

STATE OF MICHIGAN
COURT OF APPEALS

In re A M-I S, Minor.

UNPUBLISHED
September 15, 2015

No. 325237
Oakland Circuit Court
Family Division
LC No. 14-822610-NA

Before: RONAYNE KRAUSE, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Respondent mother appeals as of right the trial court's order terminating her parental rights to minor child AS under MCL 712A.19b(3)(b)(i), (g), (j), and (k)(iii). On appeal, respondent challenges the trial court's admission during the best interest hearing of AS's statements to his foster mother, who relayed them to the court-ordered psychologist, and respondent further challenges the trial court's finding that terminating her parental rights was in AS's best interest. We affirm.

This case arises from AS's treatment for multiple injuries in various stages of healing. Respondent admitted using aggressive physical discipline against the three-year-old, and evidence indicated that respondent and her boyfriend were responsible for AS's injuries.

I. STATEMENTS AT THE BEST INTEREST HEARING

Respondent first argues that the trial court erred in allowing petitioner to use, at the best interest hearing, AS's statements to his foster mother, as well as the foster mother's statements about what AS said. Reportedly, AS told his foster mother that respondent's boyfriend, who the record identified as "poppy", repeatedly hurt him and that respondent hurt him too. Respondent asserts that, before admitting AS's statements, MCR 3.972 required the trial court to conduct a hearing to determine if the statements possessed sufficient indicia of trustworthiness and, further, that the record was devoid of evidence to demonstrate the statements' trustworthy nature. We disagree.

In order to preserve the issue of the improper admission of evidence for appeal, the party opposing its admission "must timely object at trial and specify the same ground for objection that it asserts on appeal." *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Respondent did not object when petitioner elicited testimony from the senior Oakland County Psychological Clinic psychologist, Dr. Melissa Sulfaro at the best interest hearing regarding statements AS

made to his foster mother, Ms. Eller, which Eller then relayed to Sulfaro. Therefore, the issue is not preserved. See *Weiss*, 224 Mich App at 39.

We review unpreserved challenges to the admission of evidence for plain error affecting substantial rights. *People v Douglas*, 296 Mich App 186, 191; 817 NW2d 640 (2012), rev'd in part on other grounds 496 Mich 557 (2014). We review de novo, however, an evidentiary question that involves a preliminary question of law, such as interpretation of a court rule or statute. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 275–276; 730 NW2d 523 (2006).

Child protective proceedings “consist of two distinct phases: the trial, also known as the adjudicative phase, and the dispositional phase.” *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). “During the adjudicative phase, which occurs first, the trial court determines whether it may exercise jurisdiction over the minor child pursuant to MCL 712A.2(b).” *Id.* at 15-16. If the court conducts a trial, “the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply . . . notwithstanding that the petition contains a request to terminate parental rights.” MCR 3.972(C)(1). During this adjudicative phase, the trial court may not admit a child’s statement to another person without first holding an evidentiary hearing to determine whether “the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness.” MCR 3.972(C)(2)(a). “If the court acquires jurisdiction over the child, the dispositional phase follows, at which the trial court determines ‘what action, if any, will be taken on behalf of the child.’ ” *Utrera*, 281 Mich App at 16 (citation omitted); see also MCR 3.973(A).

Unlike the adjudicative phase, the Michigan Rules of Evidence do not generally apply at an initial dispositional hearing. MCR 3.973(E)(1); *In re AMAC*, 269 Mich App 533, 537; 711 NW2d 426 (2006). During this dispositional phase, which may include a best interest hearing, all relevant and material evidence, including hearsay, is admissible. See MCR 3.973(A) and (E)(2); MCR 3.977(H)(2). MCR 3.973(E)(2) specifically provides that, during the dispositional phase, “[t]he court shall consider . . . any written or oral information concerning the child” from a foster parent, among others.

In this case, respondent’s initial argument is without merit because she misinterprets MCR 3.972. Respondent argues that, under MCR 3.972, AS’s statements were inadmissible at the *best interest hearing*. However, MCR 3.972 explicitly applies to the adjudicative phase of child protective proceedings. See MCR 3.972(C); *In re Archer*, 277 Mich App 71, 79-80; 744 NW2d 1 (2007). During the adjudicative phase in this case, respondent pled no contest, the trial court accepted the plea and found a statutory basis for termination, and a best interest hearing was scheduled. The best interest hearing was therefore part of the subsequent dispositional phase and was not subject to the Michigan Rules of Evidence. See MCR 3.973(A) and (E)(2); MCR 3.977(H)(2); *Utrera*, 281 Mich App at 16.

Respondent is correct in her assertion that the trial court allowed Sulfaro to testify regarding statements that AS made to Eller. This would have qualified as hearsay within hearsay under the Michigan Rules of Evidence, and the statements would have been inadmissible unless they met a hearsay exception, quite apart from considerations of AS’s age. See MRE 801; MRE 802; MRE 805. Respondent is also correct that the trial court did not hold an evidentiary hearing

before the best interest hearing to determine if AS's statements were trustworthy. Had petitioner or the Lawyer-Guardian Ad Litem (LGAL) sought to introduce the statements at the adjudication, such a hearing would have been required. See MCR 3.972(C)(2). But because the best interest hearing was part of the dispositional phase, no evidentiary hearing was required. Under MCR 3.973(E)(2), the court is able to receive and rely on "[a]ll relevant and material evidence, including oral and written reports." Respondent was sent to Sulfaro by court order for a psychological evaluation after adjudication and before the best interests hearing. Sulfaro provided the court with a psychological evaluation report that was admitted without objection and from which she was examined. Sulfaro's report contained information that she received orally from the foster parent regarding AS's statements. The court was able to consider and rely on Sulfaro's report. MCR 3.973(E)(1). Accordingly, the trial court did not err in admitting AS's statements to his foster mother or Eller's subsequent statements about what AS said.

II. BEST INTEREST FACTORS

Respondent next contends that the trial court erred in terminating her rights at the best interest hearing because of her long history with AS, the fact that she is his mother, the lack of evidence establishing that she was personally responsible for any of his injuries, and her efforts to improve her life since AS's removal from the home. We disagree.

We review for clear error a trial court's finding that termination is in a child's best interest. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction a mistake has been made." *Id.*

To terminate parental rights, a trial court must find by a preponderance of the evidence that termination is in the child's best interest. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); see also MCL 712A.19b(5). "The trial court should weigh all the evidence available to determine the children's best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). In doing so, a court "should consider a wide variety of factors that may include 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." *Id.* (citation and quotation marks omitted). A trial court may also consider a parent's history and whether the parent abused the child. See *In re Powers Minors*, 244 Mich App 111, 120; 624 NW2d 472 (2000).

In this case, a host of factors militated for terminating respondent's parental rights. First, respondent had a history of abusing AS, or at the very least passively allowing others to do so. When Dr. Kurt Filips treated AS at the hospital, he noted a current arm fracture, several healing fractures, a liver laceration, a burn, scratches, and bruising to nearly every part of AS's body, including the tip of his penis. Filips concluded that the liver laceration had been caused by a fist, knee, or foot. There were also indications that respondent had failed to seek treatment for at least one of AS's arm fractures. AS told Eller that "poppy," respondent's boyfriend, had pushed him down, hurt his arm, yanked his penis, and burned his hand. He also stated numerous times that respondent had either participated in the abuse or failed to prevent her boyfriend from carrying it out. Respondent herself admitted that she pulled AS's arm "very hard" and hit him in the mouth.

Second, as the trial court correctly noted, evidence indicates that AS had no significant bond with respondent. Filips testified that AS seldom interacted with respondent at the hospital, only called out for his grandparents, and that respondent never tried to comfort him. Additionally, Eller told DHHS Child Abuse and Neglect Investigator Kennedy that AS did not like respondent and that he had not asked about his family at all since being placed in the foster home.

AS's safety and stability, as well as the advantages of a foster home, also weigh against respondent. Respondent admitted that her habit of yelling in AS's face probably scared him, and one can infer that AS's various injuries multiplied that fear. AS told Eller that he did not feel safe with respondent and that she did not protect him. Sulfaro opined that AS seemed fearful and untrusting, and probably did not feel safe in his home. Sulfaro also doubted that respondent would be willing or able to protect AS in the future. In contrast, AS said that he felt safe with Eller and wanted to remain in the foster home. In terms of stability, respondent testified that she and AS had never lived in the same place for longer than a year.

The fact that respondent made very little money and appeared to have no existing plan for further employment or education made it likely that her reliance on others would continue. These factors substantially outweighed the evidence favoring respondent. She was attending therapy, parenting classes, and weekly meetings with a doctor and caseworker, facts for which the trial court gave her due credit. She pursued those services on her own initiative. She also testified that she was no longer in a relationship with "poppy" and that she would protect AS from him and Santana-Mendez if the need arose. She further testified that she loved AS, had been his primary caregiver since birth, and played and interacted with him. She expressed a desire to find additional part-time employment, take care of herself, and maintain a household, all with the express aims of getting AS back and being a better parent. When balancing these few factors in respondent's favor against all the other factors discussed earlier, however, we are not left with a definite and firm conviction that the trial court reached the wrong decision. See *White*, 303 Mich App at 713; *Hudson*, 294 Mich App at 264; *Jones*, 286 Mich App at 131; *Powers*, 244 Mich App at 120. Accordingly, the trial court did not clearly err in finding that terminating respondent's parental rights was in AS's best interest. See *Hudson*, 294 Mich App at 264.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens