STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DE, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

HEATHER EGAN,

Respondent-Appellant,

and

PAUL EGAN,

Respondent.

UNPUBLISHED
December 20, 2002

No. 241498
Oscoda Circuit Court
Family Division
LC No. 01-000174-NA

Before: Whitbeck, C.J., and Hood and Kelly, JJ.

PER CURIAM.

Respondent-appellant Heather Egan (Egan) appeals by delayed leave granted the family court's order terminating her parental rights to the minor child, DE, pursuant to MCL 712A.19b(3)(i). We affirm.

I. Basic Facts And Procedural History

DE came under the Oscoda Circuit Court's jurisdiction after child protective services (CPS) worker Tim Jensen filed a petition on behalf of the Family Independence Agency (FIA). The petition alleged, among other things, that Egan and her husband, Paul Egan who is also DE's father, had an extensive history of domestic violence, and that Egan's parental rights to two other children had been terminated on August 6, 2001. According to the petition, on August 12, 2001, Egan called her mother to remove DE from her home because of domestic violence, which Egan then reported to the Oscoda County Sheriff's Department. On August 15, 2001, Egan again called her mother, but when Egan's mother arrived, no one answered the door. Egan's mother returned to Egan's home later that day, but Egan refused to leave. The next day, when Egan picked up DE from her own mother's home, Egan denied that she was having problems with her husband, Paul Egan. The petition also listed the numerous services that had been offered to

Egan, but noted that she continued to stay in the home with her abuser despite the risk to her children. The petition asked the family court to terminate Egan's parental rights to DE, but did *not* ask the family court to terminate Paul Egan's parental rights to DE.

On the basis of this and other evidence, the referee approved out-of-home placements for DE and her brother, TD, who was living with Egan. Egan's other child, over whom her parental rights had not been terminated, was living with his father in another county. The family court subsequently authorized the petition, suspended visitation for Egan, and scheduled a jury trial to determine jurisdiction over DE and TD. The family court, however, adjourned the jury trial when it learned that there was an outstanding question whether Paul Egan was DE's biological father. Egan's attorney agreed that there would be no prejudice to TD, whose paternity was not in dispute, to adjourn the matter so that the family court could conduct a single trial concerning jurisdiction over both DE and TD.

Before the family court could conduct the jury trial, and with extremely short notice, Paul Egan entered a plea of admission, conceding that he had an alcohol abuse problem, and that, during his marriage to Egan, there were domestic disputes amounting to verbal abuse in the presence of the children or within their hearing. Paul Egan stated that he understood that, if the family court assumed jurisdiction over DE, his rights to her could be terminated, and that he was giving up his right to a jury trial. Following his admission to the allegations in the petition, Paul Egan testified that Egan wanted him to quit drinking, but then would bring home a six or twelve pack. He said that there was no physical abuse involved, and that if the children were not in the room during the verbal abuse, they could probably hear what was happening. Paul Egan added that, while Egan once obtained a restraining order that she promised to drop if he stopped drinking, Egan "left and came back so many times" that he was unsure what the nature of the restraining order was. Paul Egan denied that his admission was an attempt to deprive Egan of a jury trial.

The family court found that, based on Egan's testimony, the allegations in the petition were substantiated and DE fell under its statutory jurisdiction. Following a colloquy between the family court and counsel, in which Egan's attorney noted that Egan did not have notice of the hearing and that she, counsel, "was just notified within the hour," the family court stated that if Egan

> didn't have notice of this hearing, opportunity to appear here today, I don't see how that could affect her right to have a hearing and perhaps a Jury trial, I would say the Jury trial, unless there's [sic] some features of the Juvenile Law that would cause that to be waived at this time, and I don't know what it would be. . . .

On February 11, 2002, at the dispositional hearing regarding Paul Egan, the family court first noted that Paul Egan was indeed DE's father. The FIA's attorney, joined by Paul Egan's attorney, the minor children's attorney, and FIA worker Carla Shastal, asked the family court to approve the updated services plan for Paul Egan. Egan's attorney agreed that the evidentiary and dispositional hearing on Egan's rights to DE could be held at the same time, but argued that Egan had not been given a psychological examination or offered any services. The family court again referred to the fact that Egan's parental rights to two of her other children had been terminated, and stated that Egan could present any psychological evidence she wished at the upcoming evidentiary/dispositional hearing, including any evidence to show why it would not be in the best

interests of DE to terminate her parental rights. Though Egan recently had been charged with OUIL, third offense, which would require some jail time, the family court agreed to follow the service plan proposed by the FIA with a warning that further drinking would lead to the loss of Egan's rights to DE.

At the subsequent dispositional hearing, Egan's mother, Diana Griffith, detailed her custody of four of Egan's five children, two of whom she had adopted. Griffith had originally made the complaint regarding Egan's older children because Egan was not keeping the children clean, one child had an unexplained burn on her leg, there were too many people coming in and out of the house, the children were not getting sleep, and the house was a mess. Griffith detailed her intervention in August 2001, when she took DE for Egan because of the arguing and fighting between Egan and Paul Egan. This was not the first time Egan had called Griffith to take DE because of fighting and arguing. Griffith described Egan's anger as frightening.

Arenac County FIA worker Matthew Engster testified that, in 1996, he assisted in the protective proceeding regarding Egan's older children, and became the caseworker in June 2000. Engster said that the case plan at that time required Egan to enroll in parenting classes, which she did not do. Egan did not stay in any area long enough to start anything. Engster noted that Egan had a history of leaving Paul Egan, staying with Jim Ruyts for a month or two, and then returning to Paul Egan. Engster worked approximately a year with Egan trying to help her establish a stable home, but she never stayed in one place for very long. Engster said that Egan had tried to participate in visitation, but her transportation was unreliable, even though she was able to travel for other purposes.

Oscoda County Sheriff's Department Sergeant Conrad Wojciechowski testified that he received a call regarding a civil disturbance on August 12, 2001, at Egan's home. Egan told Wojciechowski that her husband had left and all was calm. Wojciechowski, however, had responded to previous disturbances between Egan and her husband. He had observed relative lack of care for DE, agitation, emotional outbursts, and at least one occasion when she had attempted to have an officer help her retrieve her child from FIA custody when she lacked permission to do so.

Jensen reiterated the testimony he gave at the earlier hearings. He said that Egan hid vodka so Paul Egan would not drink, gave Jensen a "ton" of information about their inability to get along, and mentioned Paul threatening her with a gun and cut the phone wire so she would stop calling the police. Jensen reported that Egan became involved with protective services in October 1995, in Saginaw County, regarding three of her other children. Over the next five years, Egan "had not made any efforts to comply with any services" and her rights to two of the children had been terminated. Jensen asked the family court to terminate Egan's parental rights to TD because Egan let him visit his father, but then failed to pick him up after TD's father joined the carnival, leaving TD with his father's parents. Jensen said that Egan misrepresented TD's residency in an attempt to have the petition dismissed, and had released her rights to TD. Jensen noted Egan made a positive change in leaving Paul Egan and beginning divorce proceedings, but he was concerned that Egan and Paul Egan have been "together, apart, together, apart, together, apart, and in the middle of all that was children."

Oscoda FIA worker Carla Shastal testified that Egan had visitation with one of her children at Ruyts' home, which was clean. However, because of Egan's history, Shastal did not

think that situation would last very long. She added that it had been impossible for Oscoda County to provide services consistently to Egan because she moved in and out of the county frequently. Shastal stated that Egan had lost her parental rights to other children even though she had been given ample opportunities and services to help her provide a proper home. Shastal did not request a psychological examination for Egan because she thought that Egan had had the same problems for six years and that it was in DE's best interests to terminate Egan's parental rights.

Jim Ruyts testified that Egan was currently living with him, that there was no drinking or drugs in his home, and that the home was adequate. Ruyts said that when one of Egan's former husbands visited, there were no problems or arguments, and Egan had been more upbeat and positive though she was not working and did not contribute financially to the household. Ruyts said that Egan was very concerned about DE. Ruyts said that Egan was "more than a friend," but she had married Paul Egan while continuing the relationship with him.

Egan, who had been married twice before she married Paul Egan, testified that she and Paul Egan had argued for three years, and that in this marriage to Paul Egan there was "cheating on both ends." Egan said that she started having children at age sixteen, had three children by the time she was nineteen, and was twenty when the limited guardianship went into effect under which her mother cared for her older children. Egan said that Paul Egan called her other children bastards, yet she returned to him at least eight times, because she was raised to try to make marriage work. Egan conceded that she should have made the effort on her own to reunify with two of her children because Paul Egan was inconsistent in supporting her in those efforts. If Ruyts was rude to her child or called her child names, Egan said she would remove the child from that situation, but she would allow spanking for punishment. Before she went to the counselor, she was very gullible in believing that Paul Egan could stop drinking, but she had learned that she should have left him long ago. Egan said that even though she failed to protect her children, she would protect them "a lot more" than she had in the past. She admitted that she lied to Wojciechowski in denying that Paul Egan had physically abused her child. Further, while with her former husband in 1997, she said she was arrested as the perpetrator of domestic violence.

The family court, after recounting Egan's history, found that Egan had underdeveloped or nonexistent parenting skills, she failed to comply with prior parenting agreements and service plans, her parental rights to three[1] other children had been terminated. The family court observed that DE had been moved from county to county in her short life, which precluded Egan from benefiting from services offered to her. The family court noted that Egan had been unable to support herself or DE, there had been no change in her behavior that would justify a court taking a chance on her ability to change, and her own mother doubted her ability to move beyond her "irresponsible and promiscuous lifestyle." The family court found that Egan had failed to establish a stable home and that termination was in DE's best interests.

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[1] Egan, who had already lost her parental rights to two of her children, relinquished her parental rights to TD before the family court terminated her parental rights to DE.

II. Pretrial Placement

A. Standard Of Review

Egan argues that the family court erred in relying solely on the fact that her parental rights had been terminated to other children in the past in ordering that DE be put in an out-of-home placement before trial pursuant to MCR 5.965(C). Because MCR 5.965(C)(2) provides the family court with discretionary authority to place a child with someone other than the child's parent, the abuse of discretion standard of review is appropriate.[2]

B. Analysis

MCR 5.965(C), which governs the preliminary hearing phase of child protective proceedings, provides in pertinent part:

> (C) Pretrial Placement
>
> (1) *Placement; Proofs.* If the child is not released under subrule (B), the court shall receive evidence to establish that the criteria for placement set forth in MCR 5.965(C)(2) are present. The respondent shall be given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proof to counter the allegations against respondent . . .
>
> (2) *Criteria*. The court may place the child with someone other than the parent pending trial or further court order if the court determines that all of the following conditions exist:
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> (a) custody of the child with the parent presents a substantial risk of harm to the life, physical health, or mental well being of the child;
>
> (b) no provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in sub (C)(2)(a); and
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> (c) conditions of child custody away from the parent are adequate to safeguard the health and welfare of the child.
>
> (3) *Findings.* If placement is ordered, the court must make a written statement of findings or place them on the record. The findings may be on the basis of hearsay evidence that possesses an adequate degree of trustworthiness.

The crux of Egan's argument is that the family court ignored that she had moved out of the home she shared with Paul Egan, which is where the couple fought, and had also filed for divorce from him. There is no merit in Egan's argument. In addition to the termination of her

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[2] See *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002) (interpreting word "may" in court rules to require abuse of discretion standard of review for related issue).

rights to two other children almost immediately before this protective proceeding, Jensen testified that he filed the petition because of Egan's history of domestic violence with Paul Egan. Jensen also said that, in the past, both individuals had filed for divorce and yet remained with each other in domestic discord. Further, there was ample evidence that in the days immediately preceding Jensen's petition violence was again a part of the household. TD, in fact, reported that he had been hit and did not want to return home, and Egan said that her husband had assaulted her while she was holding DE. The testimony was sufficient to support the family court's pretrial placement order.[3] Moreover, the testimony also supports the family court's determination that there was no reasonable alternative except removal to safeguard DE from harm.[4] There was no abuse of discretion in authorizing this placement.

III. Risk Of Harm

A. Standard Of Review

Egan contends that we must reverse the order terminating her parental rights because the family court failed to find the risk of harm required by MCL 722.638 and *In re AH*,[5] thereby violating her due process rights. As a constitutional question, review de novo is appropriate.[6] However, to the extent that Egan is challenging the family court's specific factual findings, we review the family court's findings under the clearly erroneous standard.[7] A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.[8]

B. Analysis

MCL 722.638 provides, in pertinent part:

> (1) The department shall submit a petition for authorization by the court under section 2(b) of . . . MCL 712A.2, if 1 or more of the following apply:
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> * * *
>
> (b) The department determines that there is a risk of harm to the child and either of the following is true:
>
> (i) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of . . . MCL 712A.2 . . .

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[3] MCR 5.965(C)(2) and (3).

[4] See MCR 5.965(C)(2)(b).

[5] *In re AH*, 245 Mich App 77, 85; 627 NW2d 33 (2001).

[6] See *id*. at 79.

[7] *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

[8] *Id.*; see also MCR 5.974(I).

* * *

> (2) In a petition submitted as required in subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the [FIA] shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of . . MCL 712A.19b.

In *In re AH*, the respondent argued that it was unconstitutional to treat parents differently on the basis of whether they have lost rights to other children.[9] This Court held that the statute did not violate equal protection because it served a compelling state interest – protecting and safeguarding vulnerable children – and that the Legislature determined that how a parent treats one child is probative of how that parent may treat other children.[10] This Court also found that the statute met the requirements of procedural due process because: (1) after filing the petition, the petitioner still must satisfy the statute's "risk of harm" requirement and establish that the parent is either a "suspected perpetrator" or is "suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk"; and (2) a request for termination does not necessarily mean that the family court will grant the request because the "best interests" provision of MCL 722.19b(5) allows the family court to conclude that termination is clearly not in the child's best interests.[11]

Contrary to Egan's argument, MCL 722.638, even as interpreted in *In re AH*, does not set forth a requirement that the FIA, as petitioner, must meet at trial. In any event, the family court initially found that DE was in a home where there was a substantial risk of harm to her well-being because of domestic violence, which included threats with a loaded gun and Paul Egan's excessive alcohol consumption. Additionally, the family court ultimately found that Egan had her first child at age sixteen, had three children by age nineteen, and that she failed to comply with any of the earlier service plans. The family court also found that, in DE's first year of life, she was repeatedly moved from home to home, and county to county, with Egan inevitably returning to Paul Egan, despite the volatility of that environment. The record provides ample support for the conclusion that DE was at risk of harm.

IV. Jurisdiction

Egan next argues that the family court lacked jurisdiction to terminate her parental rights because it relied only on Paul Egan's admissions to determine that a basis for jurisdiction existed. Egan cites no authority for this claim and gives it only cursory consideration. Hence, we need not address it.[12] In any event, the court rules do not require that a petitioner file a petition and sustain the burden of proof at an adjudication "with respect to every parent of the

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[9] *In re AH*, *supra* at 79, 81.

[10] *Id*. at 82-85.

[11] *Id.*

[12] See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

children involved in a protective proceeding" before the court can act in a dispositional capacity.[13] Furthermore, *In re Waite*[14] and *In re Nelson*[15] do not support Egan's argument because those cases are factually distinguishable. In this case, Paul Egan's admissions concerning his alcohol abuse problems, the history of domestic violence between himself and Egan, and the continuing marital discord, were sufficient to establish the family court's jurisdiction.[16]

V. Notice

Egan also argues that her due process rights were violated because she was not notified of Paul Egan's plea hearing, which established jurisdiction over the child. We again disagree. MCR 5.971 governs pleas of admission or no contest. MCR 5.971(A) provides that a "plea may be taken at any time after the filing of the petition . . . ." The only notice requirements concern the petitioner, in this case the FIA, and the attorney for the child who is the subject of the protective proceeding.[17] MCR 5.971(A) does not require notice to a second parent who is also a respondent in the protective proceeding when the first parent chooses to enter a plea. In any event, the record indicates that Egan's attorney was present at the plea proceeding and had ample opportunity to cross-examine Paul Egan, thereby protecting her rights.

VI. Best Interests

A. Standard Of Review

Finally, Egan summarily argues that terminating her parental rights was not in DE's best interests. The clear error standard of review applies.[18]

B. Analysis

Once there is clear and convincing evidence of at least one statutory ground for termination, the family court "must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests."[19] In arguing that termination was not in DE's best interests, Egan points out that the family court did not terminate Paul Egan's parental rights and that he continues to receive services. Egan, who was living with her boyfriend at the time of the proceedings, argues that she should have been offered services aimed at reuniting her with DE. However, the evidence indicated that Egan had consistently failed to benefit from numerous services offered to her in the past, resulting in the

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[13] *In re CR*, 250 Mich App 185, 205; 146 NW2d 506 (2002).

[14] *In re Waite*, 188 Mich App 189; 468 NW2d 912 (1991).

[15] *In re Nelson*, 190 Mich App 237; 475 NW2d 448 (1991).

[16] MCL 712A.2(b)(1) and (2).

[17] MCR 5.971(A).

[18] See *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

[19] *Id*. at 354; MCL 712A.19b(5).

termination of her parental rights to other children. Furthermore, Egan's argument, which focuses exclusively on her, utterly fails to explain how termination had any effect on DE whatsoever, much less how termination was clearly contrary to the child's best interests. In light of the overwhelming evidence of violence, both verbal and physical, in Egan's household, as well as the unending instability caused by moving repeatedly, we cannot say that the family court clearly erred when it concluded that termination was not contrary to DE's best interests, as MCL 712A.19b(5) required. Thus, the family court did not clearly err in terminating Egan's parental rights to the child.

Affirmed.

/s/ William C. Whitbeck
/s/ Harold Hood
/s/ Kirsten Frank Kelly