

STATE OF MICHIGAN
COURT OF APPEALS

In re JONES, Minors.

UNPUBLISHED
November 8, 2016

No. 332616
Wayne Circuit Court
Family Division
LC No. 15-520555-NA

Before: WILDER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Respondent-father appeals as of right a circuit court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (b)(ii), (g), (j), and (k)(ii). We reverse and remand for further proceedings.

Respondent's two children, NAJ and NNJ, accused respondent of sexually abusing NAJ. Recordings of the children's forensic interviews were admitted into evidence at a combined adjudicative and dispositional hearing. Based on that evidence, the trial court found that it had jurisdiction over the children and that the statutory grounds for termination had been proved by clear and convincing legally admissible evidence. The trial court committed two fundamental errors, first by not conducting separate adjudicative and dispositional hearings, and second by basing its finding of sexual abuse on legally inadmissible evidence. Because these errors affect both respondent's substantial rights and the fairness and integrity of the proceedings, we reverse and remand for further proceedings.

This Court explained a decade ago that child protective proceedings are "divided into two distinct phases: the adjudicative phase and the dispositional phase." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). "The adjudicative phase occurs first and involves a determination whether the trial court may exercise jurisdiction over the child, i.e., whether the child comes within the statutory requirements of MCL 712A.2(b)." *Id.* If the trial court finds that it has jurisdiction, "the dispositional phase follows" to determine "what action, if any, will be taken on behalf of the child." *Id.* at 536-537. The court may terminate parental rights at the initial dispositional hearing, MCR 3.977(E), but it still must conduct separate hearings. *In re AMAC*, 269 Mich App at 538. Further, the court may terminate parental rights at the initial dispositional hearing only if it "finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial . . . 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 § 19b(3). MCR 3.977(E)(3).

MCR 3.972(C)(2) permits the introduction, at the adjudicative hearing (trial), of hearsay evidence of a child's statement regarding an act of sexual abuse performed on the child by another person if certain criteria are met. The child's statement "may be admitted into evidence through the testimony of a person who heard the child make the statement" if "the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." MCR 3.972(C)(2)(a). When a statement is made during a forensic interview, the fact that the interview is conducted in accordance with the state's forensic interview protocol is an indication of trustworthiness. *In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007). If the forensic interview has been recorded, the recording is admissible at a tender-years evidentiary hearing conducted pursuant to MCR 3.972(C)(2) to determine the trustworthiness of the statements sought to be admitted. *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 631-633; 853 NW2d 459 (2014); *Archer*, 277 Mich App at 84. In other words, the court can view the child's recorded interview at the tender-years hearing to determine whether to admit the hearsay testimony, but the recorded interview is not itself admissible at trial. By statute, a recorded forensic interview is admissible "at all proceedings *except* the adjudication stage instead of the live testimony of the witness." MCL 712A.17b(5) (emphasis added). The statute and court rule require "petitioner to produce at trial any witness claiming that a child victim made statements of abuse heard by the witness if petitioner wishes to rely on such statements in its case, subject to the existence of circumstances indicating trustworthiness." *In re Martin*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 330231); slip op at 4.

In this case, by admitting the recordings of the children's own statements rather than testimony of a person or persons who heard the children make the statements, the trial court relied on inadmissible evidence to find that it had jurisdiction over the children. Although the recordings were arguably legally admissible for purposes of the dispositional phase, *id.*, and the trial court could have made its findings regarding the statutory grounds based on evidence at the dispositional hearing, it did not conduct a separate dispositional hearing. Thus, the trial court appears to have made its determination regarding the statutory grounds on the same evidence that was introduced for purposes of trial, and that evidence was not legally admissible.

Due to these fundamental procedural and evidentiary errors, we reverse the trial court's order terminating respondent's parental rights and remand this case to the trial court. Because we are reversing the trial court's order, it is not necessary to address respondent's arguments regarding the statutory grounds for termination or the children's best interests.

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

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto