# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* A. L. MEZO, Minor.

UNPUBLISHED
August 26, 2021

No. 355869
Wayne Circuit Court
Family Division
LC No. 2020-000200-NA

Before: CAVANAGH, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court's order terminating his parental rights to ALM under MCL 712A.19b(3)(b)(*i*) (child or sibling has suffered abuse or injury caused by parent and there is reasonable likelihood that injury or abuse will occur if placed with parent), (g) (parent failed to provide proper care and custody), (j) (reasonable likelihood child would be harmed if returned to parent's home), and (k)(*ii*) (parent's abuse of child or child's sibling included criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate). We conditionally reverse and remand for further proceedings.

ALM is seven years old, and is the child of respondent and his long-term partner, ALM's mother. These proceedings commenced after at least two children accused respondent of inappropriate sexual behavior.[1] The first was BNL, who was the biological child of ALM's mother but not respondent, and who lived with her mother, ALM, and respondent. BNL reported that when she was 13 years old, respondent put his hands under her shirt and touched her breasts while they were alone. BNL reported that respondent touched her again on at least one occasion, inappropriately touching her bottom, and that respondent at some point also rubbed her vagina through her clothes. The lawyer-guardian ad litem reported that BNL had previously felt close to respondent and seen him as a "father figure." The second child to allege abuse was KM, the

[1] There were seemingly allegations made by other children mentioned in passing, but the record only clearly recounts the allegations of two children.

daughter of respondent and his ex-wife.[2] KM lived with respondent's ex-wife. KM, who was fifteen at the time of her report, stated that when she was between five and seven years old, respondent asked her to touch his penis. KM refused, threatening to tell her mother if respondent did it again, and nothing further happened. Respondent admitted to touching BNL's breasts under her clothes on one occasion, but denied all the other allegations against him.

Respondent pleaded *nolo contendere* to the existence of facts establishing jurisdiction and statutory grounds for termination, and the trial court terminated respondent's rights to ALM after determining that doing so was in ALM's best interests. Respondent now appeals as of right.

## I. ALM'S BEST INTERESTS

Respondent first argues that the trial court erred when it concluded that termination was in ALM's best interests. "[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 76, 90; 836 NW2d 182 (2013). This Court reviews "for clear error the trial court's determination regarding the children's best interests." *In re White*, 303 Mich App 701, 713, 713; 846 NW2d 61 (2014). Clear error exists when this Court is "definitely and firmly convinced that [the trial court] made a mistake." *Id*. at 709-710. When reviewing the evidence, this Court gives deference to the trial court's determination of a witness's credibility. *In re Schadler*, 315 Mich App 406, 408-409; 890 NW2d 676 (2016).

The best-interest phase is focused on the child, not the parent. *In re Trejo*, 462 Mich 341, 355-56; 612 NW2d 407 (2000), superseded in part by statute on other grounds as stated in *In re Moss*, 301 Mich App at 83. In determining whether termination is in a child's best interests, the trial court

> should consider a wide variety of factors that may include 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. 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 713-714 (quotation marks and citation omitted).]

The court may also consider psychological evaluations, the child's age, and a parent's history. *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009).

On appeal, respondent suggests that greater weight should have been given to the evaluation of his expert witness, Jennifer Zoltowski, who completed an assessment of respondent's risk of reoffending in connection with a related criminal case. Zoltowski testified that respondent's

[2] A separate petition was filed seeking termination of respondent's rights to KM, but that petition was ultimately denied.

risk of committing another criminal sexual offense during his lifetime was in the 7% to 11% range, and that denial of some of the allegations of abuse did not indicate a higher risk of reoffending.

The trial court did not give Zoltowski's testimony much weight, in part because it found that Zoltowski's evaluation was based largely on respondent's self-report. There was support in the record for this concern. For example, Zoltowski testified that having substance abuse issues would increase a person's risk level, and while respondent denied drug use to Zoltowski, he was found to have severe "Cannabis Use Disorder" in his clinic evaluation because he used marijuana daily. The trial court also gave Zoltowski's testimony less weight because Zoltowski did not specifically evaluate ALM's best interests, and did not get information from family members other than respondent. The trial court, as the finder of fact in this matter, is entitled to determine "the weight to be accorded the testimony of" an expert, see *City of Detroit v Larned Assoc*, 199 Mich App 36, 41; 501 NW2d 189 (1993), and such determinations are given deference, see *SSC Assoc Ltd Partnership v Gen Retirement Sys of City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). See also *In re Schadler*, 315 Mich App at 408-409.

In addition to Zoltowski's evaluation, the trial court reviewed a clinic evaluation, which recommended termination of parental rights because of the "probability of the sexual abuse occurring again" and respondent's "very poor" chance of "making substantial changes." The clinic evaluation emphasized respondent's denial of many of the allegations. The trial court highlighted the clinic evaluation finding that BNL was afraid respondent would abuse her again, or would abuse ALM. The case evaluation also contained information tending to cast doubt on the ability or willingness of ALM's mother to protect ALM given that she took no action when respondent initially admitted to her that he touched BNL inappropriately. Overall, the trial court's assessment that respondent presented a significant risk to ALM cannot be said to be clearly erroneous.

Respondent argues that his bond with ALM should have been considered by the trial court. While respondent is correct that this factor is an appropriate consideration in a best-interest analysis and that the trial court did not consider it, he has not established that this failure requires reversal. He has not produced any caselaw stating that a court *must* consider the bond between parent and child when making a best-interest determination, nor does anything in the record suggest that the trial court's decision was otherwise clearly erroneous. The trial court was centrally concerned with ALM's safety and well-being, and this Court has noted that a bond between a parent and a child does not necessarily prevent a parent from sexually exploiting and abusing the child. See *In re Mota*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 351830); slip op at 12. Moreover, this Court has affirmed a lower court's determination that termination was in a child's best interests based on the possibility of future harm to the child without reference to the child's bond with the parent. See *In re VanDalen*, 293 Mich App 120, 142; 809 NW2d 412 (2011).

Respondent also emphasizes his voluntary compliance with therapy and psychiatric services. Yet the trial court considered respondent's participation in therapy and decided to give it little weight because he sought therapy in relation to this matter only after BNL came forward reporting abuse. Respondent has not established that this was error.

The trial court found that respondent's actions had already "caused turmoil" in ALM's life, and that there was "a strong likelihood that [respondent] will assault his own child in the future." The trial court clearly gave significant weight to its assessment that respondent was likely to abuse

ALM in the future in its best-interest analysis. The trial court is entitled to give strong weight to the children's need for safety and stability. See, e.g., *In re VanDalen*, 293 Mich App at 142. Moreover, under the doctrine of anticipatory neglect, the trial court was free to consider how respondent treated BNL and KM in considering how respondent was likely to treat ALM in the future. See *In re Mota*, ___ Mich App at ___; slip op at 12 (applying anticipatory neglect doctrine to case in which the respondent abused a child that the respondent "had been raising . . . for a number of years as if she were his daughter").

Overall, given the evidence in the record and the regard owed to the trial court's credibility determinations, *In re Schadler*, 315 Mich App at 408-409, we are not definitely and firmly convinced that the trial court made a mistake by finding that termination was in ALM's best interests, see *In re White*, 303 Mich App at 709-710.

## II. NOTICE UNDER ICWA AND MIFPA

Respondent informed the trial court that he believed he had significant Native American heritage, but did not know the tribe. The trial court ordered that notice be made to the Bureau of Indian Affairs (BIA), and that proof of the notice be given to counsel for petitioner. The record does not contain copies of any notice or proof of receipt.

Because respondent did not preserve this issue, our review is for plain error affecting substantial rights. See *In re Beers*, 325 Mich App 653, 677; 926 NW2d 832 (2018).

The notice provisions of ICWA require that a tribe be notified "when there are sufficient indications that [a] child may be an [American] Indian child . . . ." *In re Morris*, 491 Mich 81, 100; 815 NW2d 62 (2012). If the child's tribe cannot be determined, notice must be sent to the BIA. *Id.* at 124 (appendix to opinion). Similar notice requirements apply under MIFPA. See MCL 712B.9.

In *In re Morris*, 491 Mich at 111-112, our Supreme Court noted that "assertions . . . that notice had been sent" were not sufficient when the record lacked "copies of the actual notice purportedly sent," and did not "include any original or copy of a registered mail return receipt, which is necessary to show not only that notice was received, but also to determine when the 25 USC 1912(a) waiting period begins." The Court noted that a lack of such documentation made it "impossible to discern from the record . . . whether notice was actually sent, to whom it was sent, and whether the notices were received by the appropriate recipients." *Id.* at 112. The Court held that "trial courts have a duty to ensure that the record includes, at minimum, (1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice." *Id.* at 114.

The only evidence that the BIA was notified of ALM's possible Native American heritage was the CPS worker's testimony that notice was sent and that he personally spoke with someone at the BIA. There is no documentary evidence in the record to show that notice was sent. Petitioner admits that the record does not contain sufficient proof of notice to the BIA, and that it was an obvious error for the trial court to proceed without documentary evidence of notification to the BIA.

In *In re Morris*, our Supreme Court held that "the proper remedy for ICWA-notice violations is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue." *Id*. at 122. This Court has applied this same procedure to MIFPA issues. See *In re Beers*, 325 Mich App at 678. Under this procedure, the trial court should "first ensure that notice is properly made to the appropriate entities." *In re Morris*, 491 Mich at 123. If there is no response "within the allotted time," and ICWA and MIFPA are found not to apply, then the trial court's "order[] terminating parental rights [is] reinstated." *Id.*

## III. CONCLUSION

We conditionally reverse the trial court's order terminating respondent's parental rights and remand for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Colleen A. O'Brien
/s/ James Robert Redford