

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ROBERT RAY, SCOTT RAY,
and BRANDI RAY, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RENEE LYNN WYN,

Respondent-Appellant,

and

SCOTT RAY, SR.,

Respondent.

UNPUBLISHED
February 15, 2005

No. 255280
Manistee Circuit Court
Family Division
LC No. 02-000106-NA

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Respondent Renee Lynn Wyn appeals as of right from the order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(ii) (child suffered abuse, parent had opportunity to prevent), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if child returns to parent's home). We affirm.

I. FACTS

A petition was filed on September 26, 2002, alleging that respondent had “a level III CPS [Children’s Protective Services] case open for improper supervision and neglect.” At a preliminary hearing held on September 27 and October 9, 2002, CPS worker Timothy Botrell testified that respondent left the children with her boyfriend who allowed Scott to play with illegal fireworks. Respondent also left the children with a thirteen-year-old babysitter who “cut up a dead animal” with them, allowed the children to smoke, and permitted Robert to stay for a week with a neighbor whose name respondent did not know.

FIA provided a parent mentor and things improved until late summer 2002, when Botrell learned that Henry Bliss was living with respondent. Bliss had served prison time for at least

seven offenses, the most recent being a criminal sexual conduct [CSC] against a twelve-year-old girl. Botrell asked respondent to have Bliss move out, but when Botrell returned, Bliss was still there. Robert and Scotty confirmed that Bliss was still staying overnight. They said that respondent and Bliss returned from a bar one night and had a physical fight in the home. During the altercation, Brandi was hit in the leg by Bliss. The police came and arrested Bliss and the children were removed. The trial court found by a preponderance of the evidence that at least one of the allegations in the petition was true. Having Mr. Bliss in the home caused an unsafe situation.

An adjudication hearing was held on January 14, 2003. Respondent admitted to allowing Henry Bliss to move into her home, knowing that he had a CSC conviction. Respondent further admitted that Bliss was in her home on September 23, 2002, after FIA insisted that he move out. The court took jurisdiction on the basis of the plea.

During the course of the next several months, several additional hearings were held. The children were in foster care and allegations of sexual abuse began to surface. In April, 2003, Scotty was caught in bed zipping up his pants with his four-year-old half sister Chelsea, whose pants he had removed. In May, 2003, Brandi had to be moved to a new foster home because Brandi and Robert said that they had sex with each other and Robert and Scotty had sex with Brandi. Scotty also had inappropriate sexual contact with a dog in his foster home.

On November 5, 2003, FIA filed a petition to terminate respondent's parental rights under subsections (g) and (j). At the outset of the jury trial, respondent made a motion in limine to exclude all statements of the children, including those to Scott Ray, Sr. The court denied the motion under MRE 801(d)(2)(A), because the children were party opponents.

At the January 14, 2004 trial, respondent testified that she knew Henry Bliss for about two to three weeks before inviting him to live in her home. She knew he had been in prison and had a CSC conviction and other convictions. Respondent asked Bliss to leave when Tim Botrell insisted; she too wanted Bliss gone. His criminal record bothered her and she did not want him hurting her. Bliss assaulted respondent once but did not hit her children.

Respondent stated that she never had sex when the children were in the same room. They never said they were molested by each other or by her boyfriend. Respondent first found out about their sexual activities several months into the court proceedings. She would have believed them if they had told her. Respondent testified that they fought and wrestled like all children. She felt she could take care of them now. Although she might not have been the best mother, she did the best she could. She loved the children very much and would do anything for them.

Scott Ray, Sr. testified that Robert told him "unthinkable things that they had done with each other." Robert said that Scotty "coerced them both double teaming my daughter, Brandi, both anally and otherwise." Scotty told Robert that if he did not participate, "you'll be in trouble for not telling Mom and whatnot." Robert said that Scotty had anal sex with him and both boys had sex with Brandi. Brandi did not say anything about it, except that Robert "didn't do anything to be afraid of or to be in trouble for." Melody Ray testified that she found her four-year-old daughter Chelsea in bed with Scotty, with her pants off. Scotty weighed about 270 to 280 pounds and Robert about 230 to 240. Brandi wore about a size 16 or 18 in women's clothes.

On the second day of jury trial, the jury found one or more allegations proven as to each child. On February 23, 2004, the court issued an opinion and order of disposition authorizing FIA to file a termination petition. The termination petition was filed that day and the hearing was held on March 25, 2004. Sue Fleming of FIA testified that the children continued in counseling. In Ms. Fleming's opinion, respondent should have known of the children's sexual behavior and had not provided good supervision if she did not know.

Respondent testified that she had been in counseling since March 2002, working on goals of anger management, parental skills, and dealing with her children's absence. Her counselor, Ronald Moesta, CSW, of Manistee-Benzie Mental Health Clinic, had written to support unsupervised visits in October 2003. Moesta believed that respondent "fulfilled many if not all of the requirements of the agency and the court in regards to developing and improving her parenting skills." Respondent had not known about the sexual behavior until the children were in foster care about five months. There were no indications of such behavior at home; the children had talked and played as normal siblings. To respondent's knowledge, Bliss did not molest any of the children. The trial court terminated respondent's parental rights under MCL 712A.19b(3)(b)(ii), (g), and (j).

II. JURISDICTION

A. Standard of Review

Assumption of jurisdiction in child protective proceedings is based on MCL 712A.2(b), which provides that the court has jurisdiction over a juvenile found within the county

(1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

* * *

(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

In order for the court to properly exercise jurisdiction over a child, the petitioner must prove by a preponderance of the evidence that the child comes within the statutory requirements. MCL 712A.2(b); MCR 3.972(C)(1); *In re Nelson*, 190 Mich App 237, 240; 475 NW2d 448 (1991).

B. Analysis

The posture of the present case is very unusual in that the jurisdictional hearing took place many months after the court originally assumed jurisdiction for the first time. In *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993), the Court held that challenges to

jurisdiction must be made by direct appeal and not by collateral attack years later. Here, however, the “years later” concept is inapplicable because the termination hearing was held only two months after the jurisdictional hearings and one month after the last order of disposition was entered on February 24, 2004. Also, the crucial issue of the admissibility of the children's hearsay statements had been raised in a timely manner. Respondent had requested, but was denied, a hearing on the admissibility of the children's statements, and the trial court deferred ruling on the admissibility of the statements until the trial. This case is also unusual in that in between the acceptance of respondent's plea and the 2004 jurisdictional hearing, the children's hearsay statements had been brought out at several hearings. In this rare situation, we hold that *Hatcher* does not bar respondent's challenge to the court's jurisdiction. Thus, we will review this case.

III. HEARSAY

Respondent argues that reversible error occurred in admission of testimony from witnesses Tim Botrell and Scott Ray regarding the children's alleged hearsay statements.

A. Standard of Review

Questions of law are reviewed de novo. *In re CR*, 250 Mich App 185, 200; 646 NW2d 506 (2002).

B. Analysis

MCR 3.972(C)(2), formerly MCR 5.972(C)(2)¹, provides in pertinent 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.

(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

¹ MCR 5.972(C)(2) provided:

A statement made by a child under ten years of age describing an act of child abuse as defined in section 2(c) of the child protection law, MCL 722.622(c), performed with or on the child, not otherwise admissible under an exception to the hearsay rule, may be admitted into evidence at the trial if the court has found, in a hearing held prior to trial, that the nature and circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness, and that there is sufficient corroborative evidence of the act.

See *In re Brimer*, 191 Mich App 401, 404-407; 478 NW2d 689 (1991).

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.

This subrule is inapplicable to the present case, because none of the statements were apparently made by children under ten. The youngest child, Brandi (d/o/b 10/19/92), was already ten when the alleged statements were made. No allegations of the children having sex with each other surfaced until several months after they were removed in September 2002. Respondent did not object to the testimony of Trudie Kennedy or Natalie Pendock, which first noted the presence of unspecified sexual allegations. At the jury trial, the statements were testified to by Botrell as having been made by only Scott and Robert.

The prosecutor also was incorrect in arguing for admissibility of the children's statements as admissions of a party opponent. MRE 801(d)(2) provides that an admission by a party opponent is not hearsay if it is "offered against a party and is (A) the party's own statement" Here, FIA argues that the children's statements were offered "against" them because the definition of "against" in Webster's Revised Unabridged Dictionary (1998) includes "by or before the time that; in preparation for; so as to be ready for the time when." This is not the relevant definition. The relevant definition is "in opposition to . . . adverse to" (*Id.*). The prosecutor's definition would apply, for example, in the sentence, "They battened down the hatches against the storm." There would ordinarily be nothing objectionable about, and no reason to exclude, such statements. Clearly, in this case the children's statements were not offered "against" the children as party-opponents; they were offered "against" respondent as a party-opponent. Only if they were respondent's own statements would they be admissible under MRE 801(d)(2).

The children's statements were hearsay in the classic sense, because they were offered to prove the truth of the matter asserted. MRE 801(c). This would include statements to any psychological evaluator or therapist, any FIA or CFS worker, father Scott Ray, and probably Brandi's suggestive drawing. See MRE 801(a).

Here, however, we conclude that any error in admission of the hearsay statements at the January 2004 jury trial was harmless. Ample other evidence of neglect existed apart from the statements to support the court's jurisdiction. Again, considering only evidence admitted at the jury trial and not that from intervening hearings, it appeared that respondent had allowed a man, Henry Bliss, with a long criminal record including assault with intent to commit second-degree criminal sexual conduct against a twelve-year-old girl, to move into her house after knowing him only two or three weeks. The children told Botrell that they had been left alone with Bliss.² Respondent then got into a physical altercation with Bliss in the children's presence. Brandi was

² Although respondent's motion for a taint hearing and objections were not limited to the children's statements of sexual activity, clearly that was respondent's main focus, and her arguments were and are not directed to the children's other statements. When jurisdiction was originally obtained in January 2003, the allegations and admissions did not include any sexual activity between the children.

in the middle of the fight, trying to defend her mother, while Robert or Scotty was watching from the window and calling the police. This type of traumatic event was entirely preventable had respondent taken an ounce of care regarding whom she allowed to live with her children. Domestic violence clearly has an adverse effect on children. However, respondent was previously involved with men who abused her, including the children's father, Scott Ray, who had a conviction for domestic violence against respondent. Ray also smoked marijuana in the house and had a conviction for marijuana possession. Other evidence of neglect included allowing Brandi to have her nose pierced at the age of eight, Scott's encopresis, and respondent's not realizing that Scotty possessed some fireworks. Respondent had also filed for a PPO against her husband Ray Wyn. By respondent's own admission, Wyn had grabbed respondent's hair, pushed her, and forced her to have sex with him. And respondent's third husband, Harry Howe, had a criminal record and also forced respondent to have sex. At least some of this violence presumably went on in the children's presence or with their knowledge. In respondent's case, her victimization was clearly hurting her children and she had an obligation to protect them from the unhealthy environment and to provide a nurturing home. We find that the legally admissible evidence at the January 14 and 15 jury trial was sufficient to support the court's exercise of jurisdiction over the children.

IV. STATUTORY GROUNDS FOR TERMINATION

A. Standard of Review

Termination of parental rights is appropriate where petitioner proves by clear and convincing evidence at least one ground for termination. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). Once this has occurred, the court shall terminate parental rights unless it finds that the termination is clearly not in the best interests of the children. *Id.* at 353; MCR 3.977(J). 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); *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000). A decision must be more than maybe or probably wrong to be labeled clearly erroneous. *Sours, supra* at 633.

B. Analysis

The trial court did not clearly err in finding sufficient evidence to terminate respondent's parental rights.

Respondent's parental rights were terminated under MCL 712A.19b(3)(b)(ii), (g), and (j), which provide:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:

* * *

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

* * *

(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.

Respondent argues that, absent the evidence of hearsay statements by the children concerning sexual activities, there was insufficient evidence to support termination of her parental rights. This argument is unconvincing. Respondent maintained a home where domestic violence was common and sexual offenders were permitted to move in. Respondent herself sexually abused her older children. A parent's mistreatment or neglect of one child is probative of probable treatment of other children. *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001); *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993). Melody Ray gave firsthand testimony regarding Scotty's abuse of his four-year-old half sister, thus lending support to the statements that Scotty had done inappropriate things to Brandi and Robert. There were also reports of sexual improprieties by Robert in foster care.

Respondent should have known or suspected the children's sexual behavior had she provided proper supervision. Respondent's argument that the behavior must have been impossible to detect and stop because it also occurred in foster care and in the father's home is only partially correct; the stepmother, Melody Ray, did detect similar behavior in her house, although not soon enough to stop it. Both boys committed improprieties in foster care. The testimony did suggest, however, that the children hid their behavior from respondent. It would be virtually impossible, and certainly not usual, to provide twenty-four hour supervision for nine-and-a-half, eleven, and twelve-year-old siblings. Yet this was what would have been required to prevent the sexual behavior between these children. Nevertheless, respondent had the obligation to properly educate and supervise the children and to prevent inappropriate sexual behavior from occurring.

We decline to address whether under subsection (b)(ii), "sexual abuse" can be committed by an eleven or twelve-year-old sibling. Only one statutory ground is required in order to

terminate parental rights. *In re Miller*, 433 Mich. 331, 337; 445 NW2d 161 (1989). We find the evidence sufficient to support termination of respondent's parental rights under subsections (g) and (j). Respondent did not provide proper care and custody for the children, and there is a reasonable likelihood they will suffer harm if returned to respondent's care because she failed to protect and properly supervise them. Thus, the trial court did not clearly err in terminating her parental rights.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra