

Court of Appeals, State of Michigan

ORDER

In re Ewing Minors

Docket No. 313313

LC No. 12-001054-NA

Mark T. Boonstra
Presiding Judge

Henry William Saad

Joel P. Hoekstra
Judges

The Court clarifies that its May 9, 2013 opinion and order does not limit the discretion of the trial court with respect to the proofs, if any, to be taken on remand, but instead directs the consideration of certain matters as set forth in that opinion and order.

The Court also orders that the Petitioner's motion for reconsideration is DENIED.



A true copy entered and certified by Angela P. DiSessa, Acting Chief Clerk, on

JUN 14 2013

Date

Angela P. DiSessa

Acting Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
May 9, 2013

In re EWING, Minors.

Nos. 313313 & 313315
Ingham Circuit Court
Family Division
LC No. 12-001054-NA

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

In this consolidated appeal, respondents, the parents of two young boys, appeal as of right from the trial court's order terminating their parental rights under MCL 712A.19b(3)(g) and (j). We affirm in part, vacate in part, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Two nieces, NJ and AJ, lived with respondents for a time. Petitioner became involved after receiving a report that AJ was hoarding food in her desk at school. NJ and AJ were forensically interviewed by Child Protective Services (CPS) workers, and reported that respondents punished them in ways that included intense and painful exercises, and whippings with a looped belt or hanger. Doreen Viney, the CPS worker who interviewed AJ, testified that the initial purpose of the interview was to verify her well-being. However, during the interview, AJ said that if she broke a rule, respondents "whooped" her with a belt and sometimes with a hanger, and that she would sometimes be forced to do push-ups, jumping jacks, or squats as punishment.

NJ and AJ were also forensically interviewed by Lansing Police Detective Elizabeth Reust. Reust testified that AJ reported being punished by both respondents, including by being forced to stand and look at a wall, to do squats and push-ups, and to endure "whooping" with a belt or hanger, adding that the beating by respondent-mother with a belt really hurt because she targeted the child's arms, back, and neck. AJ also indicated that NJ shared these punishments.

Dr. Stephen Guertin, an expert in child abuse, received a referral from CPS to examine the girls, and conducted a forensic interview and physical exam. NJ told Guertin that she was "whooped" with a belt by both respondents. The physical exam revealed loop marks on the front part of her right leg, the back of her left leg, and the back of NJ's right thigh, as well as AJ's spine and thighs. Loop marks occur if a cord, whip, or belt is doubled over when used. Guertin

concluded that the physical evidence resulting from the exam was “completely consistent” with being beaten with a belt.

Additionally, NJ reported that respondent-father fondled her and penetrated her mouth and anus. At the time of the termination hearing, he was in jail pending charges stemming from the sexual abuse.

Because of the abuse of NJ and AJ, petitioner filed a petition and two amended petitions seeking jurisdiction over respondents’ two sons, ME and EE, and termination of respondents’ parental rights. ME was two years old at the time of the petition; EE was three weeks old. Termination was sought at the initial dispositional hearing. A bench trial was held to determine jurisdiction. At the beginning of the trial, respondent-mother entered pleas of admission and pleas of no contest to particular allegations contained in the amended petitions. Specifically, she admitted that respondents were caring for NJ and AJ, that ME “is currently placed in temporary Foster Care due to the risk of threatened harm and failure to protect based on the severity of abuse by [respondent-mother] and [respondent-father] to [NJ] and [AJ], sexual abuse by [respondent-father] to [NJ], and the vulnerability of his age.” She also pleaded no contest to the specific allegations of physical abuse by NJ and AJ.

The trial court then proceeded to the dispositional phase of the hearing. Respondent-father admitted that he was “heavy-handed” and a “hard hitter” who used a belt to punish AJ and NJ. Respondent-father claimed that NJ (who was nine years old at the time of the abuse) initiated a sexual encounter with him while he was asleep and that he awakened, stopped her, and told her it was wrong. Respondent-mother stated that she had spanked both girls with a belt just one or two times,¹ and also resorted to timeouts, groundings, and cardio exercises consisting of five pushups or squats.

Respondent-mother reported that she had completed parenting classes and described herself as “very active” in the class. She testified that she had learned that physical punishments were no longer acceptable. She also testified that she never used physical punishment on her sons and that she was “very active” in ME’s life. Respondent also testified that she currently lived with her parents (although her mailing address was that of the paternal grandparents’ home), and testified that if her children were returned, she would live with the paternal grandparents until she could find her own place. She also testified that she was in school to be a medical administrative assistant.

A family advocate from the Headstart program testified that she scheduled weekly meetings with respondent-mother and that respondent-mother was present for some, but not all, of the meetings, but that when she was present she was “very much engaged in the visits.” The advocate opined that there was a strong bond between ME and respondent-mother. A foster care worker from Lutheran Social Services also testified to a bond between ME and respondent-mother; however she also reported one incident where respondent-mother disciplined ME

¹ The paternal grandparents also indicated that they were aware of the punishments inflicted on the girls, including the belt spankings.

inappropriately by leaving him alone in a hallway. The foster care worker also testified that she was concerned about a lack of bonding between respondent-mother and EE. She stated that EE was typically held only briefly and then left asleep in his car seat for the greater part of the visit.

Dr. Shannon Lowder conducted a psychological exam to “assess [respondent-mother’s] capacity to parent and decide if there was any psychopathology.” Lowder concluded that respondent-mother suffered from adjustment disorder, lacked empathy with what the children were going through, and was in great denial about the reality of the case. Lowder opined that the children were not safe in respondent-mother’s care. Respondent-mother’s main focus during the interview was not on what was occurring with the children, but instead was on her relationship with respondent-father and how difficult it was to be separated from him.

Lowder reported that respondent-mother had a hard time believing the allegations that respondent-father was molesting NJ. Respondent-mother testified that she was still confused “as to how” the situation came about and was still shocked and upset about it, adding that she did not believe respondent-father when he denied the allegations. However, Lowder concluded that respondent-mother appeared to minimize the reports of sexual abuse. Respondent-mother also failed to report any physical abuse of NJ and AJ, and failed to take any responsibility for the removal of her sons. Lowder concluded that respondent-mother lacked empathy and was in a great deal of denial.

Respondent-mother scored extremely high on the “life-stress” portion of the psychological exam. Additionally, the personality assessment inventory indicated a “fake good pattern” of responding, meaning that respondent-mother attempted to portray herself as overly positive during the test. The test showed she had some depressive symptoms and mild anxiety, and that therapy with her would be difficult because she would be defensive, reluctant to discuss personal problems, and possibly unwilling to commit to therapy. Lowder concluded that respondent-mother did not see the need to change herself.

The trial court concluded that respondents disliked NJ and AJ very much and devalued and dehumanized them. Further, the court found that respondent-mother’s testimony was flat and that she did not indicate any sympathy or empathy for the children at all. The court additionally concluded that respondent-mother was in great denial about the facts of the case, depressed about the removal of the children and respondent-father, and failed to provide any information about the alleged physical abuse. The court further held that respondent-mother had a hard time believing that NJ was sexually abused, did not take any responsibility for the removal of the children, and separated the girls from the boys in her mind. The court regarded respondent-mother’s indication that she needed some counseling as “fairly grave understatement” and noted that her parental stress index was extremely high. The court found it still more “damning” that the personality assessment inventory indicated that therapy would be difficult because respondent-mother was defensive and did not see a need to change herself. The court noted that the psychologist testified that the children would not be safe in her care because she did not see problems with how she functions, was not realistic about the severity of the allegations and their effect on the children, and focused on her marriage instead of the children.

The court also found that AJ had been physically abused and that NJ had been physically and sexually abused. Further, the court found that respondent-father’s description of the sexual

incident involving NJ was “absolutely ridiculously unbelievable, while crediting Guertin’s testimony that NJ described “very clearly” the sexual abuse, including fondling, sodomy, and oral sex. Accordingly, the court concluded that “there is clear and convincing legally admissible evidence that one or more of the facts alleged in the petition for termination of [respondent-father’s] parental rights has been proved.”

The court further recounted that NJ and AJ both described whippings with a belt and that there were loop marks on their bodies. The court also expressed concern that respondent-mother had repeatedly visited respondent-father in jail, adding “for all this court knows she’s still continuing to visit,” and that “[i]t certainly does not appear to the court that she has severed her relationship with him.”

The trial court stated that “[t]he prosecutor has met his burden of proof by clear and convincing legally admissible evidence that one or more of the facts alleged in the petition are both true and do come within 712A.19b(3) of the juvenile code regarding [respondent-mother] as well.”

The court concluded, with respect to both respondents, as follows:

The prosecutor’s [sic] demonstrated (g), that the parent, without regard to intent, has failed to provide proper care or custody and there’s no reasonable expectation of being able to provide proper care or custody within a reasonable time considering the ages of the children; and 712A.19(b)(3)(j), there is a reasonable likelihood, based on the conduct or capacity of the parents, the children would be harmed in their home. It seems very clear to the court. So there are grounds for termination of parental rights.

Regarding best interests, the court stated as follows:

Moving on to the best interest of the children, regarding [EE], there’s—since he is a three month old infant and has never lived with either of his parents, there is no evidence of any best interest between—of his being served by remaining in the care or custody of either of his parents.

Regarding [ME], he does have a relationship with his mother. But given her unfavorable psychological and the very young ages of both [ME] and [EE] and the severity of the abuse to the other children, this mother cannot be trusted to take care of her children in a proper way.

Therefore, I am terminating parental rights to both parents. And I’m ordering that no further efforts at reunification shall be made.

Both respondents appealed.

II. STANDARD OF REVIEW

In termination proceedings, this Court must defer to the trial court’s factual findings if those findings do not constitute clear error. MCR 3.977(K). Both the trial court’s decision that a

ground for termination has been proven by clear and convincing evidence and the court's determination of the child's best interests are reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

"This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion." *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1, 480 Mich 994 (2007). A court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes. *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

III. RESPONDENT-FATHER'S EVIDENTIARY CHALLENGES

Respondent-father argues that the trial court abused its discretion in allowing Guertin to testify as to statements made by NJ and AJ and allowing Viney to testify to statements made by AJ. Respondent-father additionally argues that the trial court reversibly erred by referencing statements NJ made to Reust, because it had previously ruled that such statements were inadmissible.² We disagree.

A. MRE 803(4) STATEMENTS

While the statements of NJ and AJ to Guertin are undeniably hearsay, MRE 801, we conclude that they were nonetheless admissible. The statements both girls made to Guertin were admissible as statements made for the purposes of medical treatment and diagnosis. See MRE 803(4). MRE 803(4) sets forth an exception to the general prohibition of hearsay:

Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

² Although MCR 3.973(E)(1) provides that the rules of evidence do not generally apply at an initial dispositional hearing, MCR 3.977(E) provides that if termination is sought at the initial dispositional hearing, the court must find statutory grounds for termination and truth of alleged facts "on the basis of clear and convincing legally admissible evidence." Although pleas of admission and no contest may be used as evidence in a proceeding to terminate, MCR 3.791(B)(4), here respondent-mother did not enter pleas related to the sexual abuse of NJ and AJ. As respondent-father's evidentiary challenges are primarily related to evidence of sexual abuse, it is appropriate to review them under the Michigan Rules of Evidence. See *In re Utera*, 281 Mich App 1, 15; 761 NW2d 253 (2008).

Respondent-father contends that the trial court erred in admitting the girls' statements to Guertin under this exception because their statements lacked sufficient indicia of trustworthiness and were not made solely for the purpose of diagnosis or treatment. Additionally, respondent-father argues that Viney failed to follow forensic interview protocols when interviewing AJ. We find no merit in these arguments.

"The trustworthiness of a child's statement can be sufficiently established to support the application of the medical treatment exception." *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 261 (1992). Also, the identity of the alleged perpetrator is "necessary to adequate medical diagnosis and treatment." *Id.* Factors for determining trustworthiness include the following:

(1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate [*Id.* at 324-325.]

Several factors in this case indicate the girls' statements to Guertin were trustworthy: (1) the girls were respectively ten and seven years old, (2) Guertin used open-ended questions, (3) NJ used childlike terminology when describing the sexual abuse, (4) the examination took place shortly after AJ reported she was abused, (5) the examination occurred around four months from the trial date, (6) the examination was not for psychological purposes, (7) the girls were respondents' nieces, and (8) the girls' statements were corroborated by Guertin's medical findings. In light of these facts, we conclude the trial court did not abuse its discretion in finding the girls' statements to Guertin trustworthy.

Additionally, the girls' statements were reasonably necessary for diagnosis and treatment. Guertin testified that the purposes of the interview were to diagnose the child and develop a treatment plan. Guertin further explained that information from the interview may indicate that the child should be tested or treated for sexually transmitted diseases. A full description of the assault is important for therapeutic reasons, as is the child's relationship with the perpetrator of abuse. Finally, the history taken guided Guertin in conducting his physical exam.

Particularly in cases of sexual assault in which the injuries may be latent, such as contracting sexually transmitted diseases or psychological in nature or psychological in nature and thus not necessarily manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault

are properly considered to be statements made for medical treatment. [*People v Mahone*, 294 Mich App 208, 215; 816 NW2d 436 (2011).]

A physician must know the identity of the assailant and whether the child is returning to an abusive home in order to properly prescribe the manner of treatment. See *Meeboer*, 439 Mich at 329. We therefore conclude that AJ and NJ's statements to Guertin were reasonably necessary for diagnosis and treatment.

B. "TENDER YEARS" STATEMENTS

The trial court admitted the statements of AJ to Viney and Reust under the so-called "tender years" exception to the hearsay rule, MCR 3.972(C)(2). MCR 3.972(C)(2) provides in relevant part:

Child's Statement. Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation . . . 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 admission if the court has found, in a hearing held before the 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.

"Circumstances indicating the reliability of a hearsay statement 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." *In Re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007).

Here, prior to trial, the trial court held a hearing on petitioner's motion to admit statements made by NJ and AJ. The trial court determined that NJ's statements to Reust were not admissible pursuant to the "tender years" exception because NJ's tenth birthday had occurred two days before her interview with Reust. Viney testified that she was trained in forensic interviewing and that she followed forensic interviewing protocols when interviewing AJ. Viney testified that AJ appeared to be telling the truth in the interview, based on her "free association" and that she "freely talked" about the physical abuse she suffered. Although the testimony of Viney was brief, we conclude that the trial court did not abuse its discretion in admitting AJ's statements pursuant to MCR 3.972(C)(2). Contrary to respondent-father's claims, the record is devoid of evidence that Viney failed to follow proper interview procedures or that AJ fabricated her story. Her claims were also supported by physical evidence obtained by Guertin. We conclude that AJ's statements had sufficient indicia of trustworthiness for admission. See *Archer*, 277 Mich App at 82 (sufficient indicia of trustworthiness found when interviewer followed forensic interviewing protocols, described abuse in an age-appropriate way, and statements were corroborated by physical evidence).

C. TRIAL COURT'S REFERENCE TO STATEMENTS MADE BY NJ TO REUST

Finally, respondent-father argues that the trial court violated its own evidentiary ruling when it referenced statements made by NJ to Detective Reust. This issue is unpreserved so this Court's review is for plain error affecting substantial rights. See *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). The trial court's sole reference to statements made by NJ came at the end of trial, when it stated "during the interview [NJ] talked to the detective about physical abuse at the hands of her aunt and uncle, but she also described sexual abuse."

As the trial court had previously ruled that NJ's statements to Reust were inadmissible, it should not have made reference to facts not in evidence. However, any error in this isolated statement was harmless in light of the fact that Guertin's interview with NJ was admissible. Therefore, the improper reference was merely cumulative of admissible evidence, and did not constitute plain error affecting substantial rights. See *People v Jordan*, 275 Mich App 659, 666-667; 739 NW2d 706 (2007).

IV. STATUTORY GROUNDS FOR TERMINATION

Both respondents argue that the trial court erred in finding that at least one statutory ground for termination was proven by clear and convincing evidence. MCR 3.977(K); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). We disagree.

Respondents' parental rights were terminated pursuant to MCL 712A.19b(3)(g) and (j), which provide as follows:

(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.

Because respondents' parental rights were terminated at the initial dispositional hearing, petitioner was required to establish a statutory ground for termination by clear and convincing legally admissible evidence. MCR 3.977(E)(3)(b).

We find that the trial court did not clearly err in determining that there was a reasonable likelihood, based on the conduct of respondents, that the children would be harmed if they were returned to the home of the respondent-father. The trial court heard ample evidence of the physical and sexual abuse inflicted by respondent-father on NJ and/or AJ in the home. Under the doctrine of anticipatory neglect or abuse, how a parent treats one child is probative of how he or she may treat other children. *In re Hudson*, 294 Mich App 261, 266; 817 NW2d 115 (2011). 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 respondents' children are of a different gender than their nieces, considering the severity and nature of the physical and sexual abuse, the trial court did not clearly err in determining that MCL 712A.19b(3)(j) was established as to respondent-father by clear and convincing legally admissible evidence.

Because only one statutory ground for termination is required, it is unnecessary to determine whether termination of respondent-father's rights was also warranted under MCL 712A.19b(3)(g).

Although a closer question, we conclude that trial court did not clearly err in determining that there was a reasonable likelihood, based on the conduct of respondents, that the children would be harmed if they were returned to the home of respondent-mother. At the time of the termination hearing, respondent-father had not yet been convicted of CSC I. There was thus a possibility that he would be released in the near future. Based on the evidence in the record, it was not clearly erroneous for the trial court to conclude that respondent-father would return to the household of respondent-mother and EE and ME, placing them at risk of harm. Although respondent-mother testified that she would be concerned that her older child would be subject to physical abuse from respondent-father if he remained in the household, and had no intention living with respondent-father again in the future, it does not appear the trial court found this testimony credible. Credibility determinations are best left for the finder of fact. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

As for MCL 712A.19b(3)(g), although the trial court did have some evidence to arouse its concern over respondent-mother's future parenting abilities, the record does not contain evidence that she was aware of respondent-father's sexual abuse of her niece or the extent of his physical abuse of the nieces; indeed petitioner agrees that respondent-mother was not aware of the sexual abuse. The record is also devoid of facts indicating that she failed to provide proper care and custody for ME and EE. Instead, she attended all parenting visits with them, was active in ME's life before his removal, and had a close bond with ME.³ Nonetheless, the trial court's determination as to respondent-mother under MCL 712A.b(3)(g) clearly was informed by the fact that the nieces were abused by respondent-father while they were in the care of respondent-mother. Given the circumstances that existed at the time of the termination hearing, we conclude that the trial court did not clearly err in determining that statutory grounds for termination under this subsection had been proven by clear and convincing legally admissible evidence as to respondent-mother.

V. BEST INTEREST DETERMINATION

Lastly, respondents argue that the trial court clearly erred in determining that termination was in ME and EE's best interest. We agree as to respondent-father, although we find the error harmless. We also agree as to respondent-mother, and we vacate the trial court's best interest analysis as to her and remand for further proceedings, as further explained below.

³ To the extent that respondent-mother did not have a close bond with EE, this principally derives from the fact that EE was taken into custody two days after his birth.

We conclude that the trial court erred with respect to respondent-father by failing to articulate an affirmative finding that the termination of his parental rights was in the children's best interest. The determination that a statutory ground for termination exists does not end the trial court's responsibility. "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider 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." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144, lv den 492 Mich 859 (2012) (internal citations omitted). "Termination of parental rights may occur only if the court finds a statutory ground for termination *and* finds that the termination of parental rights is in the child's best interests." *In re Hansen*, 285 Mich App 158, 164; 774 NW2d 698 (2009), vacated on other grounds, 486 Mich 1037 (2010). Thus, the trial court was required to make an affirmative finding before terminating respondent-father's rights under MCL 712A.19b(5). The trial court's failure to do so was clear error. *Hansen*, 285 Mich App at 164.

However, we find the error to be harmless under the facts of this case. MCR 2.613(A) provides that a trial court's error in a ruling or order, or an error or defect in anything done or omitted by the court, is not grounds disturbing a judgment or order, unless "refusal to take this action is inconsistent with substantial justice." See also *In re HRC*, 286 Mich App 444, 465; 781 NW2d 105 (2009). In this case, we believe substantial justice is served by affirming the trial court's termination of respondent-father's parental rights. Respondent-father's arguments concerning the trial court's error are premised on the exclusion of evidence of his physical abuse of NJ and AJ, and his sexual abuse of NJ. As addressed above, we find no error in the trial court's admission of this evidence, and conclude that ample evidence supports a finding that termination of his parental rights is in ME and EE's best interest. We conclude that the record was replete with evidence that respondent-father physically and sexually abused children under his care and supported the finding that a continued relationship with him would be harmful to his children. We therefore decline to disturb the trial court's order with respect to respondent-father. See *In re Sours Minors*, 459 Mich 624, 636-636; 593 NW2d 520 (1999).

With respect to respondent-mother, the issue is more complex. It appears that the trial court did not apply the correct standard for a best interest analysis, committing an error similar to the error of the trial court in *Hansen*. In *Hansen*, we held that the trial court applied the wrong best interest test when it stated, "'there's been no showing made here today that it is contrary to the best interest of [the child] and that [the respondent-father's] rights should not be terminated. The record is silent to that.'" 285 Mich App at 164. Here, with respect to EE, the trial court stated that there was no evidence that remaining in respondent-mother's care was in his best interest. However, the trial court was required to affirmatively find that termination was in EE's best interest. The trial court's failure to make such a finding is clear error. *Id.* With regard to ME, the trial court found that respondent-mother shared a bond with ME. However, the trial court found, due to respondent-mother's "unfavorable" psychological evaluation, the young ages of ME and EE, and the "severity of the abuse" of NJ and AJ, that "this mother cannot be trusted to take care of her children in a proper way." The trial court did not explicitly state that termination was in ME's best interest.

Notably, after the termination hearing, respondent-father pleaded guilty to first-degree criminal sexual conduct, MCL 750.520(B)(1)(a). According to the Offender Tracking Information System maintained by the Department of Corrections, his earliest release date is June 4, 2037.⁴ See <http://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=861258> (accessed March 19, 2013). There is thus no reasonable possibility that he will be released from prison while ME and EE are minors, and that he will pose a risk of harm to them.

At the time of the termination hearing, the trial court was aware of the potential that respondent-father might be incarcerated for this offense, noting that “that’s up to another court to take care of that.” But the sentencing of respondent-father to a mandatory minimum term that will extend into the children’s adulthood occurred only after the termination hearing, and the trial court therefore could not have taken that factor into consideration. It nonetheless is an intervening factor that, as a practical matter, would seem to moot out in large respects the trial court’s basis for proceeding as it did with respect to respondent-mother.

Removing respondent-father from the picture, the evidence presented to the trial court at the termination hearing was that respondent-mother struck AJ with a belt on a single occasion, after an incident where AJ touched the baby’s crib and the baby fell out and started crying. NJ stated that she was mostly “whooped” by respondent-father, not by respondent-mother. Respondent-mother testified that she only used a belt “one or two times.” The record also reflects that respondent-mother completed a parenting class in which she learned alternative discipline methods, and that respondent-mother testified that at the time she had the girls she did not know it was abusive to strike a child with a belt, but that she now knew that it was abusive. Additionally, respondent-mother presented evidence that she treated her sons differently than she had treated her nieces, which is relevant to the application of the doctrine of anticipatory abuse or neglect. *Hudson*, 294 Mich App at 266. Finally, the record is devoid of any evidence that respondent-mother abused her sons.

While the doctrine of anticipatory abuse or neglect may provide an appropriate basis for termination of parental rights, see *Powers*, 208 Mich App at 588, it is not to be applied on the basis of “essentially conjecture” that the children would have been hurt in the foreseeable future. *In re Sours*, 459 Mich at 636. Here, the application of this doctrine to respondent-mother, in the absence of respondent-father, may, in addition to being essentially conjecture, render reunification *more* difficult in cases of abuse or neglect of other children in a respondent’s care than in cases of abuse or neglect of a respondent’s own children. We decline to extend the doctrine so far, at least on the current record.

“There is a strong public policy favoring the preservation of the family because the family unit is deeply rooted in our nation’s history and tradition.” *In re B and J*, 279 Mich App 12, 18; 756 NW2d 234 (2008). This policy is reflected in the “high burden” the state must meet before terminating an individual’s parental rights. *Id.* This burden includes the finding of statutory grounds, the best interest determination, and the requirement of clear and convincing

⁴ A conviction for CSC I committed against an individual less than 13 years of age is punishable by a minimum sentence of not less than 25 years. MCL 750.520b(2)(b).

evidence. *Id.* Here, in light of the removal of respondent-father from the home, we are unable to find this policy served by the termination of respondent-mother's parental rights based on the record before us. This Court does not condone the physical abuse of children, or the way that respondent-mother allowed NJ and AJ to be treated when they were in her care. However, in the unique circumstances of this case, after consideration of the whole record, and in light of the fact that the trial court does not appear to have applied the appropriate standard in its best interest determination, we are unable to affirm the trial court's termination of respondent-mother's parental rights.

We therefore vacate the trial court's best interest determination with respect to respondent-mother, and remand for further proceedings. On remand, the trial court should consider whether it is in ME and EE's best interest for respondent-mother's parental rights to be terminated in the absence of risk from respondent-father. The trial court should also further consider, in that context, the recommendation of the lawyer guardian at litem for the minor children, who noted that the "big question" in this case "is whether or not [respondent-mother] has sufficiently disengaged herself" from respondent-father and the resulting "potential for future harm," and that it would be in the children's best interest to allow respondent-mother more time to work toward reunification, especially in light of the fact that respondent-mother had no prior CPS history or terminations.⁵

Affirmed as to the admission of evidence and as to the trial court's termination of respondent-father's rights, as well as to the determination that statutory grounds existed for the

⁵ We note that the amended petitions contain an attached page entitled "Termination Citations." This page contains citations to both MCL 712A.19b(3)(g) and (j). Additionally, it contains a citation to MCL 722.638(1)(a)(i) and (ii). MCL 722.638(1) requires petitioner to submit a petition for termination if, among other reasons, it determines that severe physical abuse or criminal sexual conduct involving "the child or a sibling of the child" occurred. A "sibling" under the Juvenile Code is "one of two or more individuals having one or both parents in common; a brother or sister." *Hudson*, 294 Mich App at 117, quoting *The American Heritage Dictionary of the English Language* (3d ed), p 1675. It is not entirely clear from the record that petitioner's position was that it was required, in the instant case, to seek termination of both parents' rights at the initial dispositional hearing pursuant to this statute. Petitioner may also seek termination of parental rights at the initial dispositional hearing absent required departmental action under Section (1). See MCL 722.638(3); see also *In re SLH*, 277 Mich App 662, 664; 747 NW2d 547 (2008). However, we note that to the extent that petitioner believed it was compelled by MCL 722.638(1) to seek termination of respondent-mother's parental rights at the initial dispositional hearing, that belief was in error. The record contains no evidence that any parent physically or sexually abused ME or EE. Although the doctrine of anticipatory abuse or neglect may support a trial court's decision on termination, we have found no authority for the proposition that the doctrine of anticipatory abuse or neglect requires extension of the requirements placed on petitioner by MCL 722.638(1). Therefore, petitioner is not required by any statutory compulsion, on remand, to continue to press for termination, or to proceed toward termination without efforts at reunification or the provision of other services.

termination of respondent-mother's rights. Vacated as to the trial court's best interest determination with respect to respondent-mother, and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra

Court of Appeals, State of Michigan

ORDER

In re EWING, Minors.

Docket Nos. 313313 & 313315

LC No. 12-001054-NA

Mark T. Boonstra
Presiding Judge

Henry William Saad

Joel P. Hoekstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to determine whether it is in the best interest of the minor children that respondent-mother's rights be terminated in light of respondent-father's subsequent conviction and the recommendation of the lower guardian at litem.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

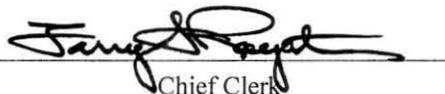
The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAY -9 2013

Date


Chief Clerk