

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KEYANNA KYMETTE
SHAZER, DE'VONTA JAVON SHAZER, and
DE'ANNA SHAVON SHAZER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

KENNETH SHAZER,

Respondent-Appellant,

and

CHRISTINA M. PIERFELICE,

Respondent.

In the Matter of KEYANNA KYMETTE
SHAZER, DE'VONTA JAVON SHAZER, and
DE'ANNA SHAVON SHAZER, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

CHRISTINA M. PIERFELICE,

Respondent-Appellant,

and

KENNETH SHAZER,

Respondent.

UNPUBLISHED
September 15, 2009

No. 290483
Wayne Circuit Court
Family Division
LC No. 07-469254

No. 290667
Wayne Circuit Court
Family Division
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Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

In these consolidated appeals, respondents Kenneth Shazer and Christina M. Pierfelice each appeal as of right from the trial court's order terminating their parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (c)(i), (g), and (j). We affirm.

I. Admissibility of Hearsay Statements

Both respondents argue that hearsay testimony was improperly admitted below. Respondent Pierfelice argues that the children's foster mother, Diane Jones, was improperly allowed to testify at a dispositional review hearing that the children's therapist, Winifred Powers, told her that visitation was detrimental to the children. Respondent Pierfelice also argues that Powers was improperly permitted to testify at the termination hearing that one of the children had told her that she did not want to go home. Both respondents also challenge the admissibility at the termination hearing of several statements made by the children to either Jones or Powers regarding abuse or domestic violence that occurred before their removal. Because respondent Pierfelice did not object to either Jones's testimony at the dispositional hearing or to Powers's testimony at the termination hearing, and neither respondent objected to the testimony concerning the children's statements at the termination hearing, these issues are not preserved. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

This Court generally reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). But unpreserved claims of evidentiary error are reviewed for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is generally not admissible except as provided by the rules of evidence. MRE 802; *McLaughlin*, *supra*. However, the rules of evidence do not apply at dispositional review hearings. MCR 3.973(E)(1); MCR 3.975(E). Thus, the fact that Jones's testimony at the dispositional review hearing was hearsay did not preclude its admission. On appeal, respondent Pierfelice's sole basis for challenging the admission of Jones's testimony is that the trial court found that the testimony was unreliable. Although the transcript indicates that the trial court stated, "I have no reason to believe this is a reliable hearsay," this appears to be either a misstatement or an error in transcription, because it is clear from the context of the surrounding exchange that the trial court considered the statement reliable. Thus, the testimony was not plain error.

With regard to hearsay testimony at the termination hearing, petitioner asserts that the court rules and case law "have firmly established that hearsay testimony is admissible at . . . termination hearings." This statement is only partially correct. At the time of the termination hearing, MCR 3.977 provided, in pertinent part:

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the

jurisdiction of the court *on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.*

(1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if

(a) the supplemental petition for termination of parental rights contains a request for termination

(b) at the hearing on the supplemental petition, the court finds *on the basis of clear and convincing legally admissible evidence* that one or more of the facts alleged in the supplemental petition:

(i) are true; and

(ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (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.¹

* * *

(G) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

* * *

(2) *Evidence.* The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At 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. 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 reports when those individuals are reasonably available.

¹ The court rule was amended, effective July 1, 2009, to now provide that the trial court must find that termination of parental rights is in the child's best interests.

Thus, if a petitioner seeks to terminate parental rights on grounds that were not the basis for the trial court's original assumption of jurisdiction, the additional grounds must be proven by legally admissible evidence. Conversely, where termination is sought on the basis of the same grounds that led to the court's original assumption of jurisdiction, the rules of evidence do not apply.

Here, the trial court asserted jurisdiction over the children because respondents exposed the children to domestic violence, failed to provide for them, and effectively abandoned them to the care of respondent Pierfelice's friend, Morris Washington. Thus, hearsay testimony pertaining to these matters was therefore admissible. Accordingly, the children's hearsay statements regarding their observations of domestic violence perpetrated by respondent Shazer against respondent Pierfelice were admissible. Similarly, the statement by one child that she did not want to go home arguably related to the original circumstances that led to the court's jurisdiction and, therefore, was admissible even though it was hearsay. Moreover, the statement arguably qualifies under the hearsay exception in MRE 803(3), as "a statement of the declarant's then existing state of mind." Thus, there was no plain error in the admission of these statements.

During the proceedings, however, new allegations emerged that respondent Shazer had abused the children by locking them in a closet that was infested with insects, and that Morris Washington had subjected some of the children to sexual abuse. Because these allegations were not a basis for the trial court's original assumption of jurisdiction, legally admissible evidence was required to prove them.

MCR 3.972(C) provides, in pertinent part:

(1) *Evidence; Standard of Proof.* Except as otherwise provided in these rules, the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply at the trial, notwithstanding that the petition contains a request to terminate parental rights.

(2) *Child's Statement.* 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.

(b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.

(c) If the child has not testified, a statement denying such conduct may be admitted to impeach a statement admitted under subrule (2)(a) if the court has

found, in a hearing held before trial, that the circumstances surrounding the giving of the statement denying the conduct provide adequate indicia of trustworthiness.

The children's statements regarding respondent Shazer's abuse of the children by locking them in a closet and concerning Morris's sexual abuse were potentially admissible under MCR 3.972(C)(2), because they were statements made by children under ten years of age regarding acts of child abuse and sexual abuse. However, the rule required the trial court to determine at a pretrial hearing "that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." MCR 3.972(C)(2)(a). Although the failure to hold such a hearing was plain error, we conclude that the admission of the statements did not affect respondents' substantial rights because the record contains adequate indicia that the statements were reliable. All three children gave consistent accounts of their experiences, and four different adults, including three therapists treating the children, gave consistent accounts of the children's statements regarding the closet. Two of the children corroborated each other's accounts of the sexual abuse, and Jones's testimony concerning the children's statements corroborated the therapists' testimony. Moreover, two of the children exhibited sexual behaviors that were consistent with the reports that Morris forced them to engage in sexual contact with each other. The witnesses' corroboration of each other's testimony provided strong indicia of reliability. In sum, the record reflects that the statements qualified for admission under MCR 3.972(C)(2)(a). Any error in failing to hold the hearing prescribed by that rule did not affect respondents' substantial rights.

For these reasons, respondents' claims of evidentiary error do not require reversal.

II. Statutory Grounds for Termination and the Children's Best Interests

Both respondents argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence and in finding that termination of their parental rights was in the children's best interests. We disagree.

To terminate parental rights, the petitioner must establish at least one of the statutory grounds for termination in MCL 712A.19b(3) by clear and convincing evidence. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). This Court reviews the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(J); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, *supra* at 209-210. To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours*, *supra* at 633. Regard is given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); *In re Fried*, *supra* at 541. Once a statutory ground for termination has been proven, the trial court shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" MCL 712A.19b(5). The trial court's best interests decision is also reviewed for clear error. *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

The trial court terminated respondents' parental rights under MCL 712A.19b(3)(b)(i), (c)(i), (g) and (j), which authorize termination under the following circumstances:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds 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.

* * *

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is 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.

A. Respondent Shazer

There was ample evidence that respondent Shazer subjected the children to physical abuse by locking them in a closet, harmed the children by engaging in domestic violence of their mother in their presence, and failed to provide for their care after he separated from respondent Pierfelice. Respondent Shazer never took full responsibility for his role in the substantial abuse and neglect. Although respondent Shazer complied with certain aspects of his treatment plan, including parenting classes and counseling, and although he presented favorably during visitations, "it is not enough to merely go through the motions [of complying with a treatment plan]; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody." *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005). Here, the evidence clearly established that respondent Shazer's completion of services and his favorable presentation at visitations were superficial compared to the severity of the children's problems.

Furthermore, the evidence showed that the children had neurological problems before they were removed from their parents' care and did not receive proper care. After failing to provide for the children's medical needs while living with them, failing to provide any care, supervision, or support after he separated from respondent Pierfelice, and failing to demonstrate a commitment to understanding and providing for the children's needs during the pendency of this case, more was required of respondent Shazer than to merely attend and complete services and act properly during weekly visits. Despite his participation in services, respondent Shazer

failed to make sufficient progress to demonstrate his commitment to providing the degree of parental care necessary for children with demanding medical and psychological needs.

In addition, respondent Shazer failed to establish stable housing and income. He verbalized plans to reinstate his employment with a security firm and to obtain housing with Section 8 benefits, but failed to follow through with these plans. Instead, he drifted from address to address, often losing contact with petitioner. Under these circumstances, the trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence with respect to respondent Shazer.

Further, the children's therapists unanimously agreed that contact with respondent Shazer would be harmful to the children because of their prior experiences of being terrorized by him, which left them fearful and traumatized. Therefore, the trial court did not clearly err in finding that termination of respondent Shazer's parental rights was in the children's best interests.

B. Respondent Pierfelice

Although we agree that termination of respondent Pierfelice's parental rights was not justified under § 10b(3)(b)(i), because there was no evidence that she participated in any of the abuse of the children, the trial court did not clearly err in finding that the remaining grounds for termination were proven by clear and convincing evidence. Respondent Pierfelice failed to provide for the children's medical needs and failed to acknowledge that they needed substantial medical intervention. For no apparent reason, she delayed consenting to a neurological assessment that one child needed, delaying the procedure for several months. She also abandoned the children to a sexual abuser. During the pendency of this case, she failed to avail herself of services that were offered. Her psychological assessment revealed a lack of insight and a poor prognosis for resolving her parental deficiencies. Under the circumstances, the trial court did not clearly err in finding that termination was justified under §§ 19b(3)(c)(i), (g), and (j), and in finding that termination of respondent Pierfelice's parental rights was in the children's best interests.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra