

STATE OF MICHIGAN
COURT OF APPEALS

In re LUMLEY, Minors.

UNPUBLISHED

July 29, 2021

No. 355722

St. Clair Circuit Court

Family Division

LC No. 20-000051-NA

Before: GADOLA, P.J., and JANSEN and O’BRIEN, JJ.

PER CURIAM.

Respondent appeals as of right the trial court’s order terminating his parental rights to the minor children, LL, EL, and CL, under MCL 712A.19b(3)(b)(i) (child injured or abused because of parent’s act or parent’s failure to prevent injury, and reasonable likelihood of future injury or abuse), MCL 712A.19b(3)(j) (reasonable likelihood of harm to child), MCL 712A.19b(3)(k)(ii) (criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate a sibling by parent) and (ix) (sexual abuse of a sibling), and MCL 712A.19b(3)(m)(i) (parent was convicted of violations under MCL 750.520c). We affirm.

I. BACKGROUND

On June 22, 2020, petitioner, the Department of Health and Human Services (DHHS), filed a second amended petition requesting that the trial court take jurisdiction over LL, EL, and CL, and terminate respondent’s parental rights to the children. Specifically, the petition included the following allegations: (1) respondent is the legal father of LL, EL, and CL; (2) Danielle Sensini is the legal mother of AS, CS, LL, and EL; (3) Amber Pollard is the legal mother of CL; (4) Shirley Lumley, respondent’s mother, has full physical custody of LL and EL and respondent, Sensini, and Lumley share joint legal custody of LL and EL; (5) respondent and Pollard share joint legal and joint physical custody of CL; (6) a Children’s Protective Services (CPS) worker and a detective with the Sterling Heights Police Department observed CS’s interview at Macomb County Care House on November 20, 2019, wherein CS had disclosed multiple incidents of sexual abuse by respondent; (7) respondent was the person responsible for CS at the time of the alleged sexual abuse but was not his legal father; (8) on July 2, 2015, respondent pleaded guilty to second-degree criminal sexual conduct (victim less than 13 years of age) (CSC II), MCL 750.520c(1)(a), based on the sexual abuse of AS from 2011 to 2015, when AS was between the ages of 9 and 13 years

old, and while respondent was the person responsible for her (AS is the biological sister of CS and the biological half-sister of LL and EL); and (9) there is an open criminal investigation with the St. Clair County Sheriff's Department regarding respondent's alleged sexual abuse of CS.

A bench trial regarding jurisdiction was held on July 22, 2020, at which petitioner called three witnesses to testify. Detective Kelsey Wade of St. Clair County Sheriff's Department testified that in July of 2015 she was assigned to a sexual molestation investigation involving AS as the victim and respondent as the perpetrator. Detective Wade testified that respondent said he had heard about the allegations from AS's mother, Sensini, and that he was "disgusted" by them. Respondent also admitted that he once put his hand inside AS's pants and demonstrated on himself. He said he put his hand almost "to where girls shave" and rubbed her bare skin with his bare hand in a circular motion. Detective Wade believed that LL and EL were home at that time. Detective Wade further testified that she was assigned to an investigation regarding respondent in November 2019. This time, the allegations were regarding respondent inappropriately touching CS. Detective Wade indicated that a warrant request regarding this investigation had been submitted to the prosecutor's office and was pending at the time of the bench trial.

AS testified that she shared a room and a bunk bed with CS, until she had her own bedroom. AS stated that she did not like to sleep by herself because respondent would come into her room and do things to her. There were instances when respondent was the only adult in the room or in the house with AS, and he touched her inappropriately. AS also testified to a particular incident in May 2015, when AS went to CS's bedroom to sleep in his bed. AS was asleep when she felt like she could not breathe—as if she was being crushed. AS could not roll over, and she was scared. AS said respondent was the one crushing her. He put his hands inside her pants, and then touched and rubbed her vagina. Respondent put his hands inside the lips of her vagina and rubbed AS underneath her clothing with his bare hand on her skin.

AS testified to additional specific incidents, including a time respondent put his hand up her shirt, as well as an occasion when he picked her up, placed her on the kitchen counter, and "squeezed" her. AS also described the last incident when respondent was inappropriate toward her. The family was having a barbeque, but AS was inside in her brothers' bedroom. Respondent walked into the bedroom and tried to pull down her pants. She told him to stop, but he did not. AS left the room and called her father to pick her up, and that was when she stopped living with respondent and Sensini. AS indicated the sexual abuse lasted for approximately six years, and that LL and EL were present in the home while most of the abuse was occurring. She said that she felt safe when her brothers were around her because respondent did not touch her when other people were there.

CS testified that he once shared a room and a bunk bed with AS. He stated that AS rarely slept in her own bed and instead shared the bottom bunk bed with CS. CS testified that, even when AS had her own bedroom, she slept with CS. CS said that he typically wore sweatpants or shorts to bed, and he was a sound sleeper. He testified regarding an incident when he was between the ages of five and seven, when he had woken up the next morning to respondent standing near his bed in his bedroom. CS recalled going to sleep with his pants on, but he noticed that he had his pants pulled down that morning. During this specific incident, CS and AS were sharing the bottom bunk bed, with CS asleep on the outer side of the bed and AS asleep on the inner side of the bed by the wall. A similar incident occurred on a different morning, except that the second time it

happened, respondent's "mouth was on [CS's] genitals." CS saw respondent's head and felt wet in his pants. His pants were pulled down. Thereafter, CS would wake up without pants on more frequently. On one occasion, CS recalled waking up with a lot of pain in his buttocks. CS ultimately sought counseling, and as a result, started writing journal entries about his experiences with respondent. CS testified that he did not disclose what happened to him previously because he did not understand what happened to him and was not ready to talk about it. CS stated that respondent being discharged from parole was not the reason he chose to disclose what respondent did to him. The trial court found, by a preponderance of the evidence, grounds to assume jurisdiction over LL, EL, and CL under MCL 712A.2b(1)(2).

A parental rights termination hearing was held on October 21, 2020. Meghan Fuller, DHHS caseworker, testified that she had observed parenting time between respondent and LL, EL, and CL, and that the visits went well. She stated that the children were happy during the visits and constantly asked for more time with respondent. Fuller also testified that respondent was appropriate with the children when supervised. EL once told Fuller that sometimes he felt respondent was nicer to him at parenting time than he was other times.

Fuller had concerns about respondent based on the prior testimony that the sexual abuse of AS and CS occurred while LL and EL were present in the house, which could have affected their mental well-being. Fuller testified that CPS received additional allegations that respondent was in a relationship with a woman (the girlfriend), who had four children ages 13, 10, 9 and 7 years old. CPS learned that respondent and the girlfriend were arranging a sleepover at respondent's house, which was alarming to Fuller because it appeared as though respondent was trying to gain access to the girlfriend's children. As a result of this investigation, a safety plan was devised to ensure that respondent was never alone with the girlfriend's children. Respondent was on parole from November 7, 2017 to November 7, 2019, and one of the terms of his parole prohibited any contact with children. Nonetheless, respondent told Fuller that he had contact with his children while he was on parole. Fuller further testified that neither Lumley nor Pollard believed that respondent had committed any wrongdoing. Moreover, LL and EL were in counseling and their counselor indicated that the children were aware that something happened between respondent and their older siblings and that it involved private parts, but they did not know the specifics. The counselor also indicated that the information to which LL and EL were privy had caused ambivalence in their relationship with respondent.

Respondent testified that he felt bonded with LL, EL, and CL. He denied that there was any truth to CS's sexual abuse allegations. He testified that CS's claims of sexual abuse were made two weeks after respondent got off parole and respondent's mother was going through a "custody issue for the boys." Respondent testified that he and his mother received threatening text messages that if she did not drop the custody case, CS was going to come forward with allegations. Respondent further testified that CS stated on multiple occasions during AS's case that respondent never did anything to him.

On cross-examination, respondent had difficulty answering questions regarding whether he sexually abused AS. Respondent initially denied that he had committed sexual misconduct toward AS until petitioner asked if he had lied under oath when he placed the factual basis for his plea on the record, to which he responded, "I guess I confessed during the plea deal." Respondent also testified that he was planning a sleepover with his girlfriend and her children. Respondent

said that although the terms of his parole prohibited any contact with children, his parole agent granted him supervised parenting time with LL, EL, and CL.

The trial court found clear and convincing evidence to terminate respondent's parental rights under MCL 712A.19b(3)(b)(i), (j), (k)(ii) and (ix), and (m). The trial court was troubled by the fact that respondent had difficulty acknowledging the sexual abuse involving AS to which he pleaded guilty, thereby calling into question respondent's credibility and his ability to address any sexually deviant behavior. The trial court also stated that respondent appeared unable to acknowledge wrongdoing without being pressured to do so. The trial court indicated that it was further troubled by respondent's plan to host a sleepover with four unrelated minors because it appeared predatory based on the evidence before the court. Therefore, the trial court concluded there was a reasonable likelihood that LL and EL would suffer injury or abuse in the foreseeable future if placed in respondent's home, and termination of respondent's parental rights to LL and EL (but not CL) was appropriate pursuant to MCL 712A.19b(3)(b)(i).

Moreover, the trial court found clear and convincing evidence that there was a reasonable likelihood, based on the conduct or capacity of respondent, that LL, EL, and CL would be harmed if they were returned to the home of respondent. Based on the testimony of AS and CS, respondent engaged in multiple acts of criminal sexual misconduct on minors. Notably, respondent was positioning himself to be overnight with more unrelated minors. Respondent's testimony showed that he did not appear to accept responsibility or have remorse for his actions. The trial court also considered emotional harm to LL, EL, and CL. The testimony of AS was that respondent had sexually abused her when LL and EL were present in the house. The trial court stated that the potential for emotional harm to LL and EL was myriad: minors could inadvertently walk in on the abuse or minors could become aware of it and have to suffer from psychological issues as they try to process the fact that their father had sexually abused a child. The trial court found that the same mental health concerns applied to CL. Therefore, the trial court held that termination of respondent's parental rights to LL, EL, and CL was appropriate pursuant to MCL 712A.19b(3)(j). For the same reasons stated above, the trial court found clear and convincing evidence to terminate respondent's parental rights to LL and EL under MCL 712A.19b(3)(k)(ii) and (ix). Respondent was convicted of CSC II. Moreover, AS's and Detective Wade's testimony detailed penetration. The trial court found that this was also ground for termination of respondent's parental rights to LL, EL, and CL under MCL 712A.19b(3)(m)(i).¹

Finally, the trial court determined that, by a preponderance of the evidence, termination of respondent's parental rights was in the best interests of LL, EL, and CL, notwithstanding the fact that LL and EL were placed with Lumley (a relative), and CL was placed with Pollard (his mother).

¹ Respondent's parental rights to EL and LL were terminated pursuant to MCL 712A.19b(3)(b)(i), (j), (k)(ii) and (ix), and (m)(i). However, respondent's parental rights to CL were terminated pursuant to MCL 712A.19b(3)(j) and (m)(i) only. The sexual abuse that led to termination of respondent's parental rights occurred when he victimized AS and CS, who are the children of Sensini, the mother of LL and EL. AS, CS, LL, and EL are half-siblings, only sharing Sensini as a mother but with different fathers. CL is the child of Pollard. CL is not biologically related to AS or CS. For this reason, only MCL 712A.19b(3)(j) and (m)(i) apply to CL.

Respondent appeared to minimize and had not accepted responsibility for his behavior, and neither Lumley nor Pollard believed that respondent had done anything wrong, despite respondent's conviction, prison sentence, and the pending warrant request for new charges.

II. STATUTORY GROUNDS

On appeal, respondent argues that the trial court clearly erred by finding statutory grounds to terminate his parental rights because petitioner failed to present clear and convincing evidence to meet its burden under MCL 712A.19b(3)(b)(i), (j), (k)(ii) and (ix), and (m)(i). We disagree.

This Court reviews for clear error the trial court's decision that a ground for termination has been proven by clear and convincing evidence. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "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 Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). In reviewing the trial court's findings of fact, this Court gives due regard to the special opportunity of the trial court to judge the credibility of witnesses. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

MCL 712A.19b(3)(b)(i) provides that the trial court may terminate the parental rights to a child if the court finds by clear and convincing evidence that the child or a sibling of the child has suffered physical injury, or physical or sexual abuse, and the parent's act caused the physical injury, or physical or sexual abuse, and the trial court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

There was ample evidence to support the trial court's finding of a statutory ground for termination of respondent's parental rights to EL and LL under MCL 712A.19b(3)(b)(i). Respondent was convicted of sexually abusing AS for approximately six years, and CS testified to additional sexual abuse perpetrated by respondent. A warrant had been submitted to the prosecutor's office regarding the abuse to which CS was subjected, and it was pending at the time of the bench trial. When describing the sexual abuse at the bench trial, AS testified that respondent put his hands inside her pants and touched her vagina, rubbed her vagina and put his hands inside the lips of her vagina, put his hands up her shirt, and tried to pull down her pants. In addition, when CS described how respondent sexually abused him, he testified that respondent pulled down CS's pants while CS was asleep, stood near CS's bed and looked at CS while CS was asleep, put his mouth on CS's genitals while CS was asleep, and caused CS pain in his buttocks. On the basis of this evidence, the trial court did not clearly err in finding by clear and convincing evidence that respondent caused the sexual abuse of EL and LL's siblings.

There was also sufficient evidence on which the trial court could conclude that there was a reasonable likelihood of abuse in the future if the children were placed in respondent's home. There was testimony that the only way to protect LL and EL was to terminate respondent's parental rights because the pattern of ongoing and repeated sexual abuse against AS and CS supported a reasonable likelihood of future abuse against LL and EL if placed with respondent. Similarly, respondent's treatment of AS and CS is probative of how he may treat the other children in the future, which also supports the trial court's conclusion. See *In re AH*, 245 Mich App 77, 84; 627

NW2d 33 (2001).² Finally, the trial court noted that respondent was arranging a sleepover with four unrelated minors, which the court opined evinced continued predatory behavior based on the evidence before the court. On the basis of this evidence, the trial court did not clearly err when it found clear and convincing evidence to terminate respondent's parental rights to LL and EL pursuant to MCL 712A.19b(3)(b)(i).

As he did in the trial court, respondent argues on appeal that CS's allegations were the result of his mother's (Lumley's) custody case involving LL and EL. He also points out that CS originally denied that anything happened to him. The trial court, however, did not find respondent's testimony to be credible because he had difficulty acknowledging the sexual abuse involving AS to which he pleaded guilty—when asked about the abuse on cross-examination, respondent initially denied that he had committed sexual misconduct toward AS until petitioner asked if he had lied under oath when he placed the factual basis for his plea on the record, to which he responded, "I guess I confessed during the plea deal." The trial court had the best opportunity to determine the credibility of the witness, and this Court defers to the trial court on issues of credibility. MCR 2.613(C); *In re Fried*, 266 Mich App at 541.

Further, the trial court did not clearly err in finding a statutory ground to terminate respondent's parental rights to CL under MCL 712A.19b(3)(j). MCL 712A.19b(3)(j) provides that a parent's rights may be terminated where "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Here, the testimonies of AS and CS show that respondent had engaged in multiple acts of sexual misconduct. Respondent was also positioning himself to host a sleepover with four unrelated minor children. Moreover, respondent's testimony showed that he did not appear to accept responsibility for his inappropriate conduct toward AS and CS or have remorse for these actions. A trial court may rely on a parent's history in determining that there was a reasonable likelihood that a child would be harmed if returned to the parent's home. *In re Archer*, 277 Mich App 71, 75-76; 744 NW2d 1 (2007).

Additionally, MCL 712A.19b(3)(j) considers both the risk of physical and emotional harm to a child. *In re Sanborn*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket Nos. 354915 and 354916); slip op at 12. The testimony of AS revealed that LL and EL were present in the house while most of the sexual abuse by respondent was happening to her. The trial court found that the potential for emotional harm to the minor children was myriad, explaining that the children could inadvertently walk in on abuse or could become aware of it and have psychological issues processing the fact that their father would sexually abuse a child. In addition, although LL and EL only had a general idea about what respondent had done, LL and EL's counselor opined that the information to which the children were privy had caused ambivalence in their relationship with respondent. The trial court found that the same mental health concerns applied to CL. Given respondent's history of sexual abuse, there was clear and convincing evidence of a reasonable likelihood that CL would be physically or emotionally harmed if returned to respondent's home.

² Respondent argues on appeal that there was no indication of sexual misconduct involving LL, EL, or CL. Although true, respondent's history of sexual abuse with other children is probative of how he may treat LL, EL, and CL in the future.

The trial court did not clearly err in finding clear and convincing evidence of a statutory ground for termination under MCL 712A.19b(3)(j). MCR 3.977(K).

Only one statutory ground must be established to support termination of parental rights under MCL 712A.19b(3). *In re Martin*, 316 Mich App 73, 90; 896 NW2d 452 (2016). Therefore, because we believe the trial court did not clearly err in finding statutory grounds for termination of respondent's parental rights under MCL 712A.19b(3)(b)(i) as to LL and EL and under MCL 712A.19b(3)(j) as to CL, we need not consider this issue any further.

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 LL, EL, and CL. We disagree.

This Court reviews the trial court's ruling that termination is in the child's best interests for clear error. *In re Hudson*, 294 Mich App at 268. "A finding is clearly erroneous 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 Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 80 (citation and quotation marks omitted). The focus of the best-interest determination is on the child, not the parent. *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). The trial court should "consider such factors as the child's bond to the parent[;] the parent's parenting ability[;] the child's need for permanency, stability, and finality[.] *Id.* (quotation marks and citation 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 701, 714; 846 NW2d 61 (2014).

A child's placement with relatives weighs against termination. *In re Olive/Metts Minors*, 297 Mich App at 43. Accordingly, if a child is placed with a relative during termination proceedings, the trial court is required to explicitly consider that factor in determining whether termination is in the best interests of the child. *Id.* "A trial court's failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *Id.*

The trial court found, by a preponderance of the evidence, that termination of respondent's parental rights was in the best interests of LL, EL, and CL. As indicated by the trial court, there was testimony that LL, EL, and CL enjoyed and looked forward to their visits with respondent. Respondent testified that he felt bonded with them. However, as stated by the trial court, the danger to the minor children, both of potential sexual exploitation and of mental or emotional injury, outweighed the consideration of any bond between respondent and LL, EL, and CL. Indeed, as the trial court stated, LL, EL, and CL "have the right to be as free as possible from the shadow that [r]espondent casts with his sexual abuse of the minors' siblings, or in the case of [CL], from the abuse of any minor child." The trial court found that the emotional and psychological effects of respondent's conduct toward AS and CS could not be overlooked. The trial court noted

the testimony that LL and EL's counselor opined that the general information about respondent's actions to which the children were privy had caused ambivalence in their relationship with respondent. The trial court also noted Fuller's testimony that EL once told Fuller that sometimes he felt respondent was nicer during parenting time than he was other times, aligning with testimony that respondent behaved appropriately when supervised.

The trial court also explicitly considered the children's relative placement. The trial court noted that respondent appeared to minimize and had not accepted responsibility for his behavior. Further, neither Lumley (LL and EL's relative placement) nor Pollard (CL's placement, his mother), believed that respondent had done anything wrong despite his conviction, prison sentence, and the pending warrant request for new charges. Therefore, the trial court found that severing the relationship between respondent and the children was necessary for the safety and mental health of the children, despite the relative placement. Further, CL was placed with his biological mother; a biological parent is not a "relative" as that term is defined in MCL 712A.13a(1)(j). *In re Schadler*, 315 Mich App at 413. The trial court therefore was not required to consider CL's placement as a relative placement for purposes of determining his best interests. *Id.* Accordingly, the trial court did not clearly err in finding that termination of respondent's parental rights was in the best interests of LL, EL, and CL.

Affirmed.

/s/ Michael F. Gadola
/s/ Kathleen Jansen
/s/ Colleen A. O'Brien