

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of CHARNISE GLADDEN, DONTE
GLADDEN, and BERT GLADDEN, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

BERT LORENZO HAYES,

Respondent-Appellant,

and

KIM DENISE GLADDEN and CHARLES PRICE,

Respondents.

In the Matter of CHARNISE GLADDEN, DONTE
GLADDEN, and BERT GLADDEN, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KIM DENISE GLADDEN,

Respondent-Appellant,

and

CHARLES PRICE and BERT LORENZO HAYES,

Respondents.

UNPUBLISHED
March 24, 2005

No. 256716
Wayne Circuit Court
Family Division
LC No. 03-422805-NA

No. 256993
Wayne Circuit Court
Family Division
LC No. 03-422805-NA

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

In Docket No. 256716, respondent Hayes appeals as of right from an order terminating his parental rights to Donte and Bert¹ Gladden under MCL 712A.19b(3)(g), (j), and (k)(i). In Docket No. 256993, respondent Gladden appeals as of right from the same order terminating her parental rights to Donte, Bert, and Charnise Gladden under the same statutory subsections.² We reverse and remand for further proceedings.

Termination of parental rights is appropriate if the petitioner establishes at least one statutory basis for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once this has occurred, the court must order the termination of parental rights unless it finds that termination is clearly not in the best interests of the children. *Id.* at 352-353. This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours Minors*, 459 Mich 624, 633; 592 NW2d 520 (1999). A finding of fact is clearly erroneous 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 Miller*, 433 Mich 331, 337; 445 NW2d (161) (1989).

An original petition for permanent custody was filed in this case on August 12, 2003, alleging sexual abuse and failure to protect. The petition charged that Donte tested positive for gonorrhea and Charnise and Bert for gonorrhea and chlamydia. The evidence produced at trial established that the children had indeed been diagnosed with venereal diseases. Petitioner alleged that respondent Hayes caused the infections by sexually abusing the children. Petitioner introduced evidence that Bert, when he was three years old, made statements indicating that respondent Hayes sexually molested him. We conclude that we must reverse the court's decision in this case because Bert's statements were erroneously admitted into evidence by the hearing referee.

MCR 3.972(C)(2) states, in part:

Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(20) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(e), (f), (r), or, (s), performed with or on the child by another person may be admitted into evidence *through the testimony of the person to whom the statement is made* as provided in this subrule.

¹ The name "Bert" in this opinion is used to refer to the minor child and not to respondent Hayes.

² The rights of Charnise's putative father, Charles Price, were also terminated, but he is not a party to this appeal.

(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 omission 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. This statement may be received by the court in lieu of or in addition to the child's testimony. [Emphasis added.]

Here, the statements in question were admitted through the testimony of Jameelah Walton, a foster care worker who was in the same room when the statements were made to Bert's attorney, Steven Gilbert. Walton testified that she "did not have a conversation with Bert but . . . was present" when the statements were made. She answered "[y]es" when asked if she was "just sitting there as an observer that day[.]"

It is abundantly clear to us that Bert's statements were admitted into evidence erroneously. Indeed, the statements were not admitted through the testimony of the person to whom they were made, as required by the court rule. The requirement that the person "to whom the statement is made" give testimony ensures that the parent can test that person's credibility and obtain facts about the elicitation of the statement. See, generally, *In re Brimer*, 191 Mich App 401, 406; 478 NW2d 689 (1991). Respondents were deprived of these safeguards in the instant case. Moreover, the referee did not make sufficient findings concerning whether there were "adequate indicia of trustworthiness" surrounding Bert's statements, as required by MCR 3.972(C)(2)(a). While this is a very troubling case in that three children somehow ended up contracting venereal diseases, we are simply not at liberty to ignore important safeguards that are in place to ensure that parental rights are terminated only for substantive and reliable reasons. Bert's statements were erroneously admitted at trial.³

Further, we cannot find the admission of the statements to be harmless. Indeed, the statements were the only evidence directly linking respondent Hayes to sexual abuse of the children. While termination of parental rights under MCL 712A.19b(3)(g) (failure to provide proper care or custody) or (j) (reasonable likelihood of future harm) might have been appropriate *eventually* in the absence of the statements, we find that an opportunity for rehabilitation, by way of parenting classes, counseling, and the like, would have been appropriate, under the circumstances of this case, in the absence of the evidence of sexual abuse perpetrated by one of the parents in the possible presence of the other parent.⁴

Moreover, while it is true that the hearing referee, in her written opinion recommending the termination of respondents' parental rights,⁵ did not explicitly refer to Bert's statements, her "conclusions of law" did not explicitly refer to *any* facts of substance with regard to the

³ We conclude, contrary to petitioner's argument, that respondents' objections at trial to the admission of Bert's statements were sufficient to preserve the issue for appeal.

⁴ Walton testified that Bert stated that respondent Hayes sexually molested him "while [Bert] was in the home with his mother[.]"

⁵ The circuit court did not issue its own opinion but instead signed an order for termination based on the referee's recommendations.

establishment of statutory bases for termination. Also, the referee stated that “the material allegation in the petition [is] substantiated[.]” Under all the circumstances of this case, it is clear to us that the referee did indeed rely on Bert’s statements in making her recommendation to terminate respondents’ parental rights,⁶ and an error requiring reversal has clearly been established.

Additionally, the referee clearly erred in finding that termination was warranted under MCL 712A.19b(3)(k)(i) (abandonment). The evidence, in contrast to the finding of abandonment, established that respondent Gladden lived with the children and that respondent Hayes visited them regularly.

We must reverse the trial court’s order in this case and remand for further proceedings.⁷ Additional proceedings may go forward without Bert’s statements. Alternatively, petitioner may choose to reintroduce the statements by following proper legal criteria; we caution the court or hearing referee to make adequate and proper findings should petitioner choose to do so.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello

⁶ Indeed, in the absence of Bert’s statements, there would have been insufficient evidence to terminate respondents’ parental rights.

⁷ We reject respondent Hayes’ argument concerning the lack of a probable cause hearing. Respondent mother did not appeal from the order removing the children or finding probable cause, and the trial court’s assumption of jurisdiction over the children empowered the court to make determinations against any adult. MCR 3.973(A); *In re CR*, *supra*, 250 Mich App 185, 202-203; 646 NW2d 506 (2002).