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STATE OF MICHIGAN

COURT OF APPEALS

In re S. N. FOHS, Minor.

UNPUBLISHED
November 12, 2020

No. 353386
Berrien Circuit Court
Family Division
LC No. 2019-000088-NA

In re S. SCHNEIDER, Minor.

No. 353387
Berrien Circuit Court
Family Division
LC No. 2019-000105-NA

Before: SAWYER, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

These consolidated appeals involve child-protection proceedings regarding two minor children who are both daughters of respondent-father, Peter Fohs, III. SNF is the daughter of respondent-father and Tonya Darnell. SS is the daughter of respondent-father and Catherine Carter. In addition, CK, who is the older sister of SNF and the former stepchild of respondent-father, provided testimony in this case.[1] With regard to both SNF and SS, the trial court entered orders of adjudication and exercised jurisdiction over the children. In Docket No. 353386, respondent-father appeals as of right the trial court's order of adjudication regarding SNF. In Docket No. 353387, respondent-father appeals as of right the trial court's order of adjudication regarding SS. This Court ordered that these cases be consolidated on appeal. *In re SNF*, unpublished order of the Court of Appeals, issued August 4, 2020 (Docket Nos. 353386; 353387). The parental rights of the children's mothers are not at issue in this appeal.

[1] The proceedings in the trial court involved other children of respondent-father, but they are not at issue in this appeal.

I. BACKGROUND

A. PRETRIAL PROCEEDINGS

On September 16, 2019, the Department of Health and Human Services (DHHS) filed a petition regarding SNF. In that petition, the DHHS alleged that respondent-father sexually abused SNF and her older sister, CK. The DHHS further alleged that the county prosecutor had brought criminal charges against respondent-father related to the alleged sexual abuse, and that respondent-father was incarcerated pending trial on those charges. The DHHS sought removal of SNF from respondent-father's care and termination of his parental rights to the child at the first dispositional hearing.

The trial court conducted a preliminary hearing in the case regarding SNF on September 19, 2019. At that hearing, respondent-father waived a finding of probable cause, without admitting any of the facts alleged by the DHHS. The trial court indicated that it had reviewed the petition and noted that respondent-father was then incarcerated on criminal-sexual-conduct charges involving SNF. The trial court authorized the filing of the petition, and placed SNF in the home of her mother.

On November 21, 2019, the DHHS filed a petition regarding SS, immediately upon the child's birth. The petition alleged that respondent-father was the child's putative father,[2] that the mother of SS had three older children in foster care, and that respondent-father had been charged with several counts of criminal-sexual conduct against three different children. The petition alleged that the mother of SS lacked stable housing or income, that she had a substance-abuse problem, and that she had failed to protect the children from respondent-father's sexual abuse because she "would often drink to the point of blacking out." The petition concluded that both the mother and respondent-father were unable to provide proper care for SS and that the home or environment was an unfit place for the child to live. The referee issued an ex-parte order taking SS, along with other children not involved in this appeal, into protective custody.

On November 22, 2019, the referee held a preliminary hearing in the case regarding SS. The referee notified respondent-father that he would be considered as the putative father of SS until paternity of the child was established. The mother of SS identified respondent-father as the biological father of SS, but stated that she was unwilling to sign an affidavit of parentage naming him as the child's legal father. The trial court provided respondent-father 14 days in which to establish paternity by biological testing.[3] After reviewing the allegations in the petition, the referee determined that probable cause existed to believe that one or more of those allegations were true, authorized the filing of the petition, and removed SS from her mother's care.

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[2] On March 13, 2020, the DHHS filed a first-amended petition regarding SS, changing respondent-father's status from putative father to legal father, and seeking termination of his parental rights at initial disposition.

[3] Respondent-father and Carter later signed an affidavit of parentage, establishing his status as the legal father of SS.

On December 12, 2019, the trial court held a preliminary hearing in the case regarding SNF. Respondent-father's counsel indicated that he planned to release his parental rights to SNF and "not go forward with the termination." Respondent-father's counsel stated that SNF was 13 years old, that she was a potential witness in his client's criminal trial, and that there had been "some discussion as to whether or not to have her testify" in both the criminal case and the child-protective proceeding. The DHHS indicated potential support for respondent-father voluntarily releasing his parental rights to SNF because it would spare the child from "having to testify twice." Ultimately, respondent-father did not voluntarily release his parental rights to SNF.

On December 18, 2019, the DHHS filed a motion in limine, requesting that the trial court rule that SNF's prior testimony in respondent-father's criminal-prosecution case was admissible at the adjudication trial in these child-protection proceedings. The DHHS filed the identical motion in the case regarding SNF, the case involving SS, and cases involving other children not at issue in this appeal. Respondent-father did not file a written response to the motion.

On January 9, 2020, the trial court held a hearing on the motion in limine. The DHHS relied solely on the testimony of Michelle Pyburn, a mental-health therapist who had treated SNF. Pyburn testified that she had provided approximately 25 counseling sessions with the child, that she had treated the child between August 5, 2019 and November 26, 2019, and that she had transferred the child to another therapist for more intensive counseling.

Pyburn testified that she had contacted the DHHS caseworker assigned to SNF to present concerns about SNF's mental-health issues. Pyburn was aware that SNF had testified in the criminal case against respondent-father on July 12 and 19, 2019. According to Pyburn, at the July 12, 2019 preliminary examination in the criminal case, SNF testified that respondent-father had sexually abused her; the child broke down on the witness stand, and the trial court adjourned the proceedings until the child could return to complete her testimony on July 19, 2019. Pyburn stated that, after SNF's testimony in the criminal case, the child suffered "major flashbacks," "extreme anxiety," and "extreme panic."

Furthermore, when Pyburn attempted to discuss respondent-father with SNF in therapy, the child "had a complete meltdown and she started to self-harm." The child's efforts to harm herself involved cutting herself with a razor "pretty intensely," multiple times on the arms, wrists, and thighs. SNF also "developed a viable plan to commit suicide," and this resulted in the child's hospitalization. When SNF learned of the filing of child-protection proceedings against respondent-father, she suffered "another severe break down and was hospitalized for a second time due to self-harming and suicidal ideations." Pyburn stated that SNF was diagnosed with post-traumatic-stress disorder and major-depressive disorder, and Pyburn opined that these disorders were caused by respondent-father's alleged sexual assaults perpetrated against SNF. Pyburn articulated her concern that if SNF was required to testify again about respondent-father, she would relapse back into self-harming behavior and would possibly become suicidal again. Pyburn testified that there was a good probability that having the child testify again would retraumatize her and could cause another hospitalization. Pyburn also opined that the child's mental-health issues could affect her ability to testify truthfully. After receiving Pyburn's testimony, the referee took the matter under advisement and scheduled a date to announce its ruling.

On January 24, 2020, the referee ruled that SNF was "unavailable" to testify under MRE 804(a)(4), and that her prior testimony in the criminal case was admissible under MRE 804(b)(1), in both the case regarding SNF and the case regarding SS. Respondent-father appealed the referee's ruling to the circuit-court judge, who upheld the ruling in both cases. The circuit-court judge indicated that he had carefully reviewed the referee's ruling, the contents of the evidentiary hearing, and relevant Michigan law. The circuit-court judge then held as follows:

> In this case, I would not have reached a different outcome if I heard the case and I do not find the Referee committed a clear error of law. The Referee correctly set forth the applicable law in making her ruling, and properly applied the law to the facts of this case. While this is an interesting and close legal issue, I fully agree with the Referee's rationale and conclusions and I adopt the Referee's Recommendation in its entirety.

B. ADJUDICATION TRIAL

On February 14, 2020, the referee held a joint adjudication trial which addressed the cases involving both SNF and SS, as to respondent-father.[4] The DHHS called as a witness CK, the older sister of SNF and respondent-father's former stepchild. In addition, the DHHS introduced into evidence transcripts of SNF's prior testimony from respondent-father's criminal trial, as well as a birth certificate for SNF and an affidavit of parentage for SS. Respondent-father chose not to testify on his own behalf.

CK testified that her mother was Tonya Darnell and that SNF was her little sister. CK stated that she was 10 years older than SNF, and that she lived with her mother and SNF during the time when she was 9 to 15 years old, and then again during the time when she was 18 to 19 years old. She recalled that her mother was married to respondent-father when CK was about 9 or 10 years old. CK testified that respondent-father sexually abused her from the time she was 9 years old until she was 15 years old, when she was able to move out of the home. CK testified that respondent-father used his hands to touch her genital area over her clothes, that he touched her genital area with his mouth, and that he placed his penis in her mouth once when she was sleeping. When asked if respondent-father had ever threatened her if she disclosed the sexual abuse, she testified that he told her that Children's Protective Services would take her away if she told anyone.

Given the referee's earlier ruling on the motion in limine, the DHHS admitted into evidence two transcripts of SNF's testimony from the preliminary examination in respondent-father's criminal trial. This testimony spanned two dates—July 12 and 19, 2019. During her testimony, SNF was accompanied by a support animal and a member of the victim-witness staff from the prosecutor's office. The transcript also indicates that SNF was crying during parts of her testimony.

[4] The referee adjourned the adjudication trial regarding the parental rights of Carter, the mother of SS, because Carter was hospitalized on the date of trial.

SNF explained that she had always lived with her mother, and that she had never lived with respondent-father, but that she had visited him on weekends until she was 10 or 11 years old. SNF testified that when she would stay with respondent-father, when he was drunk or his girlfriend was absent, he would touch her private parts and make her uncomfortable. She stated, "I don't know if he remembers but like when I would go over there he would be drunk . . . I don't know if he remembers but he would touch me and make me uncomfortable." SNF testified that respondent-father touched her butt, touched her breasts outside her clothes, and when she was 10 or 11 years old, he penetrated her vagina with his penis and his finger. At this point in her testimony, SNF asked to take a break from testifying, and eventually asked if she could return the following week to complete her testimony. The trial court adjourned the proceedings to the following week.

On the second day of testimony, the prosecutor recalled SNF as a witness, and she again testified that respondent-father had penetrated her vagina with his penis and his finger, when she was younger than 13. Respondent-father's criminal-defense counsel then cross-examined the child, and attempted to impeach her credibility with the contents of her recorded interview with the Children's Assessment Center. SNF testified that, after respondent-father sexually assaulted her, she "just wanted to drop it and pretend like nothing happened," and that respondent-father told her that if she told anyone what he had done, she would no longer be able to see her younger siblings.

At the close of proofs in the joint adjudication trial, the DHHS provided argument regarding the adjudication of SNF and SS. With regard to SNF, the DHHS argued that a preponderance of the evidence supported a finding that respondent-father had provided an unfit place for the child to live because of the cruelty, criminality, and depravity related to his sexual abuse. MCL 712A.2(b)(2). The DHHS further argued that, with regard to SS, a preponderance of the evidence supported a finding of anticipatory neglect, because respondent-father's sexual abuse of CK and SNF was evidence of the potential that he would likewise abuse SS. The DHHS argued that SS was at the same risk of harm that SNF and CK experienced when they lived with respondent-father. In response, respondent-father argued that the trial court should dismiss the petitions for insufficient evidence because CK lacked credibility, and that the trial court should completely discount the testimony of SNF because her mental illnesses impacted her ability to testify truthfully. After the referee received argument from counsel regarding adjudication in these two cases, the court recessed until the afternoon for the dispositional hearing.

When the referee resumed the proceedings, she ruled that the testimony of SNF was "unrefuted," that her testimony was credible, and that the trauma endured by SNF at the hands of respondent-father was "without question." The referee found that respondent-father's conduct constituted neglect and a failure to provide proper care and support for SNF. The referee further found that respondent-father had subjected SNF to a substantial risk of harm to her mental health. Therefore, the referee found that respondent-father's home environment was one of cruelty, neglect, criminality, or depravity, and that it was an unfit place for SNF to live.

With regard to SS, the referee ruled that the testimony of CK that respondent-father sexually abused her was credible and "unimpeached," and that respondent-father subjected CK to "mental and emotional cruelty and neglect." The referee found that respondent-father neglected to provide proper care and support for both CK and SNF, and that the doctrine of anticipatory neglect supported a finding that respondent-father was likely to abuse SS in the same manner.

Therefore, the referee determined that sufficient evidence existed to support the trial court's exercise of jurisdiction over both SNF and SS.

These appeals followed.

II. ANALYSIS

Respondent-father appeals as of right the trial court's adjudication orders regarding SNF and SS, arguing that the trial court clearly erred by finding that statutory grounds existed for the exercise of jurisdiction over the children. Because respondent-father's allegations of error in these two cases overlap significantly, we address his arguments together.

A. CHILD-PROTECTIVE PROCEEDINGS

The Michigan Supreme Court has explained the procedural phases of a child-protective proceeding, from initiation to adjudication, as follows:

> Child protective proceedings are governed by the juvenile code, MCL 712A.1 et seq., and Subchapter 3.900 of the Michigan Court Rules. Any person who suspects child abuse or neglect may report their concerns to the Department. MCL 712A.11(1). The Department, after conducting a preliminary investigation, may then petition the Family Division of the circuit court to take jurisdiction over the child. MCR 3.961(A). That petition must contain, among other things, the essential facts that, if proven, would allow the trial court to assume jurisdiction over the child. MCR 3.961(B)(3); see also MCL 712A.2(b). After receiving the petition, the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b). See MCR 3.965(B).
>
> If the court authorizes the petition, the adjudication phase follows. The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights. The court can exercise jurisdiction if a respondent-parent enters a plea of admission or no contest to allegations in the petition, see MCR 3.971, or if the Department proves the allegations at a trial, see MCR 3.972. If a trial is held, the respondent is entitled to a jury, the rules of evidence generally apply, and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition. And while the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights. The adjudication divests the parent of [his] constitutional right to parent [his] child and gives the state that authority instead. [*In re Ferranti*, 504 Mich 1, 14-16; 934 NW2d 610 (2019) (cleaned up).]

B. STANDARD OF REVIEW

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists. Jurisdiction must be established by a preponderance of the evidence. We review a trial court's decision to exercise jurisdiction in a child-protection proceeding for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004) (citations omitted). We also recognize "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We review a trial court's decisions regarding evidentiary issues in a child-protective proceeding for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). We review de novo whether child protective proceedings complied with a parent's due-process rights. *In re Ferranti*, 504 Mich at 14.

C. EVIDENTIARY ISSUE

In both appeals, respondent-father argues that the trial court erroneously held that SNF was "unavailable" to testify as a witness in these child-protection proceedings due to mental illness—and therefore erred by admitting her testimony from the preliminary examination in the criminal case. This argument is without merit.

The trial court examined MRE 804(a) and (b) to determine whether SNF was "unavailable" as a witness and whether her prior testimony in the criminal proceeding was admissible in this child-protective proceeding. MRE 804(a) provides that " '[u]navailability as a witness' includes situations in which the declarant . . . is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." MRE 804(a)(4). If "the declarant is unavailable as a witness," as defined in MRE 804(a), her former testimony is "not excluded by the hearsay rule." MRE 804(b)(1). The rule defines the term "former testimony" to mean:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804(b)(1).]

In *People v Duncan*, 494 Mich 713, 724-727; 835 NW2d 399 (2013), the Michigan Supreme Court examined the language in MRE 804(a)(4). The Court relied on a dictionary to define the term "mental infirmity" used in the rule:

> "Infirmity" is defined as "the quality or state of being infirm; lack of strength." In turn, "infirm" is defined as "feeble or weak in body or health" . . . The term "mental" modifies "infirmity" and is defined as "1. of or pertaining to the mind. 2. of, pertaining to, or affected by a disorder of the mind." Thus, read together, the phrase "mental infirmity" as used in MRE 804(a)(4) encompasses weakness or feebleness of the mind. [*Id*. at 725-726 (cleaned up).]

The Court further noted that the language of 804(a)(4) does not require that the mental illness or infirmity be "permanent, or even longstanding" because the "phrase 'then existing' specifically limits the temporal scope within which a witness's availability under MRE 804(a)(4) may be

assessed; the only relevant reference point is the point at which the witness takes the stand. As a result, the declarant need not suffer from a permanent illness or infirmity." *Id.* at 726. Thus, although a witness may have been available to testify at prior court proceedings, the only relevant inquiry is the witness's condition at the time she was called to testify. *Id.*

Respondent-father argues that "the record is devoid of any evidence that would support a finding of unavailability" under MRE 804 because SNF "was available and able to testify in July at the preliminary exam" and the same was true on the date of the January 2020 adjudication trial. Respondent-father also argues that SNF was only "reluctant to testify at trial," and that she was not unable or incompetent to testify, because "she was not physically or mentally unavailable or infirm."

The record belies respondent-father's argument on appeal. The DHHS presented testimony that SNF had cut herself, had developed a viable plan to commit suicide, and had been hospitalized to prevent her from committing suicide. Pyburn testified that she provided mental-health services to SNF, and that the child was extremely traumatized whenever she was asked to discuss respondent-father's actions towards her. Simply learning about the filing of child-protection proceedings caused SNF to suffer a severe mental-health breakdown and the child was hospitalized for a second time due to self-harming and suicidal ideations. Pyburn testified that SNF had been diagnosed with post-traumatic-stress disorder and major-depressive disorder, and she expressed concern that if SNF was required to testify again about respondent-father, she would relapse back into self-harming behavior and would possibly become suicidal again. These facts were sufficient for the trial court to find that SNF was "unavailable" for purposes of MRE 804.

Respondent-father also argues that Pyburn's testimony regarding SNF's alleged statements made to her during mental-health treatment qualified as inadmissible hearsay because Pyburn's testimony was offered for the truth of the matter asserted. Respondent-father objected on these grounds at the hearing on the motion in limine, and the DHHS argued that the testimony was admissible under MRE 803(4) as statements made for the purposes of medical treatment. On appeal, respondent-father offers no argument regarding why Pyburn's testimony was not admissible under MRE 803(4). "This Court will not search for authority to sustain or reject a party's position. The failure to cite sufficient authority results in the abandonment of an issue on appeal." *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009) (citations omitted).

Respondent-father next argues that, even if SNF was "unavailable," her testimony was not admissible under MRE 804(b)(1) because respondent-father did not have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." This argument is without merit.

In *People v Farquharson*, 274 Mich App 268, 272-273; 731 NW2d 797 (2007), this Court analyzed the language in MRE 804(b)(1). The Court examined two elements necessary for former testimony to be admitted: (1) the proposed testimony must have been given at "another hearing," and (2) the opposing party had "an opportunity and similar motive to develop the testimony" at that other hearing. *Id.* at 272, 275. In these appeals, respondent-father does not challenge the existence of the first element. He argues only that he lacked the "opportunity and similar motive" to challenge SNF's testimony in the criminal proceeding and the child-protective proceeding. To

determine whether a party had a similar motive to examine a witness at a prior proceeding, courts must consider a non-exhaustive list of factors, such as: (1) whether the party opposing the testimony had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue; (2) the nature of the two proceedings—both what is at stake and the applicable burden of proof; and (3) whether the party opposing the testimony in fact undertook to cross-examine the witness. *Id*. at 278 (cleaned up).

It is undisputed that respondent-father was represented by counsel in the criminal proceeding and that his criminal-defense counsel cross-examined SNF during her testimony in that case. In both the criminal prosecution and the child-protective proceeding, respondent-father denied SNF's allegations that he sexually assaulted her. Therefore, at the prior proceeding, he had a similar intensity to question the veracity of SNF's testimony. Respondent-father's motive to develop SNF's testimony in the criminal case was "similar" to his motive to develop that testimony in the child-protective proceedings, and the trial court properly admitted the testimony in these child-protection proceedings under MRE 804(b)(1).

D. JURISDICTION

In both appeals, respondent-father argues that the trial court clearly erred by finding that statutory grounds existed to exercise jurisdiction over the children under MCL 712A.2(b)(1) and (2). He argues that "there is no independent basis" to support the court's findings regarding adjudication "apart from the preliminary exam transcripts which were improperly admitted," and argues that the evidence presented at the adjudication trial did not rise to the level of a preponderance of the evidence. Respondent-father's arguments fail.

As explained above, the trial court properly admitted SNF's former testimony under MRE 804. Both SNF and her older sister, CK, testified that respondent-father sexually abused them. Specifically with regard to SNF, the evidence indicated that the child suffered severe emotional harm as a result of that sexual abuse. The trial court found that testimony credible, and we recognize the special opportunity of the referee to judge the credibility of the witnesses who appeared before her. *In re Miller*, 433 Mich at 337. Based on that testimony, the referee found that respondent-father's conduct constituted neglect and a failure to provide proper care and support for SNF, and that respondent-father had subjected SNF to a substantial risk of harm to her mental health. Therefore, the referee found that respondent-father's home environment was one of cruelty, neglect, criminality, or depravity, and that it was an unfit place for SNF to live. We are not left with a definite and firm conviction that a mistake was made. The trial court did not commit clear error in exercising jurisdiction over SNF.

Respondent-father also argues that "assertion of jurisdiction was wholly un-warranted and certainly premature considering that [SNF] was placed with her mother." Respondent-father relies on caselaw indicating that a child's placement with relatives weighs against termination of parental rights under MCL 712A.19a(6)(a). This caselaw is inapposite here, as respondent-father challenges the trial court's decision regarding adjudication, not termination. Respondent-father cites no authority for the proposition that a child's placement with relatives weighs against the trial court's exercise of jurisdiction under MCL 712A.2(b)(1) and (2). We will not search for authority to sustain respondent-father's position, and consider this issue abandoned on appeal. *Hughes*, 284 Mich App at 71-72. In any event, the fact that SNF was placed with her mother was not relevant

to whether respondent-father's conduct constituted neglect and a failure to provide proper care and support for SNF, or to whether respondent-father had subjected SNF to a substantial risk of harm to her mental health. Furthermore, the child's placement with her mother was not relevant to whether respondent-father's sexual assaults created a home environment that was one of cruelty, neglect, criminality, or depravity, and that it was an unfit place for SNF to live.

Finally, with regard to SS, respondent-father argues that the trial court erred in applying the doctrine of anticipatory neglect to exercise jurisdiction over the infant. "How a parent treats one child is certainly probative of how that parent may treat other children." *In re LaFrance*, 306 Mich App 713, 730; 858 NW2d 143 (2014) (cleaned up). Respondent-father argues that SNF and SS are dissimilar because SNF was a teenager who had behavioral problems when she lived with him, whereas SS was an infant who never lived with him. This argument is without merit. Both respondent-father's biological daughter and his stepdaughter testified that he sexually assaulted them, and the trial court found this testimony to be credible and unrefuted. The trial court did not err in applying the doctrine of anticipatory neglect to exercise jurisdiction over SS.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Brock A. Swartzle