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STATE OF MICHIGAN

COURT OF APPEALS

In re MILES/THOMAS, Minors.

UNPUBLISHED
January 23, 2020

No. 349940
Wayne Circuit Court
Family Division
LC No. 18-001242-NA

Before: METER, P.J., and FORT HOOD and REDFORD, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating his parental rights to his minor children under MCL 712A.19b(3)(b)(*i*) (parent physically or sexually abused child's sibling and a reasonable likelihood exists that child is at risk of abuse if placed with parent), (j) (reasonable likelihood child would be harmed if returned to parent), (k)(*ii*) (sexual abuse included penetration, attempted penetration, or criminal sexual contact) and (k)(*ix*) (sexual abuse as defined by child protection law). We affirm.

This appeal concerns the termination of respondent's parental rights to his children—XAT and JML—but the factual bases for the termination arise from allegations of abuse made against respondent by his two stepchildren—JP and ZH. In July 2018, petitioner, the Department of Health and Human Services (DHHS), received a referral concerning the alleged abuse of JP and ZH. Child Protective Services (CPS) Investigator Royce McKinney conducted an investigation into these accusations, interviewing JP and ZH. In the interview with McKinney, JP stated respondent had put his penis inside her mouth and inside the mouth of her sibling, ZH. After the interviews with McKinney, Kids-TALK employee Stephanie Green conducted forensic interviews with JP and ZH. JP's accusations remained consistent. Additionally, ZH stated in her forensic interview that respondent had put his penis in her anal area. On the basis of these allegations, DHHS filed a petition seeking original permanent custody and the termination of respondent's parental rights to his two biological children—XAT and JLM.

At the adjudicatory hearing, having heard testimony from McKinney and Green, the trial court concluded respondent had sexually abused JP and found termination was warranted under MCL 712A.19b(3)(b)(*i*), (j), (k)(*ii*) and (*ix*). At the dispositional hearing, the trial court

concluded that "by any standard but certainly by a preponderance of the evidence" termination of respondent's parental rights was in the best interests of XAT and JLM.

I. STATUTORY GROUNDS

Respondent first argues that the trial court clearly erred in determining that clear and convincing evidence existed to establish statutory grounds for termination. We disagree.

A. STANDARD OF REVIEW

We review "for clear error the trial court's factual findings and ultimate determination on the statutory grounds for termination." *In re White*, 303 Mich App 701, 709-710; 846 NW2d 61 (2014). To be clearly erroneous, a trial court's determination must be more than possibly or probably incorrect. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. In reviewing the trial court's determination, this Court must give due regard to the unique opportunity of the trial court to judge the credibility of those witnesses who appeared before it. *Id*.; see also MCR 2.613(C). Furthermore, "[c]onstitutional questions and issues of statutory interpretation, as well as family division procedure under the court rules are reviewed de novo." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning. When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written." *In re LE*, 278 Mich App 1, 22-23; 747 NW2d 883 (2008) (citation and quotation marks omitted), abrogated on other grounds as recognized in *In re Long*, 326 Mich App 455, 465; 927 NW2d 724 (2018).

In addition to contesting the statutory grounds for the termination of his parental rights, respondent also challenges the trial court's decision allowing Green and McKinney to testify concerning the hearsay allegations of abuse made by JP and ZH. At the trial court, respondent argued that the circumstances under which these statements were made were not sufficiently trustworthy to justify admission. He did not, as he does in this Court, argue that the introduction of the statements violated his constitutional right to confrontation. To preserve an evidentiary issue for appellate review, "a party must object at trial on the same ground that it presents on appeal." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 709-710; 922 NW2d 662 (2018). As a result, respondent's constitutional challenge to the evidence is unpreserved. Unpreserved evidentiary issues are reviewed for plain error affecting a party's rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error

> resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (quotation marks, citations, and brackets omitted).]

B. ANALYSIS

As an initial matter, respondent asserts that the trial court denied him his right to confrontation when it admitted, through the testimony of McKinney and Green, the hearsay allegations of abuse made by JP and ZH. US Const, Am VI; Const 1963, art 1 § 20. Because this testimony provided much of the factual basis for the trial court's termination of respondent's parental rights, it is necessary to first ensure the trial court was correct in admitting and relying on these statements. "In general, issues that are raised, addressed, and decided by the trial court are preserved for appeal." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014) (citation omitted). Notably, because respondent did not raise his constitutional argument in the trial court, raising it for the first time on appeal, the issue is unpreserved and is subject to a plain-error analysis.

In establishing plain error, respondent must demonstrate the trial court's decision to allow the hearsay statements as substantive evidence was a clear and obvious error. *Carines*, 460 Mich at 763. As our Supreme Court has noted, "[c]hild protection proceedings are not criminal proceedings. The purpose of child protective proceedings is the protection of the child, while criminal cases focus on the determination of the guilt or innocence of the defendant." *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993) (citations omitted). Because of this difference, "the Sixth Amendment right of confrontation does not apply" to child protection proceedings. *Id*. at 108. While there are due process implications inherent in terminating a parent's rights to his children, due process does not always require confrontation and cross-examination. *Id*. at 109.

These principles are reflected in the court rules governing the use of a child's statements to a third party in an adjudicative proceeding. Under MCR 3.972(C)(2)(a):

> 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*. [Emphasis added.]

This Court has interpreted MCR 3.972(C)(2)(a) as requiring petitioner to "produce at trial any witness claiming that a child victim made statements of abuse heard by the witness if petitioner wishes to rely on such statements in its case, subject to the existence of circumstances indicating trustworthiness. This allows the accused parent the opportunity to at least cross-examine that witness." *In re Martin*, 316 Mich App 73, 82; 896 NW2d 452 (2016).

Our review of the record leads us to conclude that no error occurred here. The trial court held a tender-years hearing to determine the trustworthiness of the circumstances surrounding the giving of the statements by JP and ZH to McKinney and Green. In the hearing, the trial court gave respondent the opportunity to cross-examine Green and McKinney about the protocols they used to obtain a trustworthy interview. Respondent was also able to argue to the trial court why the interviews and their content were untrustworthy and attack the substance of the accusations. While the trial court accepted the testimony of Green and McKinney as substantive evidence of respondent's abuse of JP and ZH, the record shows the trial court did so within the parameters of MCR 3.972(C). Considering respondent's diminished Sixth Amendment right in child protection proceedings, in conjunction with the trial court's adherence to the court rule's requirements, we are not persuaded any error occurred here, let alone one that was clear, obvious, and affected respondent's substantial rights. As a result, respondent's plain-error challenge to the admission of hearsay evidence fails.

Because of this determination, our review of the statutory grounds for termination becomes rather straight forward. "In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120,139; 809 NW2d 412 (2011). "Only one ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *In re Ellis*, 294 Mich App at 33. Respondent's parental rights were terminated under MCL 712A.19b(3)(b)(*i*), (j), and (k), which provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, [one] or more of the following:
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> * * *
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> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under [one] 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.
>
> * * *
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> (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 parent abused the child or a sibling of the child, the abuse included [one] or more of the following, and there is a reasonable likelihood that the child will be harmed if returned to the care of the parent:

* * *

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

* * *

(*ix*) Sexual abuse as that term is defined in section 2 of the child protection law, 1975 PA 238, MCL 722.622.

MCL 722.622(z), defines sexual abuse as "engaging in sexual contact or sexual penetration as those terms are defined in section 520a of the Michigan penal code, 1931 PA 328, MCL 750.520a, with a child." In turn, MCL 750.520a(q) states:

"Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.

(ii) To inflict humiliation.

(iii) Out of anger.

Finally, MCL 750.520a(r) defines sexual penetration to include "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

In addition to the evidence placed on the record, the trial court also relied on the doctrine of anticipatory neglect, "according to which, how a parent treats one child is certainly probative of how that parent may treat other children." *In re LaFrance Minors*, 306 Mich App 713, 730; 858 NW2d 143 (2014) (quotation marks and citation omitted). While the evidence of how a parent treats one child is not dispositive, a trial court can nevertheless infer a parent's future conduct from the parent's past behavior.

Such is the case here. The record reflects that clear and convincing evidence supported termination of respondent's parental rights under MCL 712A.19b(3)(b)(*i*). Through the testimony of Green and McKinney reporting the statements of JP, DHHS provided substantive evidence that respondent sexually abused his stepchildren—siblings of the two children at the center of this appeal. The trial court stated that, despite imperfections in JP's evidence, it found the evidence to be "compelling, believable, . . . couched in terms of that which a seven year old

would testify to, but sadly portraying a knowledge of human sexuality a seven year old should not have." The trial court expressly stated it was relying on the doctrine of anticipatory neglect to infer that respondent's abuse of his stepchildren presented a risk of future harm to his children XAT and JLM. There is nothing on the record that leads us to conclude the trial court incorrectly applied the doctrine or believed it was required to infer future conduct from respondent's past behavior. Indeed, the trial court heard and rejected argument from respondent regarding why anticipatory neglect did not apply in this case. Considering the evidence from Green and McKinney, it was reasonable for the trial court to infer that respondent posed a risk of future harm to XAT and JLM. This, in turn, provided a basis for the trial court's conclusion that statutory grounds for termination existed under MCL 712A.19b(3)(b)(*i*).

The next two statutory grounds are variations on the same theme. Concerning MCL 712A.19b(3)(j), DHHS, through the testimony of Green and McKinney, provided factual evidence of respondent's conduct, namely his sexual abuse of JP. This factual evidence provided the basis for the trial court's inference under anticipatory neglect that respondent presented a risk of harm to XAT and JLM if they were returned to respondent's home. Similarly, concerning the requirements of MCL 712A.19b(3)(k)(*ii*) and (*ix*), the evidence provided by Green and McKinney, and accepted by the trial court, showed that respondent had sexually abused JP and ZH by placing his penis in the children's mouths. This form of sexual abuse is defined as sexual penetration pursuant to MCL 750.520a(r), and as such, qualifies as the type of abuse for which respondent's parental rights can be terminated under MCL 712A.19b(3)(k)(*ii*) and (*ix*). Again, because the way a parent treats one child can indicate how a parent may treat another child, the trial court used the doctrine of anticipatory neglect to infer that XAT and JLM would be at risk of future sexual abuse if they were returned to respondent's care. While the inference is not dispositive, it was reasonable, and we are not left with the impression that the trial court made a mistake in reaching these conclusions.

In light of this analysis, we find there was clear and convincing evidence supporting each of the statutory grounds the trial court used to terminate respondent's parental rights. Because only one statutory ground needs to be proven to justify termination, we affirm the trial court's finding that statutory grounds existed for the termination of respondent's parental rights to XAT and JLM.

III. BEST INTERESTS

Respondent next argues that the trial court clearly erred by finding that termination of respondent's parental rights was in the best interests of XAT and JLM. We disagree.

A. STANDARD OF REVIEW

The trial court's ruling regarding best interests is reviewed for clear error. *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Ellis*, 294 Mich App at 33.

B. ANALYSIS

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App 35, 40-41; 823 NW2d 144 (2012). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 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, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. When the trial court makes its best interests determination it may rely on evidence on the entire record, including the evidence establishing statutory grounds. *In re Trejo*, 462 Mich 341 353-354; 612 NW2d 407 (2000), superseded by statute on other grounds as recognized in *In re Moss*, 301 Mich App at 83.

In this case, the trial court relied on multiple sources of evidence in determining that termination of respondent's parental rights was in the best interests of XAT and JLM. In addition to the factual evidence it relied on to make the statutory-grounds determinations, the trial court also relied on the report of the court clinic and the testimony of Kelly Whittaker—the CPS worker assigned to this case—both of which recommended termination of respondent's parental rights. The trial court also stated it was concerned about respondent's ability to be a moral guide in the life of his children, considering the credible accusations made against respondent by JP. Considering all of this evidence, the trial court concluded termination of respondent's parental rights was in the best interests of XAT and JLM.

Respondent alleges that the trial court failed to take into account factors that weighed against termination, but a review of the record shows this assertion to be untrue. At the time of the dispositional hearing, both XAT and JLM were living with respondent's aunt.[1] Under MCL 712A.19a(8)(a), the placement of a child with relatives weighs against termination. Furthermore, respondent's aunt would qualify as a relative for the purposes of this provision as defined by MCL 712A.13a(1)(j). While such placement is a factor weighing against termination that the trial court must consider, it is not dispositive, and termination is still appropriate if it is in a child's best interests. *In re Olive/Metts*, 297 Mich App at 43. At the dispositional hearing, Whittaker expressly stated that she believed termination was in the best interests of XAT and

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[1] We note the record reflects some confusion concerning the placement of JLM and XAT at the time of the dispositional hearing. Initially, Whittaker testified that XAT had been placed with respondent's aunt and JLM had been placed with the children's mother. However, Whittaker was no longer assigned to this case at the time of the dispositional hearing. CPS worker Anissa Duren, who was the assigned case worker when the dispositional hearing occurred, testified that both children had been placed with respondent's aunt.

JLM even if they had been placed with a relative. Similarly, the trial court noted that this factor weighed against termination, as did the bonds that respondent shares with XAT and JLM. However, the trial court went on to state that these factors were outweighed by respondent's conduct, the likelihood of harm that could come to the minor children if returned to respondent, as well as the recommendation of the clinic and the testimony of Whittaker, which both supported termination of respondent's parental rights.

Respondent also asserts that the trial court was required to make separate best interest determinations for XAT and JLM, because of the differences in the each child's circumstances. While this Court has held that a trial court should address significant differences between children when making a best interests determination, this requirement "does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *In re White*, 303 Mich App at 715. At the dispositional hearing, the trial court heard evidence that, despite some differences between XAT and JLM, it was in the best interests of each child that respondent's parental rights be terminated. Moreover, at the time of the dispositional hearing, XAT and JLM were in essentially the same situation. While JLM had been previously raised by respondent and the child's mother, both JLM and XAT had been placed with respondent's aunt. Similarly, evidence was presented that both children had a diminished bond with respondent. Considering the children's similarities regarding the factors the trial court used to determine that termination was in their best interests, individual determinations would have likely resulted in the redundant findings we cautioned against in *In re White*. *Id*. The trial court did not err in choosing not to make individual findings of fact when conducting its best interests' determination. As a result, we conclude that there was sufficient evidence to support the trial court's conclusion that termination of respondent's parental rights was in the best interests of XAT and JLM.

Affirmed.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood
/s/ James Robert Redford