STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of IVAN JOHN WILLIAM AUBREY, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ELLEN AUBREY,

Respondent-Appellant.

UNPUBLISHED
June 2, 2009

No. 287227
Macomb Circuit Court
Family Division
LC No. 2008-000105-NA

In the Matter of SONIA NICOLE AUBREY, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ELLEN AUBREY,

Respondent-Appellant.

No. 287228
Macomb Circuit Court
Family Division
LC No. 2008-000106-NA

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Respondent appeals as of right the trial court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), and (j). We affirm.

Respondent is the single mother of four adopted children: Maria, Jay, and the two younger children at issue in this appeal, Ivan and Sonia. Although several allegations of neglect and abuse have surfaced in this case, at its core the appeal is primarily based upon allegations that respondent failed to protect Sonia from being sexually abused by her older brother, Jay.

When Jay was in elementary school, he was diagnosed as ADHD. He was placed on medication, treated by a behavioral pediatrician, and placed in an emotionally impaired classroom. During these early years, Jay's behavior was manageable. However, when Jay entered middle school, his behavior became uncontrollable.

In the spring of 2004, respondent was in the car with Jay, Ivan, and Sonia when either Ivan or Sonia said, "Yeah, and we don't ever want to see your hairy penis again, Jay." Respondent asked a lot of questions, and the most she could conclude was that there had been an exposure. About this time, Jay was in the process of being admitted to a residential treatment program. At the time of his admission to that program, respondent informed the staff of the statements made by the younger children. During a subsequent evaluation of the children by Care House, neither child disclosed any instances of sexual abuse.

Between 2004 and January 2007, Jay took part in various residential treatment programs. In mid to late 2006, Jay was permitted home visits and in January 2007, he returned to the family home. During the evening of February 18, 2008, Sonia disclosed to respondent that Jay had sexually assaulted her twice that day, at separate times. Respondent reported the abuse to the police department after which Jay was taken into police custody and eventually admitted to a psychiatric facility. Ivan and Sonia were removed from respondent's care.

The initial petition was filed on February 21, 2008. Thereafter, the children disclosed that respondent had subjected them to physical, emotional, and verbal abuse. As a consequence of these, and other disclosures, the petition was amended to seek termination of respondent's parental rights, to add claims of physical abuse against respondent, and to include the allegation that, in addition to Sonia, respondent failed to protect Ivan from Jay's sexual abuse.

The first termination hearing began in April of 2008 and concluded on May 9, 2008. During these hearings, Sonia testified that she had been sexually assaulted by Jay when she was eight, nine, and ten years old. Sonia told her mother about the first two sexual assaults; in response, respondent stated that Jay was going to go away to someplace where he could get some help and that, if he should touch her again, Sonia should tell respondent. After the third disclosure, respondent took Jay to the police department. Sonia also testified that respondent had disciplined her with a belt and, on one occasion, respondent spanked her and then kicked her, causing Sonia to lose her balance, strike her head on the dresser, and sustain a black eye.

Respondent's oldest child, Maria, left respondent's home when she was 16 years old. She testified that respondent physically, emotionally, and verbally abused her, starting when she was eight or nine years old. Her departure from respondent's home in 2004 was precipitated when respondent punched her in the eye on her sixteenth birthday. The probation officer assigned to Maria's incorrigibility petition testified at trial that she observed the black eye, asked Maria how it happened, then removed Maria from respondent's home for her own safety.

Respondent testified at the April 2008 termination hearing that, before January 2007, she had no reason to believe that Jay had sexually assaulted Sonia. Sonia had never disclosed anything, and after the 2004 Care House interview, when the children did not disclose any sexual abuse, she was told by the staff there that no sexual abuse had occurred. Respondent further claimed that she had safety mechanisms in place when Jay returned to the home in January of 2007; she specifically asserted that Jay was always supervised. However, respondent admitted

that Jay overdosed four times while in her care and that she did not tell any of his multiple in-home services providers about the 2004 statements by the children that Jay had exposed himself. Additionally, although respondent claimed that Jay had no access to the family's password-protected computer, the police department discovered, after evaluating the computer's hard drive, that there were thousands of hits on pornographic websites.

After respondent's testimony, psychologist Dr. Patrick Ryan testified that he evaluated respondent, Sonia, and Ivan. Neither child indicated a fear of their mother. Dr. Ryan thought that respondent's parenting skills were "up to code" and she did not exhibit any abusive personality traits. In Dr. Ryan's opinion, reunification was "certainly a possibility."

At the conclusion of the April 2008 termination hearing, the court, in the adjudicative phase, found that the children came within the court's jurisdiction based upon the abuse of Sonia. However, moving to the dispositional phase, the court concluded that there was insufficient evidence to find that respondent had an opportunity to protect Sonia from being sexually abused by her brother. The court relied, primarily, on the fact that the statements made by the children in 2004 were too vague to put respondent on notice that Jay was abusing Sonia, especially considering that the children made no disclosure of sexual abuse to the Care House staff during their interview pertaining to those statements.

After the court denied this first termination petition, it ordered respondent, Sonia, and Ivan to undergo a psychological evaluation by Robert Schumann. Schumann concluded in his report that respondent failed to protect her children from sexual abuse and that she physically and emotionally abused them. Schumann opined that it would be in the children's best interests to terminate respondent's parental rights. Alternatively, the only hope Schumann envisioned for this family involved a long and very intensive family program through the University of Michigan, into which acceptance was not guaranteed.

After Schumann issued his report, petitioner filed a supplemental petition seeking termination of respondent's parental rights. In addition, petitioner acquired Jay's voluminous medical records, which disclosed, in several different excerpts, that in 2004, when Jay was being admitted to the various residential treatment programs, respondent had clear knowledge that Jay was acting out sexually, including exposing himself to his younger siblings, requesting that they perform oral sex on him, and possibly sexually assaulting Maria.

The second termination hearing was held on August 6, 2008. In addition to the introduction of Jay's medical records, the court considered Schumann's testimony and his corresponding report. Respondent's testimony at this hearing was also very telling. Respondent refused to answer the question whether she believed that Jay sexually assaulted Sonia and when asked by the court whether she believed that the statements made by the children in 2004 regarding Jay's exposing himself had ever been substantiated, respondent replied, "no."

At the conclusion of the second termination hearing, the court found that statutory grounds for termination had been established by clear and convincing evidence. Respondent now appeals, raising six claims of error.

Respondent first contends that, because the trial court had previously denied a petition seeking termination of respondent's parental rights, the supplemental petition was barred by the

doctrine of res judicata. We disagree. For a prior judgment to operate as a bar to a subsequent proceeding, three requirements must be satisfied: (1) the subject matter of the second action must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must have been on the merits. *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991). In *Pardee*, this Court held that res judicata did not bar an order terminating a father's parental rights, even though the petitioner relied in part on facts that predated a prior order denying termination. This Court considered that the petitioner also relied on circumstances that were new and different from the grounds raised in the first petition, and stressed that the unique concerns in parental rights cases militate against an overly rigid application of the res judicata doctrine. This Court stated:

> We recognize that respondent has a significant interest in protecting himself from repeated vexatious or unnecessary relitigation of issues which the doctrine of res judicata is designed to prevent. Nevertheless, this doctrine cannot settle the question of a child's welfare for all time, nor prevent a court from determining at a subsequent time what is in the child's best interest at that time. Moreover, res judicata should not be a bar to "fresh litigation" of issues that are appropriately the subject of periodic redetermination as is the case with termination proceedings where new facts and changed circumstance alter the status quo. [*Id.* at 248-249 (citations omitted).]

The Court further noted that "when the facts have changed or new facts develop, the dismissal of a prior termination proceeding will not operate as a bar to a subsequent termination proceeding." *Id*. at 248.

A thorough review of the record in this case reveals that the facts and issues litigated in April and May of 2008 were not identical to those relied upon by the court in August of 2008, and that "[s]econdly, and more importantly, new evidence and changed circumstances justified the pursuit of a second termination proceeding, thus precluding the application of the doctrine of res judicata." *Pardee, supra* at 249. After the court denied the initial petition, it ordered the family to undergo psychological evaluations to determine if reunification was viable. Robert Schumann evaluated the children and respondent and concluded, in no uncertain terms, that termination of parental rights was warranted. Schumann gave testimony to this effect at the subsequent hearing. Further, respondent gave testimony at the subsequent hearing illustrating her lack of insight into the events that so severely traumatized her children. Contrary to respondent's contention, the second termination proceeding was not grounded on identical evidence, but was properly based on facts existing before the first proceeding and facts arising subsequent thereto. Accordingly, the doctrine of res judicata did not prevent adjudicating the merits of the second termination petition or from relying on the facts existing before the dismissal of the first petition. *Id*. at 249-250.

Next, respondent argues that, with respect to the allegations related to Ivan, the court was permitted to consider only legally admissible evidence pursuant to MCR 3.977(F). Respondent failed to object to the admitted evidence on hearsay grounds. Consequently, this issue has not been preserved for appellate review. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Even if the issue had been properly preserved, and even if we were to review the issue and conclude that the trial court erred in considering inadmissible hearsay, reversal of the order terminating parental rights would not be warranted. There was overwhelming evidence to support termination of respondent's parental rights to both Ivan and Sonia based upon the allegations relating to Sonia set forth in the initial petition. The trial court was not similarly constrained to consider only legally admissible evidence as to these allegations. Because only one statutory ground for terminating parental rights is required, any error relating to establishing allegations pertaining to Ivan was harmless. *In re Trejo*, 462 Mich 341, 360; 612 NW2d 407 (2000).

Next, respondent contends that there was not clear and convincing evidence to support termination of her parental rights pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), and (j). We disagree. As outlined previously, there was sufficient evidence from which the court could conclude that respondent physically abused her children. Sonia and Maria both testified to the physical, mental, and verbal abuse at respondent's hands. Although respondent denied hitting the girls, and with respect to Maria, that the bruising even existed, the presence of black eyes on both of the girls was independently verified by other witnesses. It was the trial court's responsibility to determine the proper weight and credibility of this testimony, *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008), and this Court gives deference to the trial judge's unique opportunity to observe the witnesses appearing before it, *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). Based upon the evidence presented, the trial court did not err when it concluded that there was clear and convincing evidence to support termination of respondent's parental rights pursuant to MCL 712A.19b(3)(b)(i).

Likewise, the trial court did not err in concluding that there was clear and convincing evidence to support termination of respondent's parental rights pursuant to MCL 712A.19b(3)(b)(ii). Sonia testified that when she was eight, nine, and ten years old she was sexually assaulted by her brother, Jay. Sonia told respondent about the assaults and, after the first two assaults, respondent simply told Sonia that Jay was going to get help and that, if he touched her again, Sonia should tell respondent. Additionally, in 2004, respondent heard either Sonia or Ivan state that Jay exposed himself. Although, Ivan and Sonia did not thereafter make a definitive statement to Care House, it was apparent from Jay's own medical records related to his inpatient admissions in 2004 that respondent was aware that Jay was exposing himself to the younger siblings and asking them to perform oral sex on him.

Despite being on notice that Jay was acting out in this sexually aggressive manner, and that he had a multitude of other behavioral issues, respondent did not adequately supervise Jay when he was in the family home. Respondent's testimony that Jay was constantly under adult supervision is belied by the facts that Jay overdosed four times while in her care, that he had ample opportunity to surf the internet for pornographic websites, and that he actually assaulted Sonia. Under these circumstances, we cannot conclude that the trial court erred when it found that respondent failed to protect her children from sexual abuse.

Further, there was evidence that the children would be at risk if returned to respondent's home. Respondent's own testimony demonstrated that she was in denial about the abuse. This denial and lack of insight demonstrates that respondent is not capable of recognizing potential risks to her children. Consequently, the trial court did not err when it concluded that the children

would suffer injury or abuse if placed with respondent. The foregoing evidence similarly supports the court's finding that termination of parental rights was appropriate pursuant to MCL 712A.19b(3)(g) and (j).

For her fourth claim of error, respondent contends that the trial court erred when it suspended respondent's parenting time. We disagree. The original petition did not initially seek termination of parental rights. After the preliminary hearing on February 21, 2008, the trial court suspended parenting time until respondent and the children underwent a psychological evaluation. The trial court further ruled that supervised visitation could be granted if the evaluation indicated that it would not be harmful to the children. On March 25, 2008, the trial court permitted petitioner to amend the petition to add allegations that respondent physically abused her children and to seek termination of parental rights. By the order permitting the amendment to the petition, the court further continued the suspension of visitation. At the pretrial on March 25, 2008, respondent sought to initiate parenting time. Respondent argued that, because the psychological evaluation found no risk to the children, visitation should be instituted. In response, petitioner represented that, despite Dr. Ryan's report, Sonia had recently been hospitalized for suicidal ideation and had indicated that she did not want to go home. Further, petitioner indicated that there was a continuing investigation related to the allegations of physical abuse. The GAL also recommended that visitation be suspended but acknowledged that the children had been inconsistent when voicing their wishes. Ultimately, the court continued the suspension of parenting time.

At the time the court issued the challenged visitation order, MCL 712A.19b(4) provided, in pertinent part:

> If a petition to terminate parental rights to a child is filed, parenting time for a parent who is a subject of the petition is automatically suspended and, except as otherwise provided in this subsection, remains suspended at least until a decision is issued on the termination petition. If a parent whose parenting time is suspended under this subsection establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate.[1]

Because a petition to terminate parental rights was filed, parenting time was automatically suspended. Respondent did not, thereafter, show that parenting time would not be harmful to the children. The allegations in the petition asserted that respondent had physically abused the children. This was a recent revelation by the children that ultimately prompted the filing of the amended petition. The children appeared to be in a great deal of turmoil. Under these circumstances, the trial court did not err when it continued to suspend visitation through the subsequent termination hearing.

[1] MCR 712A.19b(4) was amended by 2008 PA 199, effective July 11, 2008, and now provides, in pertinent part, that "[i]f a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition."

Next, respondent claims that the trial court improperly relied solely upon the expert testimony of Robert Schumann to terminate her parental rights. Because respondent's claimed error is unsupported by the record, we disagree. It is readily apparent that the trial court did not rely solely upon Schumann's testimony when it found that statutory grounds for termination had been established by clear and convincing evidence. In its opinion from the bench, the trial court indicated that it had relied on the testimony given in prior hearings, the testimony of respondent and Schumann at the August 6, 2008 hearing, Jay's medical records, and Schumann's written report. In any event, in a bench trial, it is the role of the judge sitting as the trier of fact to observe the witnesses and determine the weight to be given their testimony, *Moore*, *supra* at 202, and we give appropriate deference to that determination, *Zeeland Farm Services*, *supra* at 195.

Finally, respondent argues that the trial court erroneously concluded that termination was in the children's best interests. MCL 712A.19b(5). We disagree. In determining that termination of respondent's parental right was in the children's best interests, the trial court relied on evidence that it was unlikely that respondent would change, that the children did not feel safe when they were in respondent's care and that Sonia would likely suffer additional physical abuse in the foreseeable future. The court also noted that Sonia should not be put through additional uncertainty in her life considering the trauma she had already experienced. Finally, the court concluded that returning the children to their mother could only be detrimental to the children psychologically and, further, that it was unreasonable to expect the children to wait for their mother to be in a position to parent them appropriately considering their ages and the level of trauma previously experienced.

We affirm.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio