STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of XAVIER PENNINGTON, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TAWANA MARCH,

Respondent-Appellant.

UNPUBLISHED
July 25, 2006

No. 266436
Ionia Circuit Court
Family Division
LC No. 04-000003-NA

In the Matter of KYLEIGH SMITH, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TAWANA MARSH,

Respondent-Appellant.

No. 266437
Ionia Circuit Court
Family Division
LC No. 05-000076-NA

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Respondent appeals by right from an order of the trial court terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i) and (ii), (c)(i) and (ii), (g), and (j). We affirm.

Respondent first argues that the trial court erred in denying her motion to disqualify. We disagree. Findings of fact on a motion to disqualify are reviewed for an abuse of discretion, although questions of law are reviewed de novo. *Armstrong v Ypsilanti Township*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

Disqualification of judges is governed by MCR 2.003, which states in pertinent part:

(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) The judge is personally biased or prejudiced for or against a party or attorney.

(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The judge has been consulted or employed as an attorney in the matter in controversy.

(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

Here, respondent filed a motion to disqualify Judge Sykes because he was previously a partner in the law firm in which respondent's former attorney, Thomas Chadwick, also practiced. The lawyer-guardian ad litem (L-GAL) stated that the matter was brought up previously, and Chadwick said that he had asked Sykes for help. Respondent's current attorney, Walter Downes, stated, in response to claims of untimeliness, that he filed the motion at respondent mother's urging; he did not consult with her before signing the stipulation to assign the case to Judge Sykes. Judge Sykes denied the motion. The disqualification matter was again brought up at the final hearing and in a letter from Chadwick. This letter, sent to the prosecutor and the L-GAL, indicated that Judge Sykes had personal knowledge of and was consulted on the case, and he was a member of the law firm representing respondent within the preceding two years. Judge Sykes denied specific recollection of any facts except the name Xavier.

In general, actual bias or prejudice is required to disqualify a trial judge, and the moving party must overcome a heavy presumption of judicial impartiality. *Cain v Department of Corrections,* 451 Mich 470, 495-497; 503; 512 NW2d 210 (1976); *Armstrong, supra* at 597. A showing of actual bias or prejudice, however, is not required where the appearance of impropriety is sufficiently strong to violate due process. *Cain, supra* at 512 n 48; *Armstrong, supra* at 599. Situations posing such a risk include where the judge has a financial interest, has been personally abused or criticized by a party, is enmeshed in other matters involving a party, or "might have prejudged the case because of prior participation as accuser, investigator, fact finder or initial decisionmaker." *Crampton v Department of State,* 395 Mich 347, 351; 235 NW2d 352 (1975). Further, judicial rulings in and of themselves never constitute grounds for disqualification. *Armstrong, supra* at 597.

In the present case, no actual bias or prejudice was shown; thus, MCR 2.003(B)(1) does not warrant disqualification. With regard to subsections (B)(2) and (3), Judge Sykes denied remembering any details of this case, other than a vague recollection of the name Xavier. This does not show that Judge Sykes had any personal knowledge of the case or that Chadwick's alleged consultation with Judge Sykes would have any effect on his ability to impartially hear the case. Chadwick's letter was not part of the lower court record and there is no clear indication that Judge Sykes was aware of its contents. Moreover, Chadwick's letter does not allege that Sykes ever gave him any advice on how to proceed with the case. Lastly, subsection (B)(4) does not warrant disqualification because, although Judge Sykes had been a member of the same law

firm as Chadwick within the preceding two years, Chadwick no longer represented respondent at the time of the motion to disqualify.

Our Supreme Court recently noted that MCR 2.003(B) lacks any language regarding the "appearance of impropriety," *Adair v State of Michigan*, 474 Mich 1027, 1038-1039; 709 NW2d 567 (2006) (statements of TAYLOR, C.J.; and MARKMAN, J.), however, even if that standard were relevant here, there is no appearance of impropriety strong enough to implicate due process. *Cain, supra* at 512 n 48; *Armstrong, supra* at 599. Respondent has never alleged that Judge Sykes has any financial interest in this case, has been personally abused or criticized by a party, is enmeshed in other matters involving a party, or "might have prejudged the case because of prior participation as accuser, investigator, fact-finder or initial decision-maker." *Crampton, supra* at 351. Furthermore, Judge Sykes stated that he could impartially hear the case. In denying respondent's motion to disqualify, Judge Sykes stated:

> I have no problem hearing it. . . . I did not enter into the July 27th of '05 hearing with any personal knowledge acquired through any information that Mr. Chadwick may or may not have discussed in the law firm during the period he was an associate of our firm prior to taking the bench. And frankly all knowledge I've acquired in this case was a result of my review of this file in preparation for that hearing and including the review reports and updated service plans and everything else.
>
> I'm not quite sure how it is that the respondent mother now feels that I should be disqualified when she herself agreed to have the case sent to me in the first place. It appears to be a case of forum shopping. There's no indication that the court is not capable of being fair and impartial in this matter. There is no attorney representing a party currently that was associated with my law firm prior to taking the bench. So I do not find that there is a sufficient basis seeking my disqualification.

Because Judge Sykes stated that he was able to hear this case impartially and there exists no appearance of impropriety sufficient to implicate due process, we find that the trial court did not err in denying respondent's motion to disqualify.

Respondent next argues that the trial court clearly erred in terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i) and (ii), (c)(i) and (ii), (g), and (j). We disagree.

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 364-365; MCR 3.977(G)(3). This Court reviews the lower court's findings under the clearly erroneous standard. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999); MCR 3.977(J). 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).

Xavier was initially removed in January 2004 because of poor home conditions and a bruise on his scrotum that apparently resulted from pinching. Previously, respondent and father Greg Pennington had had in-home services. After the removal, respondent did comply sufficiently to have Xavier returned in March 2005. Respondent had a job and an apartment approved by DHS, and had completed parenting class. However, Xavier had to be removed again only a month later because respondent had slapped him, leaving a bruise on his face and ear. By then, respondent also was caring for Kyleigh, born in February 2005. Another parenting class, anger management, and individual therapy were required. But respondent delayed several months, waiting to begin services until the termination petition was filed in September. Significantly, she had not ended her relationship with Greg, who was the initial abuser and a registered sex offender.

Respondent argues that the termination was premature and she should have been given additional time to complete services. Jurisdiction over Xavier was obtained on June 7, 2004. That jurisdiction was not terminated when Xavier was returned on or about March 3, 2005, and DHS maintained its involvement. Subsection (c)(i) (conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age) was, therefore, proven by clear and convincing evidence regarding Xavier.

Although respondent may be correct that she was given an insufficient period to improve regarding Kyleigh, subsections (b)(i) and (ii), (g), and (j)[1] were proven by clear and convincing

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[1] These subsections provide that the court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, one 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:
>
> > (i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
> >
> > (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.
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> * * *
>
> (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.

(continued…)

evidence. Only one subsection need be satisfied to terminate parental rights. *In re Powers Minors*, 244 Mich App 111, 118; 624 NW2d 472 (2000). Xavier suffered injury at respondent's hand and respondent had also failed to protect Xavier from injury by the father. Given respondent's history and failure to comply with services, there was a reasonable likelihood that Xavier or Kyleigh would be injured in respondent's home. Respondent also failed to provide proper care and custody for both children under subsection (g). Under the doctrine of anticipatory neglect, her neglect of and failure to protect Xavier indicates probable poor treatment of Kyleigh. *In re Powers*, 208 Mich App 582, 588-593; 528 NW2d 799 (1995). Although respondent loved her children and was sincere about wanting to be a good parent, she was quick to anger and too willing to expose her children to possible abuse. At the last hearing, she was unemployed, living in an unstable situation, and had just begun services required because of her slapping Xavier several months before. Respondent's testimony that she had broken off her relationship with Greg and would not reunite with him was not credible. She was asking for joint visitations and even had one joint visitation on September 13, 2005. At that visitation, Greg called respondent "honey." The explanation of respondent's "Call me Monday" remark to Greg was also not reasonable. In short, the evidence showed a high likelihood that respondent and Greg would reunite when he was again released from jail, and that one or both children would suffer neglect or abuse in respondent's care.

Respondent, nonetheless, contends that termination of her parental rights was not in the children's best interests. Respondent, however, had no strong bond with either child, and Xavier would say "no Mommy" when driving towards DHS. These facts and respondent's failure to make sufficient progress meant that the children would continue to be at risk in her care. The trial court's best interests decision was not clearly erroneous. MCL 712A.19b(5); *Trejo, supra* at 355-357, 363-365.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens

(…continued)

* * *

(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.