

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of IAQUINTA, Minors.

UNPUBLISHED
April 29, 2014

No. 315136
Wayne Circuit Court
Family Division
LC No. 12-509215-NA

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

PER CURIAM.

The two minor children appeal as of right the trial court's order finding that terminating respondents' parental rights was not in the children's best interests. We reverse.

This Court reviews orders in child protection proceedings for clear error. *In re Rood*, 483 Mich 73, 90-91, 126 n 1; 763 NW2d 587 (2009); MCR 3.977(K). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Clear error exists "if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

In April 2012, respondents divorced after 20 years of marriage and began living in separate residences. Respondents have three children: the minor twin daughters who are the appellants here and an older son, who is not part of this appeal. Respondents were awarded joint custody of the children. In July 2012, one of the then 11-year-old twins disclosed to respondent mother that respondent father, while sharing her bed at night, used her hand to stimulate his penis until it was erect. The child also appeared to describe her father penetrating her vagina with his hand. Respondent mother promptly filed a police report and relayed her daughter's disclosures to the police. However, after relatives on both sides of the family had a family meeting with respondent mother and questioned why she got the police involved in a family matter, respondent mother sought to withdraw her complaint, which the police refused to do.

Petitioner filed a petition to terminate both respondents' parental rights at the initial dispositional hearing based on sexual abuse allegations, pursuant to MCL 712A.19b(3)(b)(i) (parent caused sexual abuse and reasonable likelihood of future abuse), (b)(ii) (parent had opportunity to prevent abuse and failed to do so), (g) (failure to provide proper care or custody), (j) (reasonable likelihood that child will be harmed), and (k)(ii) (criminal sexual conduct

involving penetration). Respondent father (facing criminal prosecution) and respondent mother pleaded no contest to the petition.

A police report was admitted into evidence by the trial court and was used as a factual basis for respondent father's plea. The complaining twin also made consistent statements during a forensic interview that the sexual abuse occurred at least three times. The trial court concluded that there was clear and convincing legally admissible evidence that the child was sexually abused by respondent father.

With regard to the allegation that respondent mother failed to protect the children from respondent father after the complaining twin disclosed the sexual abuse, respondent mother acknowledged that she attempted to recant her complaint to the police. She also admitted that she was aware of the safety plan put into place by petitioner that forbade respondent father from having any contact with the children. Respondent mother admitted that she had violated the safety plan and allowed respondent father to be alone with the children for several hours one day before the children's forensic interviews. The trial court made a specific finding that respondent mother had failed to protect her children.

The trial court did not enumerate the statutory grounds for taking jurisdiction over the children in the permanent custody case. The proceedings were bifurcated and there was an extensive best-interest hearing. The trial court denied the petition to terminate respondents' parental rights. The trial court noted that the family had "serious issues," but in light of the bond between the parents and children, concluded termination was not in the children's best interests.

Appellants argue on appeal that statutory grounds existed to terminate respondents' parental rights and that the trial court erred in its findings with regard to the children's best interests. Termination of a parent's rights need only be supported by a single statutory ground. *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). Therefore, appellants must show that a statutory ground existed to terminate respondents' parental rights before this Court can address whether termination of parental rights was in the children's best interests.

In light of respondent father's no contest plea to the petition, which contained allegations of sexual abuse by the complaining twin against him and his failure to comply with no contact orders during the investigation, a logical inference from the record is that the trial court assumed jurisdiction after petitioner met its burden in proving at least one statutory ground for terminating respondent father's rights under MCL 712A.19b(3)(b)(i), (j), or (k)(ii). This was not error.

The petitioner did not present evidence that respondent mother could have prevented the sexual abuse that occurred. Therefore, there was no basis for terminating her parental rights under MCL 712A.19b(3)(b)(ii). However, the record supports a reasonable conclusion that there was sufficient proof to terminate respondent mother's rights under MCL 712A.19b(3)(j). There was ample evidence throughout the proceedings that respondent mother was incapable or unwilling to keep her children out of harm's way. Although she reported the abuse to the police when the complaining twin divulged it, she later attempted to withdraw her complaint. She complained to the police that defendant was visiting and calling the children contrary to the safety plan, but then allowed him to have unsupervised contact with them. Respondent mother maintained an extremely close relationship with respondent father, despite his sexual abuse of

her child, and at trial, attempted to shield him with her testimony. She admitted that respondent father had touched her in a way that was similar to the complaining twin's report, but she claimed he had been sleeping at the time. She also questioned the complaining twin's veracity by describing her as confused, very demanding of respondent father, and a troublemaker. Given the doubt regarding respondent mother's ability to create an environment in which the child would feel safe and protected, the trial court did not err in finding that a statutory ground for termination of her parental rights had been proven.

This Court will, therefore, review the trial court's best-interest determination. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proven by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). A trial court may consider evidence on the whole record in making its best-interest determination. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

With regard to respondent father, a contested issue in the best-interest proceeding was whether the sexual encounters were non-conscious sleep events attributable to the side effects of his prescription medications — Xanax and Vyvanse. Respondent father raises this issue again on appeal in arguing that the best-interest findings should not be overturned. In essence, respondent father asserts that he should not be treated as a sexual offender because he was asleep, is unlikely to reoffend, and does not pose a serious risk to the children. The trial court, being unconvinced that the sexual encounters were non-conscious events, pointedly found that there was no sleep defense. This Court likewise is not persuaded by respondent father's claim.

Two expert witnesses testified regarding whether respondent father's acts occurred while he was in a non-conscious sleep state. Dr. Gerald Shiener, an expert psychologist, testified that some of respondent's behaviors were common side effects of the medications. Shiener had not reviewed the police report; his opinion was based on assumptions that respondent father was taking a combination of Xanax and Vyvanse at the relevant times. However, the proofs showed that, if respondent father had taken the two medications as prescribed, he would not have been taking Vyvanse at the time the molestations occurred. Shiener himself stated that his opinion that it would be in the children's best interests to be reunited with respondent father carried little weight because he had never met respondent father or the children.

Thomas Roth, a sleep expert, testified that there was nothing in any of the medical literature that suggested that Vyvanse or Xanax were associated with complex behaviors during sleep. Respondent father was taking a low dose of Xanax. Abnormal sleep behaviors typically occurred with higher doses or when taken with multiple sedative drugs; however respondent father was taking Vyvanse, a stimulant, with Xanax. Roth further explained that drugs can cause parasomnias, which are random acts and are not purposeful. He opined that respondent father's acts were not the result of any medications. The behaviors were purposeful and not random. It was highly unlikely that the exact same random behavior would occur more than once.

After careful review of the record, we conclude the trial court's finding that respondent father's sexual behavior with his daughter was purposeful was not clearly erroneous.

Respondent father's arguments to the contrary are groundless and illustrate his complete lack of insight, which places his children at continued risk of future harm. Respondent father notes that psychologists, Dr. Patrick Ryan and Jennifer Zoltowski, opined that his risk for reoffending would be very low and that a safety plan could be put into place to protect the children. This claim is unpersuasive. Although Dr. Ryan opined that respondent father's test scores indicated that he had a very low risk for reoffending, the administered tests were based on respondent father's self reporting during a time when he had pending criminal charges. Dr. Ryan acknowledged that the tests would not have predicted that respondent father would molest his child and, although a safety plan could be put in place, there was always a risk that respondent father could reoffend. Dr. Ryan admitted that he could not comment on reunification because he had never met the children and did not review witness statements. Therefore, Dr. Ryan's opinion carries little weight in a best-interest determination.

Zoltowski, the psychologist who evaluated respondent father, testified that respondent father did not meet the definition of a pedophile because he did not have an interest in children that lasted six months or longer. Zoltowski opined that respondent father was unlikely to reoffend based on her review of reports and his self-reporting. Zoltowski's opinion was also of limited value. Respondent father scored low risk even though he had already sexually offended. Zoltowski opined that the tests predicted that future abuse would not occur even though she admitted that, if respondent father had taken the same tests a year earlier, the tests would not have predicted the abuse that actually happened. Thus, her opinion offers very little weight in the best-interest determination.

In reaching its opinion that termination was contrary to the children's best interests, the trial court improperly relied solely on the bond between respondent father and his children. Most children love their parents, even under extremely abusive circumstances. See *In re Powers Minors*, 244 Mich App 111, 120; 624 NW2d 472 (2000). The trial court should have considered whether, based on the record, the children's desire to be reunited with respondent father, a sexual abuser, was in their best interests.

The trial court ignored the findings of Dr. Valerie Simone, a clinical child psychologist, who was retained to review various documents with a primary focus on the children's treatment and best interests. Dr. Simone's greatest concerns were the repeated instances of abuse along with respondent father's failure to take any sort of responsibility, which was very important for the complaining twin to feel truly protected and for the other children to understand the events and the destruction of the family's relationships came from the abuser. Even on appeal, respondent father claims that he only repeatedly sexually abused his daughter while sleeping in her bed because of side effects of medication. Moreover, according to Dr. Simone, respondent father presented "an absence of true empathy or perspective for . . . what his daughter has been through." Dr. Simone opined that this lack of empathy was evidenced by respondent father's instruction to respondent mother to withdraw the complaint and his attempts to contact the children daily after the report of abuse, contrary to direct orders or suggestions by authorities not to have contact with them.

The trial court clearly erred when making its best interest determination and by failing to give sufficient weight to the risk respondent father's manipulative character posed to the children. The family was emotionally and financially dependent on respondent father.

Critically, Dr. Simone was concerned that the family was so dependent on respondent father that they rallied around him—the abuser—instead of focusing on the complaining twin’s needs. Respondent father had already coerced the family to brush sexual abuse under the rug and ignore the safety plan. He had also broken down the defenses of the complaining twin with grooming and special attention. Without termination, all of the children would be at risk for respondent father’s abuse and manipulative tactics in the future. *In re VanDalen*, 293 Mich App 120, 141-142; 809 NW2d 412 (2011) (safety and well-being in light of past abuse considered in best-interest determination). Although the children were placed with relatives, termination of respondent father’s parental rights, rather than guardianship, is necessary to provide the children with a safe and protected environment.

With regard to respondent mother, the trial court similarly committed clear error by relying solely on the bond between respondent mother and the children. Respondent mother is so dependent and vulnerable to exploitation by others—particularly respondent father—that she has failed to protect and nurture that bond. For example, respondent mother chose to attend visitations with respondent father, who was prohibited from visiting the complaining twin, rather than availing herself of separate supervised parenting time that was offered by petitioner. As a result, she did not have any visits with the complaining twin for a month. Respondent mother further shattered the bond when she attempted to conceal and discredit the complaining twin’s claims of sexual abuse and instead gave the abuser continued access to her children.

The record does not demonstrate that respondent mother can provide a safe and protected environment for the children. *VanDalen*, 293 Mich App at 141-142. Experts testified that therapy could have helped resolve the psychological issues that led to respondent mother’s poor decisions, but she discontinued it. Because respondent mother’s failed to make any self-improvement and continued to have a close and affectionate relationship with her child’s abuser, all of the children faced a continuing risk. The trial court clearly erred by determining that termination was not in the best interests of the children.

We reverse the trial court’s order finding that termination of respondents’ parental rights was not in the children’s best interests. We remand for entry of an order terminating the parental rights of respondents to these two children. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter