

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TIFFANY MARIE BRUSATI,
SAMANTHA ANN REO, STEVEN JAMES
CRAWFORD, JR., and GILBERT KEITH
BRUSATI, JR., Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

UNPUBLISHED
January 24, 2008

v

SHERRY BRUSATI,

Respondent-Appellant.

No. 278872
Alpena Circuit Court
Family Division
LC No. 06-006114-NA

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i). We affirm.

Respondent argues that the May 2007 termination hearing was barred by the doctrines of res judicata and collateral estoppel. We disagree. The application of these doctrines presents a question of law that this Court reviews de novo on appeal. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004); *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999).

“Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.” *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Similarly, res judicata requires (1) a prior decision on the merits, (2) that the issue was or could have been resolved in the prior action, and (3) that both actions involve the same parties or their privies. *Adair v State of Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Res judicata did not bar the May 2007 termination hearing because the hearing involved an issue not presented in the first proceeding. Petitioner's March 13, 2007, supplemental petition sought to terminate respondent's parental rights under MCL 712A.19b(3)(c)(i), among other

subsections. Subsection (c)(i) was not alleged in any previous petition and was not litigated at the December 2006 hearing. During the May 2007 termination hearing, the parties agreed that only subsection (c)(i) was at issue. Further, issues involving subsection (c)(i) could not have been resolved in the December 2006 proceeding because 182 days had not yet elapsed since the initial dispositional order. Thus, because issues involving subsection (c)(i) were not and could not have been resolved in the prior proceeding, respondent's res judicata argument lacks merit. *Adair, supra* at 121; *Baraga Co, supra* at 269.

For the same reason, respondent's collateral estoppel argument is without merit. Issues involving subsection (c)(i) were not actually and necessarily determined in the December 2006 proceeding. *Leahy, supra* at 530. Respondent argues that the trial court's decision in the first proceeding conflicted with its decision in the second proceeding because the court admitted Gilbert's statements disclosing sexual abuse at the second proceeding through tender years witnesses. At the first proceeding, the trial court did not allow such witnesses to testify regarding Gilbert's statements because petitioner did not provide the proper notice. Respondent thus argues that this factual issue was already determined in the December 2006 proceeding.

Respondent mischaracterizes the trial court's evidentiary ruling as a "factual" one that had already been decided in the first proceeding. The trial court did not factually decide the issue at the first proceeding, but rather precluded the evidence on procedural grounds. Respondent also fails to acknowledge that the second proceeding involved a different issue altogether than was presented in the first proceeding, i.e., whether respondent's parental rights should be terminated under subsection (c)(i). Thus, even if the principles of collateral estoppel apply to evidentiary rulings, because subsection (c)(i) was not at issue in the first proceeding, the trial court's evidentiary rulings in that proceeding were not binding in the second proceeding.

Respondent next argues that the trial court erred by denying her request for payment of expert witness fees. We disagree. This Court reviews for an abuse of discretion a trial court's decision on a motion for payment of expert witness fees. See *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Respondent acknowledges this Court's decision in *In re Pilarski*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 1999 (Docket No. 214488), holding that expert witnesses at public expense are not mandated in termination proceedings. She nevertheless argues that the trial court should have appointed an expert to assist it in understanding the forensic protocol utilized in questioning Gilbert regarding sexual abuse. Here, however, the trial court indicated that it was very familiar with the forensic protocol and, therefore, did not abuse its discretion by declining to appoint an expert for this purpose.

Further, the record does not support respondent's contention that Dr. Wayne Simmons and Dr. Ted Stiger "had concerns" about the questioning of Gilbert. Neither expert voiced reservations regarding the process used to interview Gilbert. In fact, both Dr. Simmons and Rachael Achatz, Gilbert's foster care worker, testified that Achatz was familiar with the forensic protocol for interviewing young children alleging sexual abuse, and Achatz maintained that she

followed the proper forensic protocol when interviewing Gilbert. Accordingly, the trial court did not abuse its discretion by denying respondent's motion for payment of expert witness fees.

Respondent next argues that petitioner failed to present clear and convincing evidence that termination of her parental rights was in the children's best interests. Once the petitioner presents clear and convincing evidence of at least one statutory basis for termination, the trial court must issue an order terminating parental rights unless there exists clear evidence that termination is not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000); *In re CR*, 250 Mich App 185, 195; 646 NW2d 506 (2002). We review the trial court's decision for clear error. *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). Clear error exists if, although some evidence exists to support a trial court's findings, a reviewing court is left with a definite and firm conviction that a mistake has been made, giving due regard to a trial court's special opportunity to observe witnesses. *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004); *In re Pardee*, 190 Mich App 243, 250; 475 NW2d 870 (1991).

The trial court properly determined that it was not contrary to the children's best interests to terminate respondent's parental rights. Respondent failed to protect her children from sexual abuse by multiple perpetrators for at least 15 years, and she continued to associate with some abusers even after they had been convicted of molesting her children. Dr. Simmons recommended that respondent's parental rights be terminated. Although he was sympathetic regarding respondent's own longstanding history of being a sexual abuse victim, he opined that "her kids deserve a chance." The trial court allowed evidence of Gilbert's allegations of sexual abuse because his allegations were relevant regarding the best interests determination. Moreover, the trial court opined that in the 40 years that it had been involved with such cases, "this is the most sexually screwed up family [it had] ever seen." Accordingly, the trial court's best interests determination was not clearly erroneous.

Affirmed.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood