STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ADRIAN JOHN ALDEN NICKERSON, Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

SUMMER GREEN,

Respondent-Appellant,

and

JASON NICKERSON,

Respondent.

UNPUBLISHED
March 23, 2010

No. 290862
Genesee Circuit Court
Family Division
LC No. 05-120467-NA

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DEPARTMENT OF HUMAN SERVICES,

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v

SUMMER GREEN,

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Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

In Docket No. 290862, respondent Summer Green appeals by right the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(*i*). In Docket No. 290863, respondent Jason Nickerson appeals by right the same order terminating his parental rights to the same minor child. For the reasons set forth in this opinion, we affirm in all respects.

I. Docket No. 290862

Respondent Green first argues that the trial court erred by determining that the rules of evidence did not apply at the second termination proceeding and by erroneously allowing hearsay testimony. We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). An abuse of discretion has occurred when the trial court's decision falls outside the range of principled outcomes. *Id.*

Once a court acquires jurisdiction over a child, it may take measures against "any adult." *In re LE*, 278 Mich App 1, 17; 747 NW2d 883 (2008). The court need not ascertain whether it has jurisdiction over each parent. Rather, it acquires jurisdiction over the child. *Id.* "If termination is sought on the basis of one or more circumstances 'new or different' from those that led to the original assumption of jurisdiction, 'legally admissible evidence must be used to establish the factual basis of parental unfitness sufficient to warrant termination of parental rights.'" *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000), quoting former MCR 5.974(E)(1). Moreover, the petitioner must present legally admissible evidence to terminate the parental rights of a parent who was not subject to an adjudication. *In re LE*, 278 Mich App at 22.

It is undisputed that the trial court acquired jurisdiction over the child after Nickerson admitted to certain allegations contained in the amended petition of December 13, 2005, regarding the child's rib fractures. Green, however, did not make any admissions. Because the trial court acquired jurisdiction over the child only on the basis of Nickerson's admissions, legally admissible evidence was required to terminate Green's parental rights.

At the beginning of the second trial, Green argued that the rules of evidence applied to the new allegations, paragraphs 15 through 23, contained in the supplemental petition of January 8, 2009. In response, the trial court stated:

> Well, rather than try to broker a determination looking forward without . . . knowing what the specifics are, I think we'll just begin our record as we proceed, and that will be the best I can do at this point; but, I'm not going to handcuff the petitioner to the extent that it would be requested.

Contrary to Green's argument, the trial court did not determine that the rules of evidence did not apply to the proceeding. Rather, the trial court's remarks indicate that it decided to address evidentiary issues as they arose during trial.

During the proceeding, Green objected to William Redman's testimony regarding how many visits she had missed during September and October 2008. Green objected to Redman's testimony on the basis that he did not have personal knowledge of the matters regarding which he testified. Redman was a foster care supervisor who reviewed the file on several occasions and worked on the file at different times because of the turnover in caseworkers. Redman testified that his knowledge of Green's missed visits in September and October 2008 was based on a review of the case file.

We conclude that even if the trial court's admission of this evidence was erroneous, reversal is not warranted because a failure to reverse would not be inconsistent with substantial justice. See *In re Utrera*, 281 Mich App at 14; see also MCR 2.613; MCR 3.902(A). Caseworker Teresa Sherwood testified at a permanency planning hearing of October 28, 2008, that Green attended only 11 out of 20 visits. In addition, Tracy Bobrowski, who supervised Green's visits, indicated that Green missed an additional three visits. Green's counsel even conceded that Green missed four visits during that time period. At the time of the termination trial, Sherwood was unavailable because she was on maternity leave. As the trial court indicated, however, the information was "part of the record." As this Court recognized in *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973), a child protective proceeding is "a single continuous proceeding." Thus, even if Redman did not have personal knowledge of Green's missed visits, the admission of his testimony did not require a new trial because the record reflects Sherwood's and Bobrowski's personal knowledge of such missed visits. Even if the admission of Redman's testimony was erroneous, substantial justice does not require reversal. See *In re Utrera*, 281 Mich App at 14.

Green also argues that Terri June was erroneously permitted to present hearsay testimony regarding what Sherwood had told her. Over Green's objection, June testified that Sherwood had told her that Sherwood informed Green shortly after the first trial that Green could apply with a Family Independent Specialist worker for cash assistance. The trial court provided no explanation for overruling Green's objection, and it appears that this statement was admitted to prove the truth of the matter asserted. However, notwithstanding this hearsay evidence, reversal is not required. The trial court did not base its decision on this evidence, and considering the other properly admitted evidence, this evidence was rather insignificant. Refusal to vacate the trial court's order on this basis is not inconsistent with substantial justice. See *id.*

Green also contends that the trial court's ruling and findings of fact reflect the use of inadmissible evidence. But Green fails to further explain her argument and fails to indicate which ruling and which findings of fact she challenges. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Green's failure to properly address the merits of this argument constitutes an abandonment of the issue. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Green next argues that the doctrines of res judicata and collateral estoppel barred the second termination trial. Generally, an issue must be raised and addressed in the trial court in order to be preserved for appellate review. *LME v ARS*, 261 Mich App 273, 294; 680 NW2d 902 (2004). Green preserved her res judicata argument for appellate review to the extent that she argued that res judicata barred the relitigation of paragraphs 1 through 14 in the supplemental petition. However, Green did not preserve her argument that res judicata barred the second trial

entirely because she did not raise this argument in the trial court. Green also failed to preserve her collateral estoppel argument because she did not raise this issue in the trial court.

This Court reviews de novo the application of a legal doctrine such as res judicata or collateral estoppel. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). But unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"In order for a prior judgment to operate as a bar to a subsequent proceeding, three requirements must be satisfied: (1) the subject matter of the second action must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must have been on the merits." *In re Pardee*, 190 Mich App 243, 248; 475 NW2d 870 (1991). "[T]he subject matter is the same in both proceedings if the facts are identical or the same evidence would support both actions." *Id.* When the facts change, however, or new facts develop, the dismissal of a prior termination proceeding does not bar a subsequent termination proceeding. *Id.* "Moreover, res judicata should not be a bar to 'fresh litigation' of issues that are appropriately the subject of periodic redetermination as is the case with termination proceedings where new facts and changed circumstances alter the status quo." *Id.* at 249.

Here, the first proceeding involved paragraphs 1 through 14 of the supplemental petition of January 11, 2008. The trial court dismissed that petition against Green only. The second proceeding primarily addressed paragraphs 15 through 23 of the supplemental petition of January 8, 2009, which alleged new circumstances. Petitioner presented new evidence regarding these allegations that was not presented in the first proceeding. Thus, although paragraphs 1 through 14 of the second supplemental petition were identical to those in the first supplemental petition, petitioner did not rely on the same evidence in both proceedings and the second proceeding addressed new or changed circumstances. In any event, res judicata does not prevent a trial court in a second termination proceeding from "relying on the facts existing before the dismissal of the first petition." *Id.* at 250. We conclude that res judicata did not bar the second proceeding or preclude evidence regarding paragraphs 1 through 14 of the second supplemental petition.

Green also argues that collateral estoppel barred the relitigation of paragraphs 1 through 14. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment, and the issue was actually and necessarily litigated." *Hawkins v Murphy*, 222 Mich App 664, 671-672; 565 NW2d 674 (1997). Collateral estoppel is inapplicable here because, as previously recognized, all termination hearings are considered "a single continuous proceeding." *In re LaFlure*, 48 Mich App at 391. In other words, the trial held pursuant to the second supplemental petition was not a "subsequent, different cause of action." *Hawkins*, 222 Mich App at 671-672. In addition, although the second supplemental petition contained paragraphs 1 through 14, which were identical to those paragraphs in the first supplemental petition, the evidence presented during the second trial primarily pertained to paragraphs 15 through 23, which focused on facts and circumstances that occurred after the first trial. Thus, the allegations contained in paragraphs 1 through 14 were not actually relitigated in the second trial. Collateral estoppel is inapplicable, and Green has failed to establish plain error affecting her substantial rights.

Green next argues that the trial court erred by terminating her parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). It appears from the record, however, that the trial court

only relied on § 19b(3)(c)(*i*) as a basis for terminating Green's parental rights. Although the court did not explicitly cite § 19b(3)(c)(*i*), it recited the language of that provision and applied it to Green's circumstances.

The circumstances that brought the child into care involved the child's unexplained bruising and three rib fractures that evidenced physical abuse. Nickerson admitted some of the allegations in the amended petition, and the trial court assumed jurisdiction over the child. At the second termination trial, Green testified that doctors had misread the child's x-rays and that the child never suffered three broken ribs. Green claimed that if her attorney had turned over documentation from a different doctor who had correctly interpreted the child's x-ray films, she would not have been in her current predicament. Green's testimony in this regard showed that she continued to deny the circumstances that led to the child's removal from her care more than three years after the child was removed. We cannot conclude that the trial court erred by concluding that § 19b(3)(c)(*i*) had been satisfied by clear and convincing evidence. MCR 3.977(J); *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004).

Green also argues that the trial court erroneously determined that termination of her parental rights was not contrary to the child's best interests. In making its best-interests determination, the trial court incorrectly relied on the prior version of MCL 712A.19b(5). That statute was amended by 2008 PA 199 to require that a trial court affirmatively determine that termination is in a child's best interests before terminating parental rights. See *In re Rood*, 483 Mich 73, 102 n 43; 763 NW2d 587 (2009). Notwithstanding the trial court's error, however, reversal is not required because Green does not challenge the standard that the trial court employed and the record clearly established that termination of Green's parental rights was in the child's best interests. *In re Hansen*, 285 Mich App 158, 165; 774 NW2d 698 (2009).

At the time of the second termination trial, Green was living with her fiancé in the back of his semi-truck. She had again moved out of her mother's home because of difficulties with her mother. During the trial court proceedings, Green never obtained a home of her own to provide for the child, a condition that was required for reunification. Approximately five weeks before the second trial, Green expressed her intent to voluntarily relinquish her parental rights to both of her children. Although she testified that she changed her mind a few days later, she did not resume visits with her younger son because she was "on the road" with her fiancé and had nowhere to stay in the area.[1] Green also missed several visits with the child at issue here before her visitation was suspended. Thus, the record demonstrated that Green did not make reunification with the minor child a priority. Further, the child was removed from Green's care when he was only approximately five weeks old, and he had lived in foster care for over three years at the time of the second termination trial. Considering Green's lack of progress during that time, the record would have supported a finding that termination was in the child's best interests. See *id*.

For these reasons, we affirm the trial court's termination of respondent Green's parental rights in Docket No. 290862.

[1] Green's visitation with the child at issue here was suspended at that time.

II. Docket No. 290863

Respondent Nickerson argues that the trial court erred by failing to specifically state a statutory basis for terminating his parental rights. We agree that the court erred by failing to articulate a statutory ground for termination, but conclude that this error was harmless in light of the evidence presented in this matter.

Petitioner sought termination of Nickerson's parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). In its findings of fact and conclusions of law following the second termination trial, the trial court stated, "under the circumstances that were presented, as I found before in the previous hearing, a basis for termination existed by clear and convincing evidence." Nickerson correctly points out that the trial court's written order terminating parental rights also failed to state a statutory basis or bases for the decision. Nor did the court state a statutory ground for termination at the conclusion of the first trial.

We fully acknowledge that "[a]n order terminating parental rights under the Juvenile Code may not be entered unless the court makes findings of fact, states its conclusions of law, and *includes the statutory basis for the order*." MCR 3.977(H)(3) (emphasis added). We further acknowledge that, under MCL 712A.19b(1), the trial court must state its findings of fact and conclusions of law on the record or in writing. However, there is simply no evidence in the record to suggest that the court was unaware of the statutory grounds on which petitioner had relied or that the court was inclined to terminate Nickerson's parental rights on any statutory ground other than those specifically cited by petitioner. Indeed, it appears that the trial court was particularly concerned that Nickerson lacked the ability to provide proper care for the minor child and that there existed a possibility of harm to the minor child if returned to Nickerson's care.

A remand for additional proceedings is generally necessary only if it would facilitate appellate review. See *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). This Court will not reverse an order terminating parental rights on the basis of procedural error unless a failure to take such action would be inconsistent with substantial justice. *In re Utrera*, 281 Mich App at 14; *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002); see also MCR 2.613; MCR 3.902(A).

Here, a remand to the trial court for articulation of the statutory grounds for termination is unnecessary. From the record, it is clear that Nickerson had suffered from anger management issues in the past, that he had failed to visit the child on a number of occasions, and that he had yet to obtain stable housing as his treatment plan required. The record also showed that Nickerson failed to benefit from his treatment plan. Considering Nickerson's lack of progress in meeting the requirements of the plan, it was highly improbable that he would be able to provide proper care and custody for the child within a reasonable time. Further, because of his low capabilities, it appears that Nickerson lacked the capacity to provide proper care for the child and that the child would face a reasonable likelihood of harm if returned to Nickerson's care.

This Court is specifically authorized to "draw inferences of fact." MCR 7.216(A)(6). Given the trial court's remarks, and in light of the record evidence in this matter, it is logical to infer that the court's order of termination with respect to Nickerson was based, at least in part, on §§ 19b(3)(g) and (j).[2] We conclude that although the court's failure to articulate a statutory ground for termination constituted procedural error, it does not require reversal. See *In re TC*, 251 Mich App at 371. It is well settled that this Court will not reverse on the basis of harmless error. *In re Gazella*, 264 Mich App 668, 675; 692 NW2d 708 (2005).

Nickerson also argues that even if the trial court's failure to articulate a statutory ground does not require reversal, there was insufficient evidence to satisfy any of the statutory grounds cited by petitioner. We disagree. For the reasons stated earlier, we conclude that petitioner presented clear and convincing evidence that, without regard to intent, Nickerson had failed to provide proper care or custody for the minor child and there was no reasonable likelihood that he would be able to do so within a reasonable time. MCL 712A.19b(3)(g). There was also clear and convincing evidence that the child would face a reasonable probability of harm if returned to Nickerson's care. MCL 712A.19b(3)(j).[3] See *In re BZ*, 264 Mich App at 296.

Nor can we conclude that the trial court committed error requiring reversal with respect to its best-interests determination. As in the case of respondent Green, we recognize that the court erroneously relied on the previous version of MCL 712A.19b(5), determining only that termination of Nickerson's parental rights was not clearly contrary to the child's best interests. However, notwithstanding the trial court's error, reversal is not required because the record affirmatively established that termination of Nickerson's parental rights was in the child's best interests. *In re Hansen*, 285 Mich App at 165. The evidence showed that over the years since the child had been removed from Nickerson's care, very little had changed in Nickerson's life that would enable him to effectively parent the child. He was still residing with his parents in a home that was deemed unfit for the child. Furthermore, Nickerson's limited cognitive capacity severely restricted his ability to care for the child on his own. Nickerson was never granted unsupervised visitation during the lower court proceedings, and his failure to visit the child on a regular basis showed that reunification was not one of his priorities or primary goals. In light of this evidence, as well as the length of time that the child was in foster care, the record would have amply supported a finding that termination of Nickerson's parental rights was in the child's best interests. See *id.*

For these reasons, we affirm the trial court's termination of respondent Nickerson's parental rights in Docket No. 290863.

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[2] We need not decide whether the trial court also intended to terminate Nickerson's parental rights under §§ 19b(3)(c)(*i*) or (c)(*ii*) because only one statutory ground need be satisfied in order to terminate a respondent's parental rights. *In re Hansen*, 285 Mich App at 162 n 1.

[3] Again, we note that only one statutory ground need be proven in order to terminate a respondent's parental rights. *In re Hansen*, 285 Mich App at 162 n 1. Accordingly, we decline to consider whether there was sufficient evidence to satisfy the statutory grounds contained in §§ 19b(c)(*i*) and (c)(*ii*) with respect to respondent Nickerson.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering