# STATE OF MICHIGAN

# COURT OF APPEALS

UNPUBLISHED
August 14, 2012

In the Matter of J. D. SEHY, Minor.

No. 306370
Kent Circuit Court
Family Division
LC No. 10-051878-NA

In the Matter of A. M. JACQUES, Minor.

No. 306371
Kent Circuit Court
Family Division
LC No. 10-051879-NA

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(concurring)*

I concur in the result reached by the majority and, with one exception, I also concur in the majority's reasoning. I respectfully disagree that, under the circumstances of this specific case and on this particular record, the domestic violence perpetrated on respondent was a proper basis for terminating respondent's parental rights. Nevertheless, I agree that termination was proper for the remaining reasons as set forth by the majority.

A parent's parental rights may not be terminated because he or she is a victim of domestic violence. *In re Plump*, 294 Mich App 270, 273; ___ NW2d ___ (2011). Of course, the effect the domestic violence has *on the child* is a proper consideration when viewed in context. Here, there was considerable evidence that *one* of respondent's children was seriously traumatized by her witnessing the domestic violence inflicted on respondent by respondent's husband, to the point where the child needed counseling and even developed a "safety plan" for herself and the other children. However, critically, that child is not at issue in this appeal. Although she was part of the proceedings below, she was placed with her father and, consequently, respondent's parental rights to that child were never terminated—despite the fact that she was the *only* child shown to have even known about or been at all affected by the domestic violence.

The evidence in the record otherwise fails to show that respondent's husband ever threatened the children, that respondent's victimization itself played any role in her ability to

provide proper care for the children, or that the domestic violence had any effect whatsoever on the children at issue in this appeal. There was some discussion below about a violated no-contact order involving respondent's husband, but it is not clear whether that order was issued against *respondent*.[1] The record contains a number of vague, generalized references to the seemingly-presumed effect the domestic violence was supposedly having on the children at issue, but nowhere was any such effect actually identified. Nowhere was it even affirmatively stated that the children at issue in this appeal *were* affected; rather, all of the discussions seem to have assumed it. Assuming all other things to be equal, the record in this matter contains many places where evidence of actual harm to the children at issue in this appeal could have been presented—but was not.

Obviously, domestic violence in the home is a serious matter that warrants consideration and investigation, but the focus must be on the *actual* effect on the children, not the hypothetical effect. There is certainly a time and a place for protecting children from possibilities, but doing so may itself cause harm if incautiously pursued, especially when the protection entails an act as drastic as terminating parental rights.

In *Nicholson v Williams*, 203 F Supp 2d 153, 193-205 (EDNY, 2002), the United States District Court for the Eastern District of New York performed an exhaustive review of the current state of experts' views on domestic violence and child welfare.[2] Among other conclusions, the court observed that "[t]he consensus of the experts was that the children can be—*but are not necessarily*—negatively affected by witnessing domestic violence." *Id*. at 197 (emphasis added). The extent to which a child may be affected, if at all, by witnessing domestic violence depends on a wide variety of factors, some environmental and some individual. *Id*. at 197-198. While there is some correlation between witnessing domestic violence and actually being maltreated, any such maltreatment typically does not come from the parent him- or herself being victimized. *Id*. at 198. Furthermore, I note that in any serious science, it is considered axiomatic that correlation may well be grounds for further investigation of a phenomenon but not direct evidence or proof per se of causation. Likewise, statistics do not necessarily predict anything about specific individuals; we, of course, are interested in doing the right thing for the specific children at issue before us rather than attempting to craft a one-size-fits-all rule that would inevitably harm anyone who does not happen to fit our assumptions.

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[1] In other words, had *respondent* been ordered not to have any contact with her husband, she would be in violation of that order by doing so, and her violation of a court order would be a significant consideration. However, if her husband had been ordered not to contact her, *his* violation of that order could not reasonably be considered against respondent. To do so would quite simply be punishing her for someone else's wrong.

[2] That case is significantly distinguishable because it involved a direct attack on New York's entire child custody and welfare system; the experts' testimony was therefore presented in the context of what was allegedly a grossly overzealous policy and practice not present in Michigan. Nonetheless, the court's thorough review of the experts *is* relevant here.

In contrast, the experts emphasized the vital importance to all children of the attachment between themselves and their parents, and the critical necessity of that bond for the child's natural development. *Id*. at 198-199. Removing a child *will* be traumatic to the child, and removing a child from a home in which domestic violence is taking place can be even more so; compounding that problem, immersing any such child "to the foster care system can be much more dangerous and debilitating than the home situation." *Id*. at 199. One of the experts put it as "'tantamount to pouring salt on an open wound,'" and another observed that the child would perceive such removal as "'a traumatic act of punishment . . . and [think] that something [the mother] has done or failed to do has caused this separation.'" *Id*.

In short, the experts' view is that merely being present in a home in which domestic violence is taking place certainly has the *potential* to be unhealthy, and is therefore cause to take a close look, but it is not *necessarily* harmful if the child or children are not, themselves, being directly maltreated. However, removing a child from a parent almost certainly will cause lasting harm, especially if that parent is him- or herself being maltreated. In the absence of any evidence that the domestic violence had an actual effect on the children at issue, termination of respondent's rights on that basis is nothing more than punishing a victim for being a victim. This is not to suggest the impossibility of a situation in which an abused parent also failed to protect a child from harm. [3] This is also not to suggest that it is impossible for a child to be harmed by merely being present in the same home as domestic violence, as the child not at issue in this appeal showed. Rather, I would hold that any such harm must be *actual* and must be shown by evidence actually placed on the record.[4] I would not terminate a parent's parental rights on the basis of speculative, presumed harm.

Had there been any evidence whatsoever in the record to show that respondent's husband *actually* had some harmful effect on the children, even indirectly, then I would find it vastly more difficult to conclude that the trial court erred in relying on the domestic violence as a basis

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[3] However, that possibility should also be viewed in context, because an abused parent may in fact be protecting his or her children by remaining with a violent partner. For example, an abused parent might reasonably conclude that, in the face of threats against him- or herself or against the children should the parent attempt to leave, it would actually be safer to remain. Traditional self-defense doctrine does not obligate anyone to attempt an escape route that is either not apparent or not seemingly safe. See, e.g., *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). A superficially ostensible failure to protect a child may really be protecting the child from something worse. Considering only the existence of domestic violence may, therefore, do more harm than good without also considering not only the actual effect it might have, but the context in which it occurred and the practical choices the parent had.

[4] I would also not preclude the possibility of, in an appropriate case, taking preemptively protective action on the basis of reasonably predictable future harm. But again, it must be shown that there *actually will* be that harm. Although the doctrine of anticipatory neglect permits the courts to infer how a parent will treat one child on the basis of how that parent has treated other children, see *In re Foster*, 285 Mich App 630, 631; 776 NW2d 415 (2009), I would not find that it dispenses with the need to provide evidence of actual or reasonably certain harm.

for terminating respondent's parental rights. However, even so, domestic violence is inherently situational and contextual and must be analyzed in that situation and context. But it would have been trivial for a worker to place on the record some testimony as to what actual effect any of the children had suffered; or for an expert to place on the record some expert opinion as to why the child will suffer some harm, and the nature thereof, in the future. No such evidence was placed on the record here. Consequently, I cannot agree that the domestic violence was a proper basis here for terminating respondent's parental rights.

/s/ Amy Ronayne Krause