

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
November 3, 2011

In the Matter of VOSS/BECKER, Minors.

No. 302500
Berrien Circuit Court
Family Division
LC No. 2009-000054-NA

In the Matter of L. VOSS, Minor.

No. 302501
Berrien Circuit Court
Family Division
LC No. 2009-000054-NA

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother T. Kolka appeals as of right from the trial court's order terminating her parental rights to her two children, L. Voss and P. Becker, under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j), and respondent-father J. Voss appeals as of right from the same order terminating his parental rights to his child, L. Voss, under MCL 712A.19b(3)(k)(ii). We affirm.

A. BACKGROUND

The children were removed from the home that respondent-mother shared with S. Becker, the father of her younger son.¹ The petition alleged that respondent-mother and S. Becker abused heroin and neglected the children. To address these concerns, the treatment plan for respondent-mother required that she complete substance-abuse treatment, obtain and maintain suitable housing and a legal source of income, and complete parenting classes.

¹ S. Becker's parental rights were also terminated, but he has not appealed.

Shortly after the children were placed in foster care, the foster-care parents expressed some concerns regarding L. Voss's behavior. Donna Veverka, from L. Voss's first placement, testified that she twice found L. Voss, then four years old, standing behind her three-year-old son, who had pulled down his pants after being told to do so by L. Voss. After the first incident, Veverka spoke to L. Voss, and he told her, without any prompting, that "my dad and my grandpa poke me in the butt." The second time, Veverka's son told her that L. Voss was trying to poke him in the butt. After being notified of these incidents, the caseworker removed L. Voss from Veverka's home and placed him with Dorothy Mimes. Mimes also reported some unusual behavior by L. Voss. She testified that she once saw L. Voss pick up a doll that her goddaughter had brought, open up the doll's legs, and lick the doll between the legs before throwing it. She also testified that, during the first few months that L. Voss was placed with her, he woke up screaming two or three times a week, and when she would ask him what was wrong, he replied, "Jay-Dad was gonna get me, because I was being naughty," while covering up his private area.

Based on these incidents, the caseworker referred L. Voss to a sexual-abuse assessment with Robin Zollar, who was qualified as an expert in social work with specific knowledge and experience in sexual-assault, abuse, and exploitation assessments of minors. Zollar testified that she helped develop the forensic-interview process for evaluating children for sexual abuse. Zollar interviewed L. Voss on three separate occasions and felt confident that he could distinguish between the truth and a lie and knew that telling a lie was wrong. At one meeting, Zollar asked L. Voss if he liked "Jay-Dad," whom he had identified as his real dad. L. Voss responded by stating, "he won't do it anymore." When asked what he did, L. Voss responded "he poked my butt with his finger" and "it hurt a lot." When Zollar asked him if there was anything else Jay-Dad did that he did not like, L. Voss replied, "he licked my pee-pee . . . with his tongue." Zollar asked him if anything else happened, and L. Voss told her, "I had to lick his pee-pee." When Zollar asked him to identify his "pee-pee," L. Voss pointed to his penis and then stated, without prompting, that Jay-Dad had a big "pee-pee." He also stated that Jay-Dad had "squished my pee out with his hand," and when Zollar asked how Jay-Dad did this, L. Voss "made a circle with his index finger and his thumb, and showed back and forth movement . . . [with] squeezing as he [went] back and forth." L. Voss also told Zollar that Jay-Dad hit him.

At their last meeting, L. Voss again told Zollar that Jay-Dad poked his butt and smacked him in the face and "licked his pee-pee and . . . it felt bad." When Zollar questioned the truthfulness of his statements by expressing doubt, L. Voss got very serious and mad at Zollar, telling her "he really did that." When she asked what he did, he explained, "he put his pee-pee in my mouth and pee came out."

Zollar concluded that L. Voss was credible and that his statements substantiated the allegations of sexual abuse against respondent-father because (1) they were consistent with statements made by other children who have been sexually abused; (2) they did not appear to be coached, given that there was a lot of detail in the statements; (3) they were fairly consistent with his general language skills; (4) he had sexual knowledge that was not appropriate for his developmental level and his physical age; (5) he got mad when she challenged him; and (6) he was distressed when he spoke about the abuse.

In connection with the sexual-abuse allegations, a Michigan State Police trooper interviewed respondent-father. Respondent-father denied the allegations and, in an attempt to

explain L. Voss's comments, stated that L. Voss had seen him naked when he helped potty-train him and when they occasionally took showers together. The trooper concluded that respondent-father was credible and there was no inappropriate sexual contact between respondent-father and L. Voss. Respondent-father took a polygraph test following his interview, but the result was inconclusive.

B. TERMINATION HEARING

Before the termination hearing, respondent-father's counsel argued against admission of any testimony regarding L. Voss's statements concerning sexual abuse on the basis that the statements were hearsay and not credible, and lacked any corroborating evidence. The parties agreed, however, for purposes of efficiency, to allow the witnesses to testify, with the court retaining the right at the end of the hearing to decide whether the evidence was admissible and could be considered in its decision. At the end of the termination hearing, the court concluded that all of the hearsay statements concerning the sexual abuse were admissible.

Kristen Harte, the caseworker in this case, testified that neither respondent had adequately complied with their respective treatment plans. Respondent-mother had failed to provide any documentation showing that she had addressed her substance abuse, which was the main concern regarding respondent-mother. She never completed an assessment that would indicate what services were best suited for her. Although she submitted required weekly drug screens for the first two months after the children were removed from her care, all of these screens were positive for cocaine. Respondent-mother admitted that, after the children were removed, she used more cocaine because she did not have the responsibility of caring for the children. She submitted only a single negative screen, after she had been released from jail on drug-possession charges.

Respondent-mother did not attend any of the visits petitioner had scheduled and at the termination hearing had not seen the children for more than a year.² Respondent-mother did not attend a single parenting class, despite being referred to two sets of parenting classes. She did not have any consistent employment or stable housing. Because of outstanding warrants for her arrest, she refused to tell Harte where she was living. Respondent-mother did not appear at the termination hearing, and she attended only a single proceeding.

Respondent-father completed parenting classes and submitted negative drug screens. However, he never completed individual counseling, to which he had been referred to address the sexual abuse. Harte was particularly concerned because respondent-father continued to deny the sexual-abuse allegations. Both Harte and L. Voss's counselor were opposed to L. Voss's return to respondent-father's care.

² Respondent-mother may have seen the children once at their grandmother's home during this year, but petitioner did not approve this visit.

Respondent-father testified on his own behalf, contending that he had had only limited contact with L. Voss since he and respondent-mother separated when L. Voss was six months old. However, he loved L. Voss and was prepared to care for him.

At the conclusion of the termination hearing, the trial court terminated both respondents' parental rights to their respective children.

C. ANALYSIS

On appeal, respondent-mother contends that the evidence did not support termination of her parental rights. This Court reviews the court's findings in an order terminating parental rights for clear error. MCR 3.977(K); *In re Rood*, 483 Mich 73, 90; 763 NW2d 587 (2009); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Respondent-mother's failure to comply with any aspect of her treatment plan and her failure to visit the children on any of the scheduled visitations during the entire time the children were in the court's care support both the statutory grounds cited and the court's finding that termination of her parental rights was in the children's best interests. See, e.g., *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003) (a parent's failure to comply with the treatment plan is evidence of the failure to provide proper care and custody for the child). Although respondent-mother sporadically contacted the caseworker and indicated an interest in complying with services, she never followed through. Therefore, the trial court did not clearly err in terminating respondent-mother's parental rights to both children.

Respondent-father challenges the admission of L. Voss's hearsay statements concerning the sexual abuse. This Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). An abuse of discretion occurs when the outcome falls outside the range of principled outcomes. *Id.*

The prosecutor moved for admission of the hearsay statements pursuant to MCR 3.972(C)(2), which provides, in pertinent part:

Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation . . . 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.

Determining whether circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness requires consideration of the totality of the circumstances surrounding the making of the statement. *In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007). These

circumstances “may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate.” *Id.*

Although the trial court did not articulate its reasoning for allowing the hearsay testimony, consideration of the evidence supports the conclusion that the totality of the circumstances provided adequate indicia of trustworthiness. Like the child victim in *Archer*, L. Voss described to Zollar the abuse he endured using information not commonly known among four-year-olds unless they had been victims of such abuse, and he used age-appropriate terminology. His statements to Zollar were corroborated by testimony from his foster-care guardians, who described his inappropriate sexual behaviors. The totality of the circumstances, including the nature of L. Voss’s statements, Zollar’s qualifications, and the inappropriate sexual behaviors witnessed by his foster families, supported the trial court’s finding that the hearsay statements were admissible under MCR 3.972(C)(2). Thus, the trial court did not abuse its discretion when it allowed L. Voss’s hearsay statements to be admitted into trial through the testimony of Zollar, Veverka, and Mimes.

Respondent-father also challenges termination of his parental rights under MCL 712A.19b(3)(k)(ii). This statutory ground requires clear and convincing evidence that “[t]he parent abused the child . . . and the abuse included . . . [c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.” The testimony from Zollar, Veverka, and Mimes supported the allegations that respondent-father had sexually abused L. Voss. Respondent-father challenges the statements on the bases that L. Voss could not describe when the abuse occurred and respondent-father did not see L. Voss very often before the instant proceedings, during which time L. Voss could have been coached into making the statements. However, Zollar testified that even if L. Voss had not seen his father for two years, he could have experienced a level of trauma that would nonetheless make his memory of events accurate. Zollar also felt that even though L. Voss was unable to tie the sexual-abuse incidents to any particular event or time, this did not discredit the reliability of his statements because, as a consequence of his young age, he could not relate the incidents to any event in his life; he was not yet in school and he had been placed with different people in a less-than-orderly progression. The trial court did not clearly err when it terminated respondent-father’s parental rights and found that termination of respondent-father’s parental rights was in the child’s best interests.

Affirmed.

/s/ Peter D. O’Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering