

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JOSEF ROBERTS, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JAY OLIVER ROBERTS,

Respondent-Appellant.

UNPUBLISHED

December 11, 2008

No. 281740

Crawford Circuit Court

Family Division

LC No. 07-003492-NA

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(k)(ii).¹ We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). The trial court's decision is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). In applying the clearly erroneous standard, the Court should recognize the special opportunity the trial court has to assess the credibility of

¹ This Court granted respondent's motion to remand to the trial court so that respondent could file a motion for a new trial based on his claims of newly discovered evidence and ineffective assistance of counsel. *In re Josef Roberts, Minor*, unpublished order of the Court of Appeals, issued March 24, 2008 (Docket No. 281740). Following a hearing, the trial court denied respondent's motion for new trial. The trial court did not find the testimony of the witness offering new evidence to be credible. The issue of ineffective assistance of counsel was not raised at the hearing.

the witnesses. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court shall order termination of parental rights, unless the court finds from evidence on the whole record that termination is clearly not in the child's best interests. MCL 712A.19b(5); *Trejo*, *supra* at 353.

The trial court did not clearly err when it terminated respondent's parental rights pursuant to MCL 712A.19b(3)(k)(ii). Kristiana, the minor child's 15-year-old half-sister, testified that respondent, her stepfather, sexually abused her over a period of four years. Kristiana described a piercing that respondent had on his penis, which she stated was a barbell that he removed when they had sexual intercourse. When Kristiana was asked by the trial court whether she was alleging that these activities occurred to get back at either respondent or her mother, Kristiana stated no. Respondent's wife, the mother of Kristiana and the minor child at issue, testified that respondent had not had that particular piercing for at least two years and that he now had two other piercings, one on either side of his scrotum. She explained Kristiana's knowledge of the piercing came from Kristiana walking into the bedroom without knocking, and that it was common knowledge among their friends that respondent had genital piercings. Respondent-mother did not believe Kristiana's allegations and formed this opinion within a half hour of Kristiana disclosing the abuse allegations to her.

In its bench opinion, the trial court stated very clearly the court's belief that Kristiana was telling the truth and that she was credible. The trial court gave significant weight to Kristiana's answer when the court asked her whether she was making up the allegations to get back at respondent or her mother. The trial court "noted" that Kristiana was able to describe the genital piercings and that she had described two piercings, one of which was on respondent's scrotum. This was factually incorrect because Kristiana's testimony was that respondent had only one piercing, the barbell on his penis, and her mother's testimony was that respondent had two piercings, one on either side of his scrotum. However, the trial court only noted the description of the piercings and relied on many other factors when it determined the issue of Kristiana's credibility.

The trial court further found that Kristiana's testimony was more credible than that of her mother and cited inconsistencies in the mother's testimony. The trial court found it surprising that Kristiana's mother formed an opinion that Kristiana was not being truthful only a half hour after Kristiana disclosed the sexual abuse allegations to her. The trial court pointed out that the mother believed her son, Steven, when he told her that Kristiana had been drinking alcohol, but she did not believe Steven when he expressed his belief that something was going on between respondent and Kristiana based on his observations that respondent often took Kristiana into the bathroom. The mother's explanation for how Kristiana knew of respondent's genital piercing was not credible. It would be difficult to see the piercings if Kristiana had just barged into the room while respondent was getting dressed, and discussions of respondent's genital piercings in front of Kristiana would not be appropriate.

This Court determines that the trial court's findings are not clearly erroneous. This Court recognizes the special opportunity that the trial court had to assess the credibility of Kristiana and her mother. The trial court went to great lengths to explain why it found Kristiana's testimony credible as well as why it found her testimony to be more credible than that of her mother. A review of the record does not leave this Court with a definite and firm conviction that

a mistake was made. Once the trial court found the evidence clear and convincing that respondent sexually abused Kristiana, the minor child's half-sister, and that the abuse involved sexual penetration, asserting jurisdiction of the minor child and termination of respondent's parental rights to the minor child pursuant to MCL 712A.19b(3)(k)(ii) was not error.

The trial court did not clearly err when it found that the exact timing of the last alleged sexual abuse was not "of critical import." The trial court found that Kristiana was credible, that the alleged acts of sexual abuse did in fact occur, and that they had occurred over a period of years. Moreover, the testimony of a third party was not inconsistent with when Kristiana alleged that the most recent act of sexual abuse occurred. When Kristiana was questioned about the most recent incident, she stated that it occurred on a Thursday evening in November, approximately between 9:00 and 10:00 p.m., when her mother was out of town. She indicated that the date was most likely November 16, 2006, and that respondent had taken her to K-Mart after work to buy some hair dye. Respondent's friend and hunting partner testified that he had gone hunting with respondent on that day and that they were together from approximately 3:45 p.m. to 6:30 p.m. This is not inconsistent with Kristiana's testimony because there was still time for respondent and Kristiana to go to K-Mart before 9:00 p.m., the approximate time that the abuse occurred, according to Kristiana's testimony.

The trial court also did not err in its best interests determination. Respondent's attorney requested that the trial court allow the minor child to testify on the issue of best interests. The trial court inquired whether the minor child would provide information in addition to that reported by the guardian ad litem (i.e., he wanted to live with his parents). Respondent's attorney indicated that the minor child would be able to testify that he was well cared for when he lived with respondent. The trial court denied respondent's request and stated that he had the guardian ad litem's report, that he could assume that a seven-year-old would not want his father taken out of his life, and that it would be detrimental to put the minor child up on the stand to state that he loves his father and that he does not want the relationship to end. The trial court stated that it would accept these assumptions as true. The trial court did not clearly err when it did not allow the minor child to testify at the best interests hearing. Furthermore, the trial court did not clearly err when it found that there was no evidence to indicate that termination was not in the minor child's best interests. The trial court found that respondent engaged in very "deviant sexual behavior" that is damaging not just to the person that it is performed on but to the other children in the household. The minor child would grow up in a household where there was a risk of observing and being taught this type of behavior and in an incestuous culture, which was not in the child's best interests.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Patrick M. Meter