STATE OF MICHIGAN

COURT OF APPEALS

In re LETO, Minors.

UNPUBLISHED
December 19, 2019

No. 348302
Oakland Circuit Court
Family Division
LC No. 18-865579-NA

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Respondent father appeals as of right from an order terminating his parental rights to his two minor children, AL and BL, under MCL 712A.19b(3)(b)(*i*) (physical or sexual abuse with a foreseeable risk of future harm if returned to the parent's home), (g) (the parent failed to provide proper care for the child, despite having the financial means to do so, and there is no reasonable expectation the parent will provide proper care in a reasonable time given the child's age), (j) (reasonable likelihood the child will experience harm if returned to the parent's home), and (k)(*ii*) (the parent abused the child through criminal sexual conduct involving penetration or attempted penetration or assault with the intent to penetrate). Respondent challenges the sufficiency of the evidence for the trial court's findings that statutory grounds existed to terminate his parental rights and the finding that termination was in the children's best interests. We affirm.

I. BACKGROUND

Respondent and KK, the children's biological mother, are divorced and had joint legal and physical custody of their two children, AL and BL. KK also had an older child from a previous relationship, MK, who was eight years old at the time of the events in this matter and referred to respondent as "dad." KK and MK are not parties to this proceeding. All three children stayed at respondent's home at least every other weekend. The gravamen of respondent's argument in this matter is that the allegations against him were the product of a child's imagination, compounded by multiple violations of forensic interviewing protocols and "a morass of investigative blunders."

The instant matter arose in June 26, 2018, when AL, who was then four years old, told KK that respondent had touched her "private parts." KK testified that AL told her "out of the blue," and that respondent used his fingers and a pizza cutter. KK further testified:

> I said, "[AL] are you sure? Pizza cutters are very sharp that would really hurt you." And she said he uses the black handle part . . . And, then I asked her if it hurt at all when he touched her there and she said sometimes. And, I also asked her if she ever asked him to stop and she said I asked him – no I'm sorry. She said, "I told him to stop but he just keeps doing it."

KK then testified that AL told her she was not supposed to tell anyone, otherwise "Dada" would kill her with a knife. KK testified that AL explained respondent brought a knife into her room, and that respondent repeated these interactions with her during her weekend visits with him. AL then said respondent would enter her room when MK was sleeping and would take her to his room. When KK asked AL to describe respondent's actions to her, AL "opened her pants and her underwear and she just put her hands on the top of her vagina and she just kind of [made] a little rubbing motion." KK explained AL did not demonstrate penetration, however. KK also explained AL seemed calm during her initial recollection, but KK noticed AL's head begin to drop and she seemed worried as the conversation continued.

KK took AL to Children's Hospital the following day, where AL repeated the allegations to the medical practitioners who examined her for evidence of sexual abuse. AL was treated by Dr. Stacey Abraham, who performed an examination and took a history. AL was interviewed by social worker Maria Taormina for approximately 45 minutes. Taormina was not forensically trained, but she had extensive training in child abuse and welfare.

According to Taormina, AL appeared very shy and embarrassed. When Taormina asked her why she was sad, she stated that "she was afraid of her daddy . . . because daddy's been touching me with his fingers and the plastic end of a pizza cutter." AL pointed to her vagina, stated that the touching occurred under her clothing, and it happened "every time that she goes to daddy's house at night, it happens when everyone's asleep." Taormina testified that AK answered the questions on her own, and Taormina had asked the questions in different ways as a technique to detect possible coaching. At one point, AL corrected KK, saying

> that, no daddy did stick his fingers inside me because at first mom didn't – she didn't tell mom that dad penetrated her and then when I asked she corrected mom and said no he did stick his finger and the pizza cutter handle inside of me.

Taormina testified that KK became visibly more upset at that point, and KK cried during the interview. MT believed AL's statements because she "answered [questions] on her own," she was not prompted by KK, and she showed no signs of coaching, such as repeating the same story and becoming upset or confused when being asked the same questions in a different way. After the interview, Taormina contacted Child Protective Services and the police. Attending physician Dr. Jennifer Noble made a diagnosis of sexual assault on the basis of information from Abraham and Taormina. KK was given a referral for AL for a forensic physical examination and a forensic interview.

On June 29, 2018, Nichole King performed a forensic interview of AL at Macomb County Care House, with Ashlee Wellman, the DHHS caseworker, present.[1] King testified that AL presented her with a free narrative regarding her recollections of her experiences with respondent. AL was forthcoming and talkative and her use of the term "private parts" was age-appropriate. King explained these traits showed evidence a child was not coached in preparation for the interview. AL told King that during one occasion, respondent touched AL in her room, MK was awake, and laughed and took a picture of the abuse.[2] AL alternated her explanation of the abuse between touching and rubbing, and AL occasionally moved her fingers in and out, up and down, and in a "poking motion" to describe the ways respondent touched her. Initially, AL explained that respondent's touches were accidental and his touches did not hurt. However, as the conversation continued, AL said his touches hurt a lot. AL also stated she was clothed, but respondent touched her on the skin of her private parts, and that the occurrences happened multiple times.

Lastly, King testified that AL talked about the three guns respondent had in his home, and that respondent pointed the guns at her, BL, and her cousin. AL told respondent she was scared and told him to stop, and respondent did. AL explained this occurrence happened once. King testified that AL's interview was partially consistent with the allegations against respondent, which could open possibilities for alternative hypotheses regarding AL's experiences.

On July 24, 2018, King also conducted an interview of MK. King asked MK if respondent had anything in his home that could hurt anyone, and MK explained that respondent had knives to chop food and four guns, three large ones and one small one. MK also explained that respondent did not often take the guns from their cases, but did show the guns to the children, which scared AL, BL, and their cousin. Though MK did not believe the guns had bullets in them, respondent did pretend to shoot the ceiling and, on one occasion, shot a box. Furthermore, respondent pretended to load one of the guns, which scared BL. King testified that MK did not claim respondent directed a gun at any of the children. Additionally, MK denied being a victim of any inappropriate touching, nor did he disclose information about photos that involved inappropriate touching. However, he did tell King that he thought that at night, respondent came into the bedroom that he and AL shared.

At some point, Jessica Ojula, a co-director of Wayne County SAFE,[3] performed a physical forensic examination of AL. Ojula was unavailable to testify, but Kristin Neuman-Sweeney, the SAFE Program Coordinator, explained that the forensic physical examination was not an interview, children were not questioned, and the child's medical history would be provided by the parent. However, "if a child makes a disclosure during the examination then we

[1] The Care House of Macomb County coordinates "investigation, prosecution, and treatment services to victims of child sexual and physical abuse." See <http://www.mccarehouse.org/our-history.html>.

[2] Investigators searched respondent's home, but they did not discover a picture of this incident.

[3] Sexual Assault Forensic Examiners.

would record that, we would add that into our report." Ojula's examination revealed "no acute injury." However, Neuman-Sweeney explained that examinations of prepubescent children were external examinations only, and more invasive examinations would "most likely" require anesthesia. Thus, in pediatric patients like AL, she rarely saw anal/genital injuries, and that if a finger had penetrated those areas, an injury would not necessarily exist or be visible. She also explained that a young child might confuse certain kinds of touching with penetration. According to Ojula's report, AL made no disclosures during the examination.

Wellman testified that after receiving the sexual assault allegations against respondent, she conducted a well-being check on the children. However, she did not conduct any interviews with them because of the active police investigation regarding the allegation. She learned that investigators removed a black-handled pizza cutter from respondent's home.

At a later adjudication hearing, KK reiterated her previous testimony and added she believed her children were forthright and understood the importance of telling the truth. She also testified that she noticed AL "was never really very excited or overly happy after her visits" with respondent. Furthermore, KK explained AL would be very excited to see respondent, but at other times, KK would experience "a little bit of a struggle to get [AL] in the car." Additionally, KK testified that approximately one month before the forensic interview, AL complained to KK that her "bottom" hurt. However, AL did not make any further comments regarding pain in that area. King explained that a child of AL's age may leave information out during interviews because the interviewer's question did not address that particular topic or the child forgot.

Respondent's father, CL, respondent's sister, ML, and respondent's partner, AB, testified that respondent's home was suitable for children, and that the children expressed affection for respondent and did not exhibit fear towards him. Furthermore, the three witnesses had not observed respondent behave inappropriately with any child. ML testified that she asked her six-year-old daughter whether respondent made her feel uncomfortable. ML's daughter responded, in effect, that she was comfortable in respondent's home. AB testified that she did not have any qualms about her four-year-old daughter staying at respondent's home. During CL's testimony, he explained that when AL had nightmares, respondent would go into her room, calm her down, and then return to his room, while AL stayed in hers.

CL, ML, and AB testified respondent did have guns in his home, but they did not see him take the guns out of their cases, handle, or load them, in the children's presence. CL further explained the only time he saw respondent use a gun in front of the children was when respondent borrowed an air-soft gun that used rubber pellets, during which time he shot a box in the back yard "to see how it worked." The children watched respondent shoot the gun from the porch, but they were not in respondent's line of fire, nor did respondent point the gun at them.

The Department of Health and Human Services (DHHS) filed a petition to terminate respondent's parental rights on August 6, 2018, pursuant to MCL 712A.19b(3)(B)(*i*), (g), and (k). The court authorized the petition after respondent waived probable cause. AL and BL remained in KK's care and the court suspended respondent's parenting time. On October 5, 2018, the court held an evidentiary hearing to determine the admissibility of AL and MK's out-of-court statements regarding respondent's alleged sexual abuse and respondent's gun use in the presence of his children. The trial court found no indication that AL or MK manufactured their

claims and that AL and MK did not possess any motive or malicious intent to fabricate their statements. The court concluded the circumstances surrounding AL and MK's statements provided adequate indicia of trustworthiness, so it ruled their statements admissible.

On October 30, 2018, the jury rendered a verdict in favor of petitioner, that the statutory grounds to terminate respondent's parental rights, pursuant to MCL 712.19b(3)(B)(*i*), (g), (j), and (k)(*ii*) had been proven by a preponderance of evidence. During the subsequent statutory grounds hearing, the trial court concluded the petitioner had proven, by clear and convincing evidence, statutory grounds existed to terminate respondent's parental rights, pursuant to MCL 712A.19b(3)(b)(*i*), (g), (j) and (k)(*ii*), and it ordered DHHS not to provide respondent with any family reunification services.

On January 24, 2019, the trial court held a best interests hearing. Torre Brown, a licensed clinical psychologist, performed a psychological examination of respondent. Brown testified that respondent acknowledged the presence of firearms in his home, but he denied ever pointing the guns at the children, and he said the children had no basis for their fear. Brown opined that respondent lacked insight, empathy, and decision-making skills, which impeded his parenting ability. Brown further opined that "there's a big disconnect between how [respondent] perceives his parenting versus what [AL] perceives as something detrimental to her." Brown believed "something happened" at respondent's home, and respondent's denial of wrongdoing demonstrated his lack of insight. Furthermore, respondent refused to acknowledge that AL had even been hurt and refused to take any responsibility, in lieu of blaming others. A normal parent would have exhibited empathy when discovering their child was harmed. Therefore, Brown concluded that respondent's children "should not be returned [to him] in the foreseeable future," and future exposure to respondent could cause the children more harm, regardless of respondent and the children's bond.

Both Wellman and KK testified they believed it was in the children's best interests to terminate respondent's parental rights. Wellman testified that after respondent's exposure to AL and BL ceased, both children "started coming out of their shells." She opined that the children should not return to respondent's care because of the harm AL experienced, and the likelihood BL would also experience harm in the future because of respondent's past actions. KK testified AL was diagnosed with post-traumatic stress disorder, once she started therapy, because of her experience. KK explained that AL and BL were adjusting well to not spending time with respondent and they no longer exhibited aggression the way they had after their weekend visits with him. Furthermore, KK testified that AL and BL asked about respondent less frequently. KK also said she was concerned for AL and BL's safety if they returned to respondent's care.

The trial court determined terminating respondent's parental rights to AL and BL was in their best interests because respondent took no responsibility for the harm that AL experienced and he showed no empathy towards his traumatized children. Respondent timely appealed.

II. STANDARD OF REVIEW

The trial court must order termination of parental rights if it finds there are one or more statutory grounds for termination, and if termination is in the best interests of the children. *In re Olive/Metts Minors*, 297 Mich App 35, 40, 42; 823 NW2d 144 (2012). "[W]hether termination

of parental rights is in the best interests of the child[ren] must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court must evaluate each child's best interests individually. *In re Olive/Metts Minors*, 297 Mich App at 42. However, if the best interests of the individual children do not significantly differ, then the trial court may assess the same factual findings for each child. *In re White*, 303 Mich App 701, 715; 846 NW2d 61 (2014). The child is the focus of the best interest determination, not the parent. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). We review orders terminating parental rights and best interest determinations for clear error. MCR 3.977(K), MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). To be clearly erroneous, a decision must be more than "maybe or probably wrong." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Clear error exists "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

III. STATUTORY GROUNDS DETERMINATION

The trial court need only find that one statutory ground has been proven to support termination of parental rights. *In re Trejo,* 462 Mich 341, 360; 612 NW2d 407 (2000), superseded by statute on other grounds as stated in *In re Moss*, 301 Mich App at 83. The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(b)(*i*), (g), (j), (k)(*ii*) which state:

> (3) The court may terminate a parent's parental rights 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 1 or more of the following circumstances:
>
> (*i*) The 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.
>
> * * *
>
> (g) The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There 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.

(k) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

* * *

(*ii*) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

The trial court found sufficient proof to terminate respondent's parental rights under MCL 712A.19b(3)(b)(*i*) because the jury determined respondent had sexually abused his daughter. Furthermore, because of respondent's denial of his role in the harm AL experienced, the jury found there was a reasonable likelihood the harm to AL would occur again. The gravamen of respondent's claim of error is that the trial court improperly concluded that the statements were trustworthy and of sufficient weight to merit terminating his parental rights.

Respondent argues the statements sprang from AL's overactive imagination and were inherently untrustworthy, and were embellished, because of inconsistencies. The medical practitioners and social workers who interviewed AL testified they believed AL's statements were genuine and trustworthy: AL was forthcoming and talkative; she used age-appropriate terminology to refer to her body parts; she answered questions presented in different ways without becoming flustered or confused; she used consistent hand gestures to illustrate respondent's actions to her; her answers were consistent between interviews; she had no reason to lie, nor was there evidence KK had motivation to manipulate AL to speak out against respondent; and AL understood the importance of speaking truthfully. Additionally, AL and MK's answers corroborated the others' experience regarding respondent's use of firearms in his home.

Pursuant to MCR3.972(C)(2), a child's out-of-court statements concerning acts of abuse must have adequate indicia of trustworthiness to be admissible at trial. The trial court held a separate hearing to consider the admissibility of the children's statements to their mother and the forensic interviewer pursuant to MCR 3.972, which states in pertinent part:

> Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (g), (k), (z), or (aa), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

"The reliability of a statement depends on the totality of the circumstances surrounding the making of the statement." *In Re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007). "Circumstances indicating the reliability of [these statements] may include spontaneity,

consistent repetition, the mental state of the [child], use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *Id.* As noted, the trial court admitted AL and MK's interview responses because the interviewers found their answers to be trustworthy. We find no error in the trial court's decision.

Respondent also argues that the investigation was tainted by AL's conversations with social workers and doctors who had not been formally trained in the Governor's Task Force Protocol (4th edition) (the Protocol) for forensic interviewing of children. See MCL 722.628(6). Respondent correctly points out that the Protocol cites the use of video recording as a best practice, and the interviewers in this matter instead took notes. However, the Protocol explicitly permits notetaking as an alternative. Although the trial court found the notes difficult to follow, we find no indication that the notes or the failure to record the interview tainted the interview itself, or that the notes had any impact on the forensic examiner's testimony. Furthermore, MCR 3.972 does not require strict compliance with the Protocol in order for the court to deem a child's statement trustworthy. Such a requirement would lead to the absurd result that statements made to untrained laypersons, such as parents and teachers, would be automatically inadmissible. The court rule imposes no such limitation. Rather, it allows "the testimony of a person who heard the child make the statement" if there is "adequate indicia of trustworthiness." MCR 3.972(C)(2), (2)(a). For the same reason, we reject respondent's argument that AL's statements were necessarily tainted to the point of being totally unreliable because she was questioned by individuals who lacked formal training in forensic interviews.

We conclude the trial court properly determined that the circumstances surrounding the statements to KK and the social workers and medical practitioners provided adequate indicia of trustworthiness. AL's statements were spontaneous, specific, and remained consistent. It was not unreasonable for the trial court to conclude that her memory of the salient facts of multiple incidences was reliable, even though she omitted or added certain details. Therefore, the evidence supported the trial court's conclusion that reasons for respondent's termination under subsection (3)(b)(*i*) and (k)(*ii*) were fulfilled, and that there was reasonable likelihood that both AL and BL (as AL's sibling) would suffer from injury or abuse in the foreseeable future if returned respondent's care.

Because the trial court found clear and convincing evidence to terminate respondent's parental rights under one ground, we do need not to determine whether grounds for other factors, pursuant to MCL 712A.19b, were sufficiently established. See *In re Trejo,* 462 Mich at 360. However, based on AL's consistent retelling of the sexual abuse, and AL and MK's statements of respondent's use of firearms in their presence, we agree with the trial court that respondent failed to provide proper care of AL and BL. Furthermore, we find there is no reasonable expectation respondent would be able to provide proper care for AL and BL in the future because of his lack of accountability for AL and BL's trauma. Based on witness testimony, we also agree with the trial court that there is a reasonable likelihood AL and BL will be harmed if returned to respondent's care. For these reasons, we find the trial court found sufficient evidence to terminate respondent's parental rights, pursuant to MCL 712A.19b(g) and (j).

IV. BEST INTERESTS

The trial court may consider various factors when making its best interests determination, including the child's bond to the parent, *In re BZ*, 264 Mich App at 301, the parent's parenting ability, *In re Jones*, 286 Mich App 126, 129-130; 777 NW2d 728 (2009), and "the child's need for permanency, stability and finality." *In re Gillespie*, 197 Mich App 440, 446-447; 496 NW2d 309 (1992). A trial court may consider evidence from the whole record in making its best-interest determination. *In re Trejo,* 462 Mich at 356. The trial court's findings need not be extensive; "brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1). The trial court may consider evidence presented during the adjudicative phase and additional evidence presented by any party at the dispositional hearing, which supports a finding that termination was in the children's best interest. *In re Trejo*, 462 Mich at 353. Here, the trial court incorporated its findings from its previous two written opinions. Additionally, the trial court appropriately considered the best interests of each child because it considered the abuse specific to AL's experience, AL and BL's exposure to respondent's firearms and their subsequent fear, and the likelihood that respondent would properly care for BL in light of respondent's lack of proper care for AL.

Respondent, relying on *In re Blakeman*, 326 Mich App 318, 321; 926 NW2d 326 (2019), misconstrues the record when claiming that as an innocent respondent, he had no recourse unless he admitted to something that he did not do, in violation of his Fifth Amendments rights to self-incrimination. The best interest determination did not solely rest on the statutory findings that respondent had molested AL and pointed guns at his children. The trial court concluded that respondent's lack of insight or empathy, when taken together with the other evidence, established by a preponderance of the evidence that terminating his parental rights was in the children's best interests. Unlike the respondent in *In re Blakeman*, who showed deep empathy for the injured child, respondent never even acknowledged that AL was traumatized by *any* causal factor. Moreover, respondent showed no empathy for the children's fear of the guns in his home. Respondent merely blamed others for the children's fear. Brown opined that no services were appropriate for respondent because he did not acknowledge that *anything* had happened to AL while she was in his care, and that AL would be further traumatized if she returned to respondent's care. Respondent would not necessarily have been required to admit to committing abuse in order to have empathy for AL's feelings, and respondent's lack of care for AL's feelings was clearly an appropriate consideration.

The trial court properly incorporated its findings when determining BL's bests interests. The court reasonably concluded that based on respondent's treatment of AL, permitting the other child to be returned to respondent's home environment would pose an unacceptable risk to his safety and stability. "The doctrine of anticipatory neglect recognizes that "[h]ow a parent treats one child is certainly probative of how that parent may treat other children." *In re AH*, 245 Mich App 77, 84; 627 NW2d 33, 38 (2001) (internal citation omitted). The court properly concluded that any bond existing between respondent and BL was outweighed by BL's need for a safe and stable home environment. Given the court's finding of respondent's sexual abuse to AL, coupled with respondent's denial of any responsibility and his assignment of blame to others, the trial court properly concluded that respondent's home would be an unstable environment.

Respondent also claims that termination was improper because he had a strong bond with both his children. However, the children rarely asked for respondent and the trial court properly concluded that their mother would provide them with a parental bond, permanency and stability. Moreover, the mother testified that the children no longer exhibited inappropriate aggression as they had previously done when returning from respondent's parenting time. The mother's home was safe and the children were flourishing in her care. Given these factors, the trial court did not clearly err in determining that termination of respondent's parental rights was in the children's best interests. Respondent argues that "there was an alternative to termination" because the trial court could have placed the children with a relative. However, that argument misses the point that the trial court appropriately found respondent harmful to the children.

V. CONCLUSION

The trial court did not clearly err when it found sufficient evidence based on witness testimonies and AL and MK's interviews to terminate respondent's parental rights, pursuant to 712A.19b(3)(b)(*i*), (g), (j), and (k)(*ii*), and that termination was in AL and BL's best interests. Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro