

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 21, 2013

In the Matter of O. M. IDE, Minor.

No. 310527
Oakland Circuit Court
Family Division
LC No. 11-791601-NA

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Respondent E. Ide appeals by right from the trial court's order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii). We affirm.

The Department of Human Services (DHS) petitioned the trial court to take jurisdiction of the minor child and to terminate respondent's parental rights to the child at the initial dispositional hearing pursuant to MCR 3.977(E), based on allegations that respondent had repeatedly sexually abused the child's half-sibling when the sibling was between four and seven years of age. Following a bench trial, the trial court determined that all four statutory grounds for termination were established by clear and convincing evidence. The trial court thereafter conducted a hearing to determine the child's best interests and found that termination of respondent's parental rights was in the child's best interests. Accordingly, the court terminated respondent's parental rights.

On appeal, respondent first challenges the introduction of certain statements by the child's half-sibling to her mother regarding respondent's sexual abuse. Because there was no objection to the challenged statements at trial, this issue is unpreserved and our review is limited to plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

MCR 3.972(C)(2)(a) provides that a child's statement describing sexual abuse is admissible "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." Although the trial court had previously conducted a pretrial hearing to determine the admissibility of various statements made by the sibling to her mother and to a forensic interviewer during a later CARE House interview, the statements at issue on appeal were made after the CARE House interview ended and were not the subject of testimony at the pretrial hearing. To the extent that MCR 3.972(C)(2)(a) provides the sole basis for admitting the sibling's post-interview statements to her mother, the failure to hold a pretrial hearing concerning the admissibility of the statements

renders their admission at trial plain error. However, respondent has not established that the statements affected his substantial rights. Had a timely objection been made, the trial court could have taken appropriate steps to remedy the lack of a preliminary foundational hearing. Where there is reason to conclude that the DHS would have been able to satisfy the foundational requirements for admissibility of the evidence if a timely objection had been made, the denial of appellate relief does not result in a miscarriage of justice. See *In re Snyder*, 223 Mich App 85, 91-93; 566 NW2d 18 (1997) (discussing former MCR 5.972(C)(2)).

In this case, the trial court had already found after a pretrial hearing that the sibling's previous statements to her mother and during a CARE House interview were admissible under MCR 3.972(C)(2)(a). Those statements indicated that the sibling had been subjected to repeated sexual abuse, which included respondent putting his "weiner [sic] in her butt." The sibling's statements during the CARE House interview indicated that respondent had, on one occasion, engaged in penetration, or at least attempted penetration or an assault with intent to penetrate, by trying to put his "thing" in the sibling's crotch until he was told that it hurt and that he should stop.¹ Although the sibling's post-interview statements regarding respondent putting his "weiner [sic] in her mouth" and inserting his finger in her "butt" were not the subject of the pretrial hearing, the trial record contains sufficient indicia of trustworthiness to support the admissibility of those statements. In addition, contrary to what respondent argues, the additional post-interview statements were not necessary for the DHS to establish any of the statutory grounds for termination. Because the record indicates that a sufficient foundational basis for admitting the challenged statements could have been established if respondent had timely objected to the challenged testimony, and that the challenged statements were not decisive of the trial court's determination that a statutory ground for termination was established, the introduction of the statements at trial in the absence of the required pretrial hearing did not affect respondent's substantial rights. *Utrera*, 281 Mich App at 8.

Respondent next argues that his appointed counsel was ineffective for failing to object to the sibling's post-interview statements. Principles of effective assistance of counsel developed in the context of criminal law apply by analogy to a child protection proceeding. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). Because respondent did not raise an ineffective assistance of counsel issue in an appropriate motion for rehearing or a new trial pursuant to MCR 3.992, our review of this issue is limited to mistakes apparent from the record. *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced respondent that it denied him a fair trial. *In re CR*, 250 Mich App at 198. To establish prejudice, respondent must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

¹ "Sexual penetration" for purposes of criminal sexual conduct is defined as "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." MCL 750.520a(r).

It is not apparent from the record why counsel did not object to the admissibility of the statements in the absence of a pretrial hearing. Counsel may have determined that a timely objection would have afforded the trial court with an opportunity to conduct the preliminary foundational hearing and resulted in a ruling admitting the statements, see *In re Snyder*, 223 Mich App at 92, and concluded that pursuing such relief would be futile. Counsel need not pursue futile objections. *Brown*, 279 Mich App at 142. But even if counsel's failure to object fell below an objective standard of reasonableness, for the reasons previously discussed, respondent has not established a reasonable probability that the result of the proceeding would have been different if counsel had objected. Accordingly, respondent's ineffective assistance of counsel claim cannot succeed.

Respondent next argues that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence. "A petitioner must establish by clear and convincing evidence at least one statutory ground for termination of parental rights." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). We review the trial court's findings for clear error. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). Because respondent's parental rights were terminated at the initial dispositional hearing, the DHS was required to establish a statutory ground for termination by legally admissible evidence. MCR 3.977(E)(3)(b).

The principal evidence in support of termination was respondent's sexual abuse of his child's half-sibling. Evidence was also introduced that respondent's child exhibited sexual acting out behavior that mimicked some of respondent's conduct toward the child's sibling. Contrary to respondent's argument on appeal, § 19b(k)(ii) does not require proof of actual penetration. Rather, this statutory ground permits termination where a parent has abused a child's sibling and the abuse included "[c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate." The legally admissible evidence introduced at the trial clearly and convincingly supports the trial court's determination that this statutory ground was established, even without considering the evidence of the sibling's statements after the CARE House interview.

In addition, the trial court properly applied the doctrine of anticipatory neglect to find that § 19b(3)(b)(i) was established. This statutory ground is applicable to a respondent-parent who sexually abuses the sibling of a child who is the subject of a child protection proceeding. *In re Jenks*, 281 Mich App 514, 517-518; 760 NW2d 297 (2008). Under the doctrine of anticipatory neglect, how a parent treats one child is probative of how he or she may treat other children. *In re Hudson*, 294 Mich App at 266. This doctrine is applicable even where abuse is directed at a child other than the respondent's own child. *In re Powers*, 208 Mich App 582, 592-593; 528 NW2d 799 (1995), superseded by statute on other grounds in MCL 712A.19b(3)(b)(i). Although a respondent is free to argue that he perceived one child differently than another child, *In re Hudson*, 294 Mich App at 266, the evidence in this case indicated that respondent was functioning in a parental role to his child's half-sibling at the time of the sexual abuse. Although respondent's child is a different gender than his sibling, considering the duration of respondent's sexual abuse, the nature of the abuse committed by respondent, and the evidence that respondent's child was approaching the age of the sibling when respondent began abusing the sibling, the trial court did not clearly err in determining that § 19b(3)(b)(i) was established by clear and convincing legally admissible evidence.

Because only one statutory ground for termination is required and §§ 19b(3)(b)(i) and (k)(ii) were both established by clear and convincing evidence, it is unnecessary to determine whether termination was also warranted under §§ 19b(3)(g) and (j). Cf. *In re Jenks*, 281 Mich App at 518 n 3.

Lastly, respondent argues that the trial court erred in determining that termination of his parental rights was in the child's best interests. We disagree. Pursuant to MCL 712A.19b(5), once the court finds a statutory ground for termination, it shall order termination of parental rights if it finds "that termination of parental rights is in the child's best interests[.]" A trial court may consider the entire record in evaluating a child's best interests. *In re Trejo Minors*, 462 Mich 341, 356; 612 NW2d 407 (2000). A child's placement with his or her family is a factor the court must consider. *In re Mason*, 486 Mich 142, 161 n 11; 782 NW2d 747 (2010); *In re Olive/Metts*, 297 Mich App 35, 43; 823 NW2d 144 (2012). Other relevant factors include the child's bond with the respondent, the respondent's parenting ability, and the child's need for permanency, stability, and finality. *In re Olive/Metts*, 297 Mich App at 43. We review the trial court's best interests decision for clear error. MCR 3.977(K); *In re JK*, 468 Mich at 209; *In re Hudson*, 294 Mich App at 264.

Contrary to what respondent argues, the record indicates that the trial court explicitly considered the child's placement with his mother in its evaluation of the child's best interests. Because a child's need for stability and finality are appropriate considerations, we reject respondent's argument that the trial court's consideration of potential future events and, in particular, how the death of the child's mother could affect the child's custody, was improper. Likewise, it was not improper for the court to consider the uncertainty arising from the fact that criminal charges against respondent for his sexual abuse of the child's sibling were still pending at the time of the termination proceeding. We reject respondent's argument that the court was required to delay a termination decision until the outcome of respondent's criminal case.

The trial court appropriately considered respondent's psychological evaluation, which contained a poor prognosis for respondent's successful treatment, the seriousness of respondent's sexual abuse, and the risks to respondent's own child. As the trial court indicated, given the evidence presented, it is difficult to envision a circumstance where respondent could be trusted to provide appropriate and nurturing care for his child in the foreseeable future. Considering all of the circumstances, the trial court did not clearly err in finding that termination of respondent's parental rights was in the child's best interests.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood