

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In the Matter of RACHELLE LAVERTY, Minor.

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FAMILY INDEPENDENCE AGENCY

Petitioner-Appellee,

v

MISTI-LYN LAVERTY,

Respondent-Appellant,

and

KENNETH LAVERTY, SR.,

Respondent.

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UNPUBLISHED

June 30, 1998

No. 204975

Mackinac Probate Court

LC No. 95-000974 NA

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Respondent mother appeals as of right from a probate court order terminating her parental rights to Rachelle Lavery (the “minor child”), d/o/b March 7, 1986, based on the statutory grounds for termination of parental rights provided by MCL 712A.19b(3)(b)(i) and (c)(i); MSA 27.3178(598.19b)(3)(b)(i) and (c)(i). We affirm.

**I. Factual and Procedural Background**

In March 1995, petitioner Family Independence Agency obtained temporary custody of the minor child after she reported that she had been sexually abused by respondent father. At a jury trial in June 1995, the jury found that the probate court had jurisdiction of the minor child and that this jurisdiction was, in part, based on allegations pertaining to respondent mother. At the adjudicative trial, petitioner maintained that respondent father had sexually abused the minor child and that respondent

mother failed to protect the minor child. Eventually, respondent father's parental rights were terminated; he is, however, not a party to this appeal. On February 20, 1997, the probate court entered a provisional order terminating respondent mother's parental rights but stayed the effect of the order for three months, in short to allow for further counseling of respondent mother and the minor child aimed at avoiding termination. On June 12, 1997, the probate court entered its final order terminating respondent mother's parental rights.

## II. General Principles Regarding Termination of Parental Rights

If the probate court determines that the petitioner has established a statutory ground for terminating parental rights, then the probate court must terminate the respondent's parental rights unless the probate court finds that termination of parental rights is not in the child's best interests. *In re Hall-Smith*, 222 Mich App 470, 472-473; 564 NW2d 156 (1997). We review a decision to terminate parental rights in its entirety for clear error. *Id.* at 472. A decision is clearly erroneous if a reviewing court is left with the firm and definite conviction that a mistake has been made. *In re Vasquez*, 199 Mich App 44, 51; 501 NW2d 231 (1993).

## III. Termination of Parental Rights Under §19b(3)(b)(i)

We agree with respondent mother that the probate court erred in finding the ground for termination of § 19b(3)(b)(i) to have been met. As in effect when respondent mother's parental rights to the minor child were terminated, §19b(3)(b)(i) provided:<sup>1</sup>

The court may terminate the parental rights of a parent to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

\* \* \*

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

(i) A 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.

The probate court's finding of this ground for termination was based on its findings that respondent father sexually abused the minor child and that respondent mother was not able to protect the minor child. However, a natural reading of the plain language of § 19b(3)(b)(i) only allows for that ground of termination to be found with regard to a parent who has *caused* physical injury or inflicted physical or sexual abuse. See *Hall-Smith*, *supra* at 472 (in construing a statute, a court must presume the Legislature intended the meaning plainly expressed). Thus, the probate court clearly erred by finding this ground of termination with regard to respondent mother based on sexual abuse that was, according to the findings of the probate court, perpetrated *only* by respondent father. However, this error was harmless because this was one of two alternative grounds for terminating parental rights and, as we will

discuss below, the probate court did not clearly err by terminating respondent mother's parental rights on the other ground.

#### IV. Termination of Parental Rights Under § 19b(3)(c)(i)

Section 19b(3)(c)(i) provides the following ground for termination of parental rights:

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 age of the child.

In finding this ground for termination to have been established, the probate court essentially found that, if the minor child were returned to respondent mother's care and custody, the conditions that led to adjudication would recur – respondent father would resume sexually abusing the minor child and respondent mother would continue to fail to protect her – and that there was not a reasonable likelihood of these conditions being rectified within a reasonable time.

First, the probate court found by clear and convincing evidence that respondent father sexually abused the minor child. In making this determination, the probate court emphasized the minor child's consistency in providing accounts of sexual abuse by respondent father, including during questioning that suggested she was confusing this with sexual abuse by other relatives, and the lack of an apparent motive for the minor child to lie about this matter. The probate court also noted physical symptoms that were consistent with the occurrence of sexual abuse. While the probate court noted testimony that respondent father "passed" a polygraph test in which he basically denied having sexually abused the minor child, the probate court attached "little weight" to the polygraph results based on "their lack of scientific accuracy."

It is emphatically not our role to determine whether respondent father actually committed any sexual misconduct against the minor child. Rather, we must review the probate court's finding of clear and convincing evidence that he did, as well as the probate court's other pertinent factual findings, under the clearly erroneous standard. *Hall-Smith, supra* at 472. In this regard, we must give deference to the probate court's evaluation of the credibility of witnesses. MCR 2.613(C). The substantial consistency of the minor child's statements and her lack of motive to lie offered reasonable support to her credibility. Because we lack a firm and definite conviction that the probate court was incorrect in finding that respondent father sexually abused the minor child, this finding was not clearly erroneous. *Vasquez, supra*.

With regard to respondent mother's failure to protect the minor child, testimony from the minor child indicted that respondent father continued to sexually abuse her after she first told respondent mother about the sexual abuse and further that respondent mother discouraged her from reporting the

abuse to a Children's Protective Services worker. The probate court did not clearly err by considering respondent mother's failure to protect the minor child from sexual abuse by respondent father to have been a condition underlying the adjudication.

The probate court's determination that respondent mother continued to be unable to protect the minor child from sexual abuse was based in large part on respondent mother's refusal or inability to regard respondent father as having committed sexual abuse against the minor child. From the testimony below, we gather that termination of respondent mother's parental rights might not have been sought by petitioner if respondent mother had proclaimed that she accepted respondent father's culpability and essentially severed all contact with him. On the one hand, the insistence that respondent mother proclaim that she believed that respondent father sexually abused the minor child might strike some as almost an Orwellian attempt at thought control.

On the other hand, if, as the probate court found, respondent father indeed committed sexual abuse against the minor child and respondent mother responded ineffectually to these reports, there were sound reasons to conclude that the sexual abuse by respondent father would likely recur if the minor child were reunited with respondent mother. Testimony indicated that respondent mother had resumed an active relationship with respondent father. Even if respondent father's parental rights were formally terminated with regard to the minor child, one could reasonably conclude that the minor child might often be in his presence if she were eventually reunited with respondent mother. Moreover, even if the probate court entered orders requiring respondent mother not to allow respondent father to have any contact with the minor child, in light of the evidence of respondent's mother past response to the reports of abuse one might well reasonably conclude that respondent mother would not accept or comply with a direction to keep the minor child away from respondent father. Put simply, if respondent mother did not believe respondent father had committed any sexual misconduct against the minor child, any such restrictions would likely appear pointless to her.

We conclude that the probate court did not clearly err by finding that the conditions underlying the adjudication continued to exist and that there was no reasonable likelihood that they would be rectified within a reasonable time considering the minor child's age. In light of this finding, it follows that it was not feasible to return the minor child to respondent mother's care within a reasonable time. Thus, the probate court did not clearly err by terminating respondent mother's parental rights. *Hall-Smith, supra* at 472-473 (if a statutory ground for termination is established, a probate court must terminate parental rights absent a showing that termination is clearly not in the child's best interests).

#### V. Alleged Ineffective Assistance of Counsel

Respondent mother claims that she was denied the effective assistance of counsel at the adjudicative jury trial. In analyzing this claim, we apply "by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Accordingly, to obtain relief based on ineffective assistance, respondent mother must show a reasonable probability that, but for unprofessional errors by trial counsel, the result of the proceedings below would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Stated otherwise, ineffective assistance of counsel requires

representation that fell below an objective standard of reasonableness and that deprived the defendant (or, in this case, respondent mother) of a fair trial. *Pickens, supra* at 302-303. Moreover, because these claims of ineffective assistance were not advanced below, we may review only mistakes that are apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

While respondent mother argues that trial counsel should have sought severance of her adjudicative trial from that of respondent father, even assuming that failure to do so was a tactical mistake, respondent mother has not established that this denied her a fair trial. *Pickens, supra* at 302-303. Similarly, we conclude that there is no reasonable probability that trial counsel's alleged deficiency in failing to make various motions would have changed the outcome of the adjudicative jury trial, let alone the ultimate decision to terminate respondent mother's parental rights. *Id.* at 314.

Affirmed.

/s/ Stephen J. Markman

/s/ Richard Allen Griffin

/s/ William C. Whitbeck

<sup>1</sup> The current version of §19b(3)(b)(i) is substantially the same.