep her children safe in the future, the trial court reiterated an unwillingness to consider Blomquist's testimony. The trial court's comments reflect a lack of interest in considering evidence that conflicted with the court's preconceived conclusions. "[A] fair trial in a fair tribunal is a basic requirement of due process." *Cain v Dep't of Corrections*, 451 Mich 470, 499; 548 NW2d 210 (1996), quoting *Withrow v Larkin*, 421 US 35, 46; 95 S Ct 1456; 43 L Ed2d 712 (1975). Because the trial court's comments demonstrate that it lacks the ability to impartially evaluate respondent's evidence, this case shall be assigned to a different judge on remand to preserve the appearance of judicial impartiality.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher