STATE OF MICHIGAN

COURT OF APPEALS

In re DOBBINS, Minors.

UNPUBLISHED
August 21, 2014

No. 320063
Wayne Circuit Court
Family Division
LC No. 13-514290-NA

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating his parental rights to his minor children under MCL 712A.19b(3)(b)(*i*) (parent's act caused sexual abuse and the court finds likelihood that child may suffer from injury in the foreseeable future if placed in parent's home), MCL 712A.19b(3)(b)(*ii*) (parent who had ability to prevent sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer abuse in the future if placed in parent's home), MCL 712A.19b(3)(j) (reasonable likelihood, based on the conduct of the parent, that the child will be harmed if returned), and MCL 712A.19b(3)(k)(*ii*) (parent abused the child and the abuse involved criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On September 11, 2013, the original petition for permanent custody of the minor children was filed, alleging that Sabrina Yvette Hall, the minor children's mother, was not married to respondent, and that respondent is the legal father of the minor children BD, LD, KD, and RD. The petition alleged that respondent had been charged with 17 counts of criminal sexual conduct (CSC) in the first, second, and third-degrees, as well as aggravated indecent exposure, in connection with the sexual abuse of BD, KD, and LD. On or about August 21, 2013, Child Protective Services (CPS) received a complaint alleging that BD had been sexually abused by respondent. CPS conducted an interview with BD, KD, and LD in which they all revealed that respondent had requested to have sexual intercourse with them on multiple occasions and that he exposed his penis to them. A "Kids Talk" interview was conducted and the three children further disclosed that respondent touched them inappropriately and attempted sexual intercourse with penetration. Respondent was arrested on August 21, 2013, in connection with the alleged sexual abuse. CPS had no evidence that Hall had any reason to know or actually knew about the abuse. Ultimately, petitioner requested that the court allow the minor children to live with Hall

and to terminate respondent's parental rights. Also on September 11, 2013, a trial was held, and the court authorized the petition.

On November 12, 2013, the trial court held a termination hearing. SD, the adult daughter of Hall and respondent, testified that respondent touched her in a place that she did not "really remember" because she tried to block the memories out of her mind. In fact, SD explained, "I don't want to remember[,] and I'm trying to stay focused on school." Petitioner's attorney repeatedly attempted to refresh SD's memory by asking her questions based on testimony she gave at the preliminary examination held in respondent's criminal case where he was accused of sexually abusing SD. However, none of the details from the preliminary examination refreshed SD's memory. SD's preliminary examination testimony was entered into evidence.

At the preliminary examination, SD testified to several incidents of sexual abuse, perpetrated by respondent, that occurred when she was fourteen years old and lived with respondent. At the termination hearing, SD testified that she never spoke with respondent about the sexual abuse. Before police were involved, and before the preliminary examination, SD never told anyone about the abuse in detail, although she told both a friend and a mentor that "things" were going on in her home.

KD and BD both testified at the termination hearing to multiple instances of sexual abuse at the hands of respondent. KD testified that that she understood why she was asked to testify. However, she did not want respondent's rights to be terminated, and she wished to still have contact with him and to be able to talk to him. BD testified that she loved respondent, and she did not want respondent's parental rights terminated.

On January 7, 2014, the trial court, following the recommendation of referee, terminated respondent's parental rights to the four minor children. The court found, by clear and convincing evidence, that statutory grounds supported the termination of respondent's rights pursuant to MCL 712A.19b(3)(b)(*i*), (3)(b)(*ii*), (3)(j), and (3)(k)(*ii*), and that termination was in the best interests of the minor children, MCL 712A.19b(5) (O).

II. STANDARD OF REVIEW

"In order to terminate parental rights, the [trial] court must find that at least one of the statutory grounds for termination . . . has been met by clear and convincing evidence." *Matter of Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). This Court reviews a trial court's factual finding that a statutory termination ground has been established for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding is clearly erroneous where the reviewing court has a definite and firm conviction that a mistake has been made." *Matter of Jackson*, 199 Mich App at 25.

"This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion." *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007).

III. ADMISSION OF SD'S PRELIMINARY EXAMINATION TESTIMONY

Respondent first contends that the trial court erred when it admitted SD's preliminary examination testimony at his termination hearing. We disagree.

MRE 801(d)(1)(A) provides that a statement is not hearsay if the statement was a "[p]rior statement of [the] witness," the witness was subject to cross examination, and the statement was "inconsistent with the [witness's] testimony, and was given under oath." *People v Chavies*, 234 Mich App 274; 593 NW2d 655 (1999), overruled on other grounds by *People v Williams*, 475 Mich 245 (2006). At the preliminary examination, SD testified under oath, was subject to cross-examination, and testified that respondent sexually abused her. During the termination hearing, SD testified that she remembered that respondent touched her inappropriately, but claimed that she had blocked all of her previous testimony out of her memory because she was trying to focus on her education.

In *Chavies*, 234 Mich App at 274, this Court examined a very similar issue, and held that a witness's "grand jury testimony implicating defendant was inconsistent with their [sic] trial testimony, where they [sic] remembered nothing" and was therefore "properly admitted into evidence under MRE 801(d)(1)(A)." *Id.* at 282. Accordingly, SD's testimony from respondent's preliminary examination was admissible in this case because it constitutes an inconsistent statement when compared to her inability to remember anything she had previously testified to at the preliminary examination.

IV. STATUTORY GROUNDS FOR TERMINATION

Next, this Court must evaluate whether the trial court was correct in its decision to terminate respondent's parental rights to his minor children. Pursuant to MCL 712A.19b(3), a court "may terminate [a] parent's parental rights to a child if the court finds, by clear and convincing evidence," that one or more of the criteria listed in MCL 712A.19b(3)(a)-(n) has been satisfied. See *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). In this case, the trial court found, pursuant to MCL 712A.19b(3)(b)(*i*), 19b(3)(b)(*ii*), 19b(3)(j), and 19b(3)(k)(*ii*), that respondent's parental rights should be terminated.

The trial court's conclusion that respondent's parental rights should be terminated pursuant to MCL 712A.19b(3)(b)(*i*) is supported by clear and convincing evidence. MCL 712A.19b(3)(b)(*i*) provides that a court "may terminate a parent's rights to a child if the court finds, by clear and convincing evidence" that the child was sexually abused and that "there is a reasonable likelihood that the child will suffer from abuse in the foreseeable future if placed in the parent's home." The trial court found that evidence was presented that respondent sexually abused his minor daughters BD and KD, as well as his adult daughter, SD, when she was a child. SD, for example, testified at the preliminary examination that respondent penetrated her with the tip of his penis, and because his penis would not fully go into her vagina, he rubbed his penis against her vagina. SD also testified that respondent performed oral sex on her.

Respondent's minor daughter, KD, also testified that respondent touched her buttocks and her vagina on more than one occasion. Furthermore, KD recalled that respondent had revealed his penis to her on at least two occasions, and that he had rubbed her breast. He told her that she was not to tell anyone because respondent would have to go to jail. Respondent's other minor daughter, BD, also testified that respondent touched her buttocks, breasts, and vagina. Respondent also touched BD's breasts and attempted to touch her vagina. Respondent "frequently" touched BD's buttocks (at least 10 times). At least four times, respondent showed BD his penis. Given the fact that respondent sexually abused SD, BD, and KD, there is a strong

likelihood that if the minor children were placed back in respondent's care, he would sexually abuse them again. Thus, the trial court properly found that MCL 712A.19b(3)(b)(*i*) had been satisfied.

Next, the trial court found that that MCL 712A.19b(3)(b)(*ii*) had been satisfied. MCL 712A.19b(3)(b)(*ii*) provides that a parent's rights can be terminated if "[t]he parent who had the opportunity to prevent the . . . sexual abuse failed to do so . . . and there is a reasonable likelihood that the child will suffer . . . abuse in the foreseeable future if placed in the parent's home." Respondent had the ability to stop all of the abuse discussed in the analysis of MCL 712A.19b(3)(b)(*i*) and he did not. Instead of protecting his minor children, he chose to wait until their mother, who lived in the home with respondent and the minor children, was gone or when they were sleeping to sexually abuse them on multiple occasions. Thus, this statutory basis is satisfied as well.

Clear and convincing evidence also supported the trial court's conclusion that MCL 712A.19b(3)(j), which requires proof that "[t]here 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," was satisfied. SD, KD, and BD all testified that respondent had committed sexual acts against them over a period of years, as was also outlined in the analysis of MCL 712A.19b(3)(b)(*i*). Given respondent's exhibited propensity to sexually abuse the minor children, there is a reasonable likelihood that if they are returned to respondent's home they will continue to be sexually abused. Thus, this statutory basis is satisfied.

Lastly, clear and convincing evidence supported the court's decision that the requirements of MCL 712A.19b(3)(k)(*ii*) were satisfied. MCL 712A.19b(3)(k)(*ii*) requires proof that the parent abused a child and that the abuse involved criminal sexual conduct involving penetration, attempted penetration, or assault with the intent to penetrate. For the reasons discussed above, MCL 712A.19b(3)(k)(*ii*) has also been satisfied. Specifically, respondent penetrated SD's vagina with the tip of his penis and with his mouth. Thus, this statutory provision was also satisfied.

V. BEST INTEREST DETERMINATION

Lastly, this Court must determine whether termination is in the children's best interest. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). Whether termination is in the best interests of the children is based on the preponderance of the evidence. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). In deciding whether termination is in the child's best interests, the court may consider the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality . . . ." *In the Matter of Olive/Metts, Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (internal citations and quotations omitted).

The preponderance of the evidence shows that respondent is a child sexual abuser (see analysis regarding MCL 712A.19b(3)(b)(*i*)). While the minor children may have a bond with respondent, it is not in their best interest to be placed under his care; his sexually abuse shows

that, to put it mildly, he lacks all abilities to parent and could never provide his children a safe and stable home. The children would be at a severe risk of physical and emotional harm if they were returned to his care. Thus, it is in the best interest of the minor children that they no longer be in respondent's custody.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra