

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TENNYSON DESIRE JELINEK,
and KYLIE WHITE, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CASEY JELINEK,

Respondent-Appellant,

and

AMBER T. EDWARDS,

Respondent.

UNPUBLISHED

May 17, 2005

No. 258209

Calhoun Circuit Court

Family Division

LC No. 01-001359

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Respondent Casey Jelinek appeals as of right from an order terminating his parental rights to his minor children, Tennyson Desire Jelinek and Kylie White, pursuant to MCL 712A.19b(3)(b)(i), (g), (j), and (k)(ii) following allegations that he sexually abused his daughter, Alexandra von Jelinek. We affirm.

I. Facts and Procedural History

Tennyson (who was eleven years old at the time of the initial dispositional hearing) and Kylie (who was nine) lived with respondent, respondent's girlfriend, Laura Gaskell, and her daughter, Breana Gaskell (who was also nine). Tennyson and Kylie were placed with respondent after being removed from the care of their mother, Amber T. Edwards, for neglect. Alexandra (who was nine years old) lived with her mother, Katherine Butler, and spent some weekends in respondent's home. Following a weekend visit in early 2004, Breana told Ms. Butler that respondent sucked and bit her nipple during two previous visits. Ms. Butler reported the

allegations and Breana told investigating officers and case workers that respondent also digitally penetrated her vagina and rectum during prior visits.¹ She asserted that the sexual abuse occurred in the girls' bedroom and that Tennyson witnessed these acts. She further asserted that Tennyson told her that respondent sexually abused her as well.

Although criminal charges were never brought against respondent, the Family Independence Agency (FIA) petitioned the court to take jurisdiction over Tennyson and Kylie and immediately took them into care.² Alexandra was left in Ms. Butler's care. The FIA subsequently petitioned for the termination of respondent's parental rights over Tennyson, Kylie, and Alexandra. An adjudication trial was conducted before a jury. The jury determined, based on a preponderance of the evidence, that the court should take jurisdiction over Tennyson and Kylie. The trial court subsequently terminated respondent's rights to all three girls after taking additional evidence at the initial dispositional hearing on August 17, 2004, and finding that grounds for termination were established by clear and convincing evidence. This appeal followed.³

II. Termination of Parental Rights

Respondent contends that statutory grounds for the termination of his parental rights to Tennyson and Kylie have not been established. A trial court must terminate a party's parental rights when at least one statutory ground for termination has been established by clear and convincing evidence unless it is determined that termination is clearly not in the children's best interests.⁴ We review the trial court's determination whether to terminate for clear error.⁵ The subsections of MCL 712A.19b(3) under which respondent's parental rights to Tennyson and Kylie were terminated provide:

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

* * *

¹ A subsequent medical examination showed no evidence of abuse.

² Breana was moved to a relative's home in response to FIA concerns.

³ Respondent is not challenging the termination of his parental rights over Alexandra in this appeal.

⁴ MCR 3.977(G)(3); MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 352-353; 612 NW2d 407 (2000).

⁵ *Trejo*, *supra* at 356-357; *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There 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.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.^[6]

During the adjudication trial, Alexandria testified that respondent sucked and bit her nipple during her last visit and on a previous visit. She also testified that, during prior visits, respondent digitally penetrated her vagina and rectum while rubbing lotion on her. Alexandria indicated that respondent told her not to tell her mother about these incidents. Alexandria testified that Tennyson witnessed previous incidents of sexual abuse. She asserted that when she told Tennyson about the abuse, Tennyson admitted that respondent had digitally penetrated her and sucked on her chest in the past. Tennyson, however, denied on the stand that respondent ever sexually abused her or that she witnessed respondent abuse Alexandria. Tennyson testified that Alexandria told her that respondent gave her a "hickey" on her chest, but that Alexandria had no such mark. Tennyson did testify that respondent still rubbed lotion on her and that she thought she was old enough to do this for herself. Both Tennyson and Kylie told a psychologist that Alexandria was lying, denied that respondent had sexually abused them, and indicated their desire to remain with respondent.⁷ Breana testified at the adjudication trial that, when the girls were left alone with respondent, he would take Alexandria and Tennyson upstairs alone. She and Kylie would be punished if they left the couch during this time.

The FIA presented psychologist Randall Haugen who testified generally about sexual abuse.⁸ Dr. Haugen testified that victims of sexual abuse are often embarrassed and hesitant, as Alexandria was during their interview. Over respondent's objection, Dr. Haugen testified that many victims still love the perpetrator. He testified that many perpetrators transition from

⁶ MCL 712A.19b(3).

⁷ Tennyson told the psychologist that her mother's boyfriend had sexually abused her, but the psychologist doubted the truthfulness of this allegation.

⁸ Although Dr. Haugen had interviewed the children, he did not testify regarding their particular mental states.

grooming, such as applying lotion, to sexual abuse and have a second child present to desensitize that child to the act. In a multiple victim situation, it is possible that one victim would raise allegations of abuse while another would deny that abuse occurred. Dr. Haugen also testified that, after age four, a child is unlikely to form “memories” based on the questions and suggestions of others.

Respondent denied the allegations against him. He admitted that he rubbed lotion on the girls’ lower legs and arms as they all suffered from dry skin or eczema. He also admitted to giving Alexandria a “blowfish” on her stomach during her last visit. When Alexandria described the “blowfish” as a “hickey” to Tennyson, respondent told Alexandria not to tell Ms. Butler because it was untrue. Ms. Gaskell corroborated respondent’s testimony by asserting that he was never alone with Alexandria on the night in question.

Respondent presented additional evidence at the initial dispositional hearing. Respondent presented the testimony of police officer Eric Andrews who initially spoke to Alexandria about the allegations. Officer Andrews’ report indicated that it was possible that Alexandria was exaggerating and that Ms. Butler did not want to press charges. Detective Lavern Brann testified that Alexandria told an investigating officer in his presence that the alleged digital penetration occurred more than a year earlier.⁹ He testified that charges were never brought because Alexandria’s allegations could not be substantiated. Finally, psychologist Andrew Barclay testified that respondent did not meet the profile of a child molester.

Based on this testimony, a jury determined by a preponderance of the evidence that the court should take jurisdiction over Tennyson and Kylie. The trial court, after reviewing additional evidence, ratified the jury’s decision and found that grounds for termination had been established by clear and convincing evidence. Without medical evidence to substantiate Alexandria’s allegations of abuse, the issue turns on the credibility of the witnesses. The jury and the trial court both determined, after observing the testimony of all the witnesses, that Alexandria’s story was credible. We will not disturb the assessment of two separate finders of fact regarding witness credibility.¹⁰ We also note that it is not fatal to the FIA’s petition that respondent was never charged with sexual abuse. Such allegations must be proven by the higher “beyond a reasonable doubt” standard in a criminal trial, but need only be established by a preponderance of the evidence in an adjudication trial and by clear and convincing evidence to establish grounds for termination. The purpose of the two proceedings are also quite different; a child protective proceeding is concerned with the welfare of the child, not the punishment of the parent.¹¹

Furthermore, the trial court properly determined that termination was not contrary to the children’s best interests. The evidence reveals that Tennyson and Kylie love and are bonded with respondent and that termination of his parental rights would cause them anxiety. Termination did not provide immediate permanence for the children because their mother was

⁹ Alexandria told others that all of the incidents of abuse occurred in the prior two months.

¹⁰ *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

¹¹ See *In re Unger*, 264 Mich App 270, 278, 280-281; 690 NW2d 495 (2004).

still unable to care for them. However, in light of the determination by the jury and the trial court that respondent sexually abused Alexandria and that Tennyson and Kylie were at risk of similar harm in his home, returning the children to his care would not serve their best interests.

III. Ineffective Assistance of Counsel

Respondent also asserts that he was denied the effective assistance of counsel at the adjudication trial.¹² Respondent argues that: (1) counsel admitted at the outset of the trial that he was unprepared; (2) counsel failed to bring a motion in limine prior to the adjudication trial to limit the scope of Dr. Haugen's general testimony regarding victims and perpetrators of sexual abuse; and (3) counsel failed to present witnesses to impeach Alexandria's testimony at the adjudication trial. Counsel waited to present these witnesses until the initial dispositional hearing and the trial court noted that the probative value of the testimony was greatly reduced.

A respondent in a proceeding to terminate parental rights has a due process right to the effective assistance of counsel.¹³ "[T]he principles of ineffective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings."¹⁴ Effective assistance of counsel is presumed and a respondent bears a heavy burden to prove otherwise.¹⁵ To establish ineffective assistance of counsel, a respondent must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.¹⁶ A respondent must overcome the strong presumption that counsel's performance was sound trial strategy.¹⁷

Counsel's statement that he was unprepared to proceed with the adjudication trial standing alone does not establish that counsel was ineffective. A review of the record shows that counsel thoroughly cross-examined Alexandria, objected to the general nature of Dr. Haugen's testimony on the grounds of relevance, and thoroughly cross-examined Dr. Haugen. Furthermore, several witnesses did impeach Alexandria's testimony at the adjudication trial,

¹² Respondent was represented by another attorney from the same firm at the initial dispositional hearing and is not challenging his performance.

The adjudication trial was conducted pursuant to MCR 3.977(G). The trial was held before a jury, only admissible evidence was allowed, and the standard of proof was by a preponderance of the evidence, rather than clear and convincing. Although petitioner requested termination before the adjudication trial, the trial court did not find clear and convincing evidence that the statutory grounds for termination were established until it reviewed the case service plans and other evidence submitted at the initial dispositional hearing.

¹³ *Reist v Bay Circuit Judge*, 396 Mich 326, 348-349; 241 NW2d 55 (1976).

¹⁴ *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001); quoting *In re EP*, 234 Mich App 582, 597-598; 595 NW2d 167 (1999).

¹⁵ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

¹⁶ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

¹⁷ *Id.* at 600.

including Ms. Gaskell, Tennyson, Kylie, respondent's mother, and the physician who initially examined Alexandra. Although the trial court indicated that respondent's failure to present the testimony of investigating officers until the initial dispositional hearing reduced its probative value,¹⁸ the trial court stated that its ultimate determination was based primarily upon the testimony of Alexandra and respondent. Accordingly, it is unlikely that these claimed errors affected the outcome of respondent's adjudication trial.

There is also no indication in the record that Dr. Haugen's testimony would have been limited if counsel filed a motion in limine rather than objecting during trial. Dr. Haugen's testimony was not hearsay and was relevant to the issues in this case. Counsel is not required to bring meritless motions.¹⁹ Furthermore, it does not appear that the trial court relied heavily on this testimony, as it did not comment on Dr. Haugen's testimony in the termination opinion, but did comment on the testimony of several other witnesses.

IV. Adjournment

Respondent contends that the trial court improperly denied his request for adjournment of the adjudication trial when counsel stated that he was unprepared to proceed. Counsel stated that he had been consumed during the past four days by a trial in Ingham County Circuit Court and was expected to be in that court the next day. Short adjournments are allowed in child protective proceedings for good cause after consideration of the children's best interests.²⁰ We review the trial court's decision on a motion for adjournment for an abuse of discretion.²¹

The record shows that counsel knew of his conflict ahead of time, failed to submit a written motion requesting adjournment in either court, was assisted by associate counsel at the case management conference during the prior week, and that, in spite of his assertion that he was unprepared, he effectively represented respondent at the adjudication trial. The evidence also shows that the children were present and waiting to testify. All other parties were ready to proceed, and the adjudication trial had already been delayed once by stipulation of the parties. Accordingly, the trial court did not abuse its discretion in denying respondent's motion for adjournment.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

¹⁸ The court noted that the testimony would have been more probative if offered at the adjudication trial in an attempt to make Alexandra "break down" or recant.

¹⁹ *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

²⁰ MCR 3.923(G).

²¹ *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).