

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* K. HAMMEL, Minor.

UNPUBLISHED  
March 16, 2017

No. 334785  
Kalamazoo Circuit Court  
Family Division  
LC No. 2014-000122-NA

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Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to his minor son under MCL 712A.19b(3)(b)(i), (3)(c)(i), (3)(c)(ii), (3)(g), (3)(j), and (3)(k). On appeal, respondent argues that the trial court was biased against him and clearly erred when it found that petitioner proved at least one statutory ground for terminating his parental rights and that termination was in the child's best interests. We affirm.

I. BASIC FACTS

The minor child came to the attention of petitioner after the discovery of child pornographic images on respondent's cellphone. Testimony and evidence established that the images were of a 12-year-old girl whom respondent watched at night while the child's mother worked. At around the same time, several young girls, including the minor child's half-sister, MJ, came forward with allegations that respondent engaged in inappropriate sexual contact with them.

After the trial court took jurisdiction, it ordered respondent to undergo a sex offender evaluation and participate in a program for sex offenders. The evaluation concluded that respondent should undergo treatment and recommended specific goals to be accomplished. It also recommended that respondent not associate with persons under the age of 18. Respondent completed several months of therapy but did not reveal critical facts to his therapist nor accomplish many of the goals set forth in the evaluation. He underwent reevaluation about a year after the initial evaluation. The reevaluation indicated that respondent showed less characteristics of pedophilia on testing, and that "there is no evidence" on the testing "that he will become physically abusive in a parenting situation at this time." However, the reevaluation concluded that visitation continue to be supervised and that respondent enter into evidence-based sex offender treatment with the same goals as before, thus indicating that additional progress was needed. Petitioner eventually moved to terminate respondent's parental rights to his son. The trial court held a termination hearing over three days and ultimately found that petitioner had

proved by clear and convincing evidence the grounds for termination stated above and that termination of respondent's parental rights was in the minor child's best interests.

## II. JUDICIAL BIAS

Respondent first argues that the trial court's conduct at the termination hearing demonstrated that it held an actual bias against him and that the court's bias deprived him of a fair hearing.<sup>1</sup> A trial judge may be disqualified from presiding over a case where—in relevant part—the judge “is biased or prejudiced for or against a party” or, “based on objective and reasonable perceptions, has either . . . a serious risk of actual bias . . . or has failed to adhere to the appearance of impropriety standard” set forth in the Judicial Canons. MCR 2.003(C)(1)(a) and (b). The bias must normally “have its origin in events or sources of information gleaned outside the judicial proceeding.” *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996). A trial court's conduct may deserve to be characterized as biased or prejudiced if the conduct displays a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id.* at 496. The trial judge is, however, presumed to be impartial, and respondent has a heavy burden in overcoming this presumption. See *id.* at 497.

Respondent relies on the trial court's questioning of witnesses to establish that it held a bias against him. Respondent initially points to the trial court's questioning of a caseworker, Shannon Wagoner, at the termination hearing and argues that the trial court assumed the role of the prosecuting attorney and cross-examined her. While the trial court did interrupt the questioning of Wagoner to ask clarifying questions, it did not cross-examine her. It is clear from the context of the transcript that the assistant prosecuting attorney asked the questions that respondent takes issue with. The trial court similarly did not, contrary to respondent's contention on appeal, question Wagoner about respondent's parenting time. Respondent's own lawyer elicited that testimony. Respondent cannot rely on the questions by the parties' lawyers to establish that the trial court held a bias against him.

Respondent also finds fault with the trial court's questioning of Merridessa Katz, the psychologist who performed the reevaluation of respondent in September 2015. He maintains that the trial court aggressively cross-examined Katz about her conclusion that, given respondent's history of offending against female children, he was not likely to offend against a male child. The trial court did not begin its questioning until after the prosecuting attorney cross-examined her, and, although the trial court questioned Katz extensively, the questions do not demonstrate that the court held a bias against respondent.

Before the trial court asked Katz any questions, the assistant prosecuting attorney had elicited testimony that Katz premised her opinion on respondent's self-reporting and had gotten

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<sup>1</sup> Respondent did not raise his claim of bias before the trial court, so it is unpreserved. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Unpreserved claims of constitutional error are reviewed for plain error affecting the respondent's substantial rights. *Id.* The respondent must show that there was an obvious error that affected the outcome of the proceedings. *Id.* at 8-9.

Katz to acknowledge that respondent might have neglected to state or misrepresented facts relevant to his situation. The trial court then questioned Katz about the assumptions behind her determination that respondent was not likely to sexually abuse a male child. In posing its questions, it appears that the trial court may have assumed some facts that were not established by the record or through testimony.<sup>2</sup> However, to the extent that the trial court's questions suggesting that respondent had not been honest and open with Katz during her evaluation might be viewed as critical or hostile remarks, such remarks ordinarily do not establish bias. *In re MKK*, 286 Mich App 546, 567; 781 NW2d 132 (2009).<sup>3</sup> Additionally, the trial court's questions show that it was merely developing the record to help with that determination.<sup>4</sup> The questions do not suggest that the trial court was determined to alter Katz's testimony or that it held a deep seated bias. Respondent has failed to show judicial bias or prejudice. See *Cain*, 451 Mich at 498.

### III. STATUTORY GROUNDS

“Termination of parental rights is appropriate when the D[H]HS proves one or more grounds for termination by clear and convincing evidence.” *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012). Respondent's challenge to the trial court's finding of statutory grounds to terminate his parental rights is two-fold. Respondent first alleges that several of the trial court's factual findings were clearly erroneous.<sup>5</sup> He then challenges the trial court's ultimate conclusion on the statutory factors.

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<sup>2</sup> The court arguably implied that respondent must have lied to Katz when he told her that the other allegations against him had been “disproven” and either lied or misrepresented facts by failing to disclose that 11,000 images had been discovered on his phone at the beginning of this case. However, at the adjudication trial, an officer testified that he reviewed the images and determined that of the 11,000 approximately 3,000 could be characterized as pornographic images of adults and 9 were pornographic images of children.

<sup>3</sup> Additionally, there was evidence in the record that respondent had been dishonest. The report Katz prepared along with her supervisor, Dr. Haugen, stated that respondent exhibited the personality traits of a narcissist who takes “liberties with facts to support a view of [himself] or a situation.” Moreover, even though respondent emphatically and repeatedly denied that he ever touched any of the child victims inappropriately, the court that presided over respondent's adjudication found one of the child victims to be highly credible.

<sup>4</sup> In a child protective proceeding, the trial court has broad authority to develop the record; the trial court may examine the parties' witnesses, call a witness, adjourn the matter, cause service of process on additional witnesses, and order the production of other evidence. See MCR 3.923(A); see also *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992) (noting that the trial judge in a bench trial has more discretion to examine witnesses).

<sup>5</sup> A trial court's factual findings are clearly erroneous when, after reviewing the entire evidence, this Court is left with the definite and firm conviction that the trial court was mistaken. *In re Gonzales/Martinez*, 310 Mich App 426, 430-431; 871 NW2d 868 (2015).

## A. THE TRIAL COURT'S FACTUAL FINDINGS

Respondent first argues that the trial court erred in finding that he would not comply with petitioner's or the court's directives. Respondent argues that the trial court based this finding on his failure to attend an additional counseling program after his reevaluation. Although respondent claims that his failure to attend this additional program was financial, there was testimony that petitioner would have paid for the program. Respondent also testified at the termination hearing that he chose not to go, in part, because a therapist-friend recommended that he not participate. This testimony and evidence supported the trial court's finding.

Respondent next maintains that the trial court clearly erred by holding respondent's refusal to characterize himself as a pedophile against him. In the reports prepared after respondent's two evaluations, respondent was diagnosed as having "Pedophilic Disorder, Sexually Attracted to Females, Nonexclusive Type; Mixed Personality Disorder Features with Predominant Narcissistic Pattern; Sexual Abuse of Child." When considered with the allegations of inappropriate sexual contact and child pornography, there was adequate record evidence to support the trial court's finding that he was in "denial that [he had] inappropriate conduct or inappropriate thoughts or inappropriate behavior."

Respondent also contends that the trial court clearly erred in concluding that he "screwed up" a child's life forever. However, contrary to respondent's assertion, the trial court did not state that he had "screwed up" a particular child's life; rather, when examined in context, the trial court was discussing the ramifications of respondent's inability to recognize that his sexual improprieties are harmful.<sup>6</sup> In context, the trial court's comments simply recognized that groping a child for a sexual purpose—as opposed to something more extreme—can be harmful to a child and that respondent's failure to recognize the potential for harm was a serious concern. Contrary to respondent's contention, the trial court did not find that he had "screwed up" the life of a particular child.

Respondent also takes issue with the questions posed by the trial court to him at the termination hearing maintaining that the trial court was badgering him. Respondent states that the trial court's decision to characterize his explanation for the accusations against him as "ludicrous" indicated that "the Trial Court [had] no understanding or knowledge of the trailer

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<sup>6</sup> The specific statements of the trial court were:

He needs to know what his triggers are; he needs to understand that his thought process about sex may not be appropriate. He may think that it's probably okay, no harm no foul if he gropes and grabs a little. It's what that does to a child's psyche and how that changes the boundaries of what is right and wrong for that child. That's a big deal . . . . Huge. I don't care if you have a half-brother or another family member that might upset the applecart. You screwed up that kid's life forever.

park culture.” Specifically, respondent refers to the trial court’s rejection of his explanation that the child victims were only accusing him of inappropriate sexual contact because their mother told them to do so. The statements by the child victims were in the record and supported the trial court’s finding that respondent did the things that they accused him of doing. It was for the trial court to assess the credibility of the witnesses—including respondent—and it was free to reject his testimony as incredible and find that the child victims were credible. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We are not left with a definite and firm conviction that the trial court erred in making its factual findings.

## B. THE TRIAL COURT’S DETERMINATION ON THE STATUTORY FACTORS

Petitioner had the burden to prove by clear and convincing evidence at least one statutory ground for terminating respondent’s parental rights. *In re Gonzales/Martinez*, 310 Mich App 426, 431; 871 NW2d 868 (2015). In this case, the trial court found that the DHHS proved by clear and convincing evidence grounds to terminate his parental rights under MCL 712A.19b(3)(b)(i), (3)(c)(i), (3)(c)(ii), (3)(g), (3)(j), and (3)(k).

Termination is proper under MCL 712A.19b(3)(b)(i) when the “child or a sibling of the child has suffered . . . sexual abuse” and the “parent’s act caused . . . 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 trial court found that respondent had sexually abused the minor child’s half-sister, MJ, and that respondent did not recognize the triggers that led him to act out inappropriately, nor did he have a viable plan in place to prevent a relapse. It additionally found that he took advantage of children out of anger and to hurt others. While the trial court did not foreclose the possibility that respondent might sexually abuse the minor child, it recognized that the more likely harm involved the influence that respondent’s poor choices would have on the child.

These findings were adequately supported in the record. At the adjudication trial, a forensic interviewer testified that MJ, as well as another young girl, reported to her that respondent had touched them inappropriately. Katz testified that, despite having months of therapy, respondent was unable to state what his triggers were and was unable to articulate his plan to prevent a relapse. In her view, she would have expected to see more progress at this point in his therapy. Katz’s supervisor, Dr. Haugen, also testified at the adjudication that a pedophile’s choice of victims will often depend on his access to children and that a pedophile might switch genders if he does not have access to a child of his preferred gender. Thus, there was evidence to support the trial court’s finding that there was a reasonable likelihood that [the minor child] would be harmed in the foreseeable future if placed in respondent’s home. MCL 712A.19b(3)(b)(i).

This same evidence supported the trial court’s finding that petitioner established grounds for termination under MCL 712A.19b(3)(c)(i), (3)(g), (3)(j), and (3)(k).

MCL 712A.19b(3)(c)(i) allows a trial court to terminate a respondent’s parental rights if the conditions that caused the adjudication continue to exist and there is no reasonable probability that they will be corrected in a reasonable time. The conditions that led to the adjudication were respondent’s possession of child pornography and inappropriate touching of a

young child. Respondent's inability to benefit from and failure to be forth coming during therapy, along with his inability to understand the severity of his prior actions, all support the trial court's conclusion that the conditions that led to adjudication would not be rectified within a reasonable time.

Termination under MCL 712A.19b(3)(g) is appropriate when the parent fails to provide proper care and custody and there is no reasonable expectation that the parent will be able to provide proper care and custody in a reasonable time, and termination under MCL 712A.19b(3)(j) is appropriate when there is a reasonable likelihood that the child will be harmed if returned to the parent. Evidence of respondent's propensity to engage in sexual misconduct with minors and his inability to recognize the severity of that conduct or seek sufficient treatment establishes both that he will be unable to provide proper care and custody in a reasonable time and that there is a reasonable likelihood that the child would be harmed if returned to him.

Finally, the trial court could terminate respondent's parental rights under MCL 712A.19b(3)(k)(ix) if it found that he abused "a sibling of the child and the abuse included" "[s]exual abuse as that term is defined" under MCL 722.622. Sexual abuse is defined under MCL 722.622 to mean "engaging in sexual contact or sexual penetration as those terms are defined [under MCL 750.520a] with a child." MCL 722.622(w).<sup>7</sup> The trial court found that respondent sexually abused the minor child's half-sister, and there was evidence supporting that finding. See MCL 750.520a(q) (defining sexual contact). Consequently, the trial court did not clearly err when it found that petitioner had proven these grounds for termination by clear and convincing evidence. *In re Gonzales/Martinez*, 310 Mich App at 430-431.

The trial court also found that the DHHS had established grounds for termination under MCL 712A.19b(3)(c)(ii), which authorizes termination if "[o]ther conditions exist that cause the child to come within the court's jurisdiction" and if there is no indication that those conditions will be rectified within a reasonable time despite the parent having a reasonable opportunity to do so. It is unclear from the record what "[o]ther conditions" existed that caused the minor child to come within the court's jurisdiction. However, even if the trial court erred when it found that petitioner proved this ground for termination that error would not warrant relief. Petitioner only had to prove one ground for termination and, as already discussed, the trial court did not clearly err when it found that the other grounds had been proven. *In re Gonzales/Martinez*, 310 Mich App at 431.

The trial court did not err when it found that statutory grounds existed to terminate respondent's parental rights.

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<sup>7</sup> The Legislature amended MCL 722.622 effective April 2017. See 2016 PA 491. However, it did not change the definition of sexual abuse. See amended MCL 722.622(z).

#### IV. BEST INTERESTS

Even after finding that petitioner had proven a ground for termination, a trial court may not terminate respondent's parental rights unless it also finds by a preponderance of the evidence that termination is in the minor child's best interests. MCL 712A.19b(5).

"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, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (quotation marks and citations omitted). The trial court failed to explicitly review these best interest factors one-by-one, an omission that significantly complicates our review and invites reversal. However, after a careful review of the court's oral ruling, we conclude that the trial court did consider each factor albeit in a somewhat disjointed fashion. It found that respondent and the child had a very close bond, but that the existence of such a close bond where there was risk of abuse was not solely a positive factor. It also found that despite his earlier compliance with orders respondent had refused to enter into an evidence-based treatment program and that given the unusual facts of this case, the child's placement with a relative had effects that supported termination.<sup>8</sup> The court made clear that it viewed the child as being at significant risk should respondent be permitted to serve as caretaker and that, after the lengthy period of jurisdiction, the child needed stability and finality. See *Id.* at 43 (stating that a trial court must explicitly consider as a factor that the child has been placed with a relative when determining the child's best interests); but see *In re Schadler*, 315 Mich App 406, \_\_\_; \_\_\_ NW2d \_\_\_ (2016), slip op at 3, (noting that a trial court does not need to consider a child's placement with his or her biological mother because the statute does not define relative to include biological mother).

Given the trial court's findings that respondent sexually abused multiple children, did not fully recognize his problem, and did not adequately progress with therapy, it could reasonably find that it was in the minor child's best interests to terminate respondent's parental rights.

Affirmed.

/s/ Cynthia Diane Stephens  
/s/ Douglas B. Shapiro  
/s/ Michael F. Gadola

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<sup>8</sup> The child was placed with his mother who would frequently leave the child at her parent's house to spend the night with respondent.