

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* ROBERTSON/ROBERTSON-HARRIS,  
Minors.

UNPUBLISHED  
April 16, 2015

No. 322301  
Oakland Circuit Court  
Family Division  
LC No. 13-804871-NA

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Before: HOEKSTRA, P.J., and MARKEY and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's orders terminating her parental rights to JLR pursuant to MCL 712A.19b(3)(c)(i) and (g), and terminating her parental rights to JRH pursuant to MCL 712A.19b(3)(g) and (j). Because respondent was not denied due process and the trial court did not clearly err in terminating her parental rights, we affirm.

JLR became a temporary court ward in January 2013. The child had tested positive for marijuana and cocaine at birth in November 2012, and respondent thereafter left the child with a relative and had not returned after more than a month. After the court obtained jurisdiction over JLR, petitioner established a treatment plan for respondent and offered her services that included substance abuse counseling, mental health treatment, drug screens, parenting classes, and regular visits with JLR. Respondent failed to comply with services, continued to use drugs, and failed to regularly visit JLR. JRH was born in November 2013, and also tested positive for marijuana and cocaine at birth. Petitioner filed a supplement petition to terminate respondent's parental rights to JLR, and an original petition requesting termination of respondent's parental rights to JRH at the initial dispositional hearing.

Respondent agreed to plead no contest to a statutory basis for jurisdiction for JRH, and to the existence of statutory grounds for termination with respect to both JLR and JRH. The court received testimony from DHS caseworkers to establish factual support for respondent's pleas. The case thereafter proceeded to a contested hearing to determine whether termination of respondent's parental rights was in the children's best interests. Following the hearing, the trial court found that termination of respondent's parental rights was in the children's best interests. Accordingly, it terminated respondent's parental rights to the children.

I. DUE PROCESS

On appeal, respondent first raises three due process challenges relating to the trial court's termination of her parental rights to JRH. First, respondent maintains that her due process rights

were violated by the removal of JRH and the court's assumption of jurisdiction over JRH based on the doctrine of anticipatory neglect. Second, as a related matter, respondent contends that the trial court violated her due process rights by relying solely on the doctrine of anticipatory neglect to terminate her parental rights to JRH based on her purported failings relating to JRL. Third, respondent argues that no "aggravated circumstances" existed to warrant petitioner's request for termination in the initial petition relating to JRH without affording her an opportunity to participate in reunification services.

When the state seeks to interfere with familial bonds, it must provide the parent with fundamentally fair procedures. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). The most basic component of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 92. Michigan statutes, court rules, DHS policies and procedures, and various federal laws set forth procedures to ensure due process to a parent facing removal of a child. *Id.* at 93. Whether proceedings complied with a party's right to due process presents a question of constitutional law which is reviewed de novo. *Id.* at 91. In this case, however, respondent failed to raise any of her due process complaints in the trial court, meaning that her arguments are unpreserved and reviewed for plain error affecting her substantial rights. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012).

In this case, as a general matter, the record discloses that the trial court complied with applicable procedural requirements in taking custody of and exercising jurisdiction over JRH. The court held the appropriate removal and preliminary hearings, and made the necessary statutory findings to support both the child's initial placement into protective custody and the court's authorization of the petition. Respondent was provided notice of the proceedings, and these procedures afforded respondent with a meaningful opportunity to respond to the child's placement and the allegations against her.

On appeal, respondent argues specifically that the application of the doctrine of anticipatory neglect in the trial court's assumption of jurisdiction and placement of JHR violated her due process rights. For a court to assume jurisdiction over a child, it must determine by a preponderance of the evidence that the child comes within MCL 712A.2(b), which includes, for example, situations in which a parent's home is unfit for a child or where a parent is unable to provide proper care and maintenance for the child. Relevant to respondent's arguments regarding anticipatory neglect, it is well-recognized that a parent's treatment of one child is probative of how that parent is likely to treat another child. See *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001). Accordingly, under the doctrine of anticipatory neglect, abuse or neglect of a child is not a prerequisite for jurisdiction; but, rather "[a] child may come within the jurisdiction of the court solely on the basis of a parent's treatment of another child." *In re Gazella*, 264 Mich App 668, 680-681; 692 NW2d 708 (2005), superseded by statute on other grounds as stated in *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009), vacated on other grounds 486 Mich 1037 (2010). This doctrine also applies to protect a child who is not yet born, meaning a parent's treatment of one child may be indicative of how a parent will treat a second child when that child is born. *In re AH*, 245 Mich App at 84. In support of her argument that anticipatory neglect does not merit removal of a child and the court's assumption of jurisdiction, respondent notes that, in cases of an infant born to a parent with another child in out-of-home care, the DHS Child Protective Services Manual (PSM) requires a "full field investigation to ensure the safety of the newborn," PSM 712-6, p 14, and that the investigation

must “focus on the reasons for prior removal . . . and how the family has addressed these specific issues,” PSM 713-08, pp 13-14.

Contrary to respondent’s arguments, in this case, the trial court could, on the basis of anticipatory neglect, assume jurisdiction over JRH based on respondent’s neglect of JRL without violating respondent’s due process rights because her treatment of JRL supported the conclusion that she would be unable to provide proper care and a fit home for JRH. See, e.g., *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). While the DHS manual requires a “full field investigation” relating to the newborn, nowhere does it preclude consideration of a parent’s treatment of another child and it in fact requires consideration of the reasons for prior removal as well as the family’s efforts to address these issues. Given that both children in this case were born with drugs in their systems and that respondent had wholly failed to address her failures with JRH, her due process rights were in no way violated by the court’s application of the doctrine of anticipatory neglect. Moreover, it is clear that, contrary to respondent’s arguments, the petition relating to JRH and the trial court’s assumption of jurisdiction was not based solely on respondent’s treatment of JLR. The record shows that respondent tested positive for drugs while pregnant with JRH, and JRH’s meconium tested positive for cocaine and marijuana at the time of JRH’s birth. Respondent’s prenatal treatment of JRH demonstrated neglect warranting the trial court’s assumption of jurisdiction over JRH and the child’s placement in care.<sup>1</sup> See *Matter of Baby X*, 97 Mich App 111, 116; 293 NW2d 736 (1980).

Similarly, the trial court did not deny respondent due process by terminating respondent’s parental rights to JRH, in part, on consideration of respondent’s treatment of JLR. As indicated, respondent agreed to plead no contest to the existence of a statutory ground for termination with respect to JRH, and the court received testimony in support of that plea which indicated that JRH tested positive for marijuana and cocaine at birth, and that respondent lacked appropriate housing to care for JRH. In addition to respondent’s treatment of JRH, contrary to respondent’s arguments on appeal, “anticipatory neglect can militate in favor of termination . . . .” *In re LaFrance Minors*, 306 Mich App 713, 730; 858 NW2d 143 (2014). Respondent had shown an inability to care for JLR, which was relevant to her ability to provide care and custody for JHR as well as the likelihood that JHR would come to harm in respondent’s care. The trial court did not merely speculate that JHR might come to harm; rather, respondent had a documented history of drug abuse and the evidence established a direct connection between respondent’s drug use and the health and well-being of her children, both of whom tested positive for drugs at birth.<sup>2</sup> In

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<sup>1</sup> Indeed, it is disingenuous for respondent to complain about the placement and jurisdictional decisions and to contend that she was denied due process, considering that she expressly informed the court at the placement hearing that she was “not objecting to [the child] being where, you know, she’s placed at,” that she waived a determination of probable cause at the preliminary hearing, and that she agreed to plead no contest to the allegations in the petition in support of a statutory basis for jurisdiction.

<sup>2</sup> In this regard, respondent’s reliance on *In re LaFrance Minors*, 306 Mich App at 731 is misplaced. There, this Court concluded that “drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of

short, as discussed in more detail *infra*, the trial court had statutory grounds for terminating respondent's parental rights to JRH and the trial court did not violate respondent's due process rights by considering respondent's treatment of JRL.

We also reject respondent's argument that termination of her parental rights to JRH was premature because she was not provided an opportunity to participate in reunification services for JRH. Pursuant to MCL 712A.19a(2), "[r]easonable efforts to reunify the child and family must be made in all cases" unless certain aggravating circumstances exist. See *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). Notwithstanding its obligation to provide reasonable reunification services, petitioner is authorized to request termination of parental rights in an initial petition,<sup>3</sup> MCL 712A.19b(4); MCR 3.961(B)(6), and reunification services are not required where termination is the agency's goal. *In re Moss*, 301 Mich App 76, 91-92; 836 NW2d 182 (2013); *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). As more fully set forth in MCR 3.977(E), additional reunification efforts are not required where (1) the initial petition requested termination, (2) the trial court found by a preponderance of the evidence that there were grounds to assume jurisdiction, (3) clear and convincing evidence under MCL 712A.19b(3) for at least one ground for termination had been established, and (4) termination was in the child's best interests. See *In re Moss*, 301 Mich App at 91-92.

In the present case, there is no denying that respondent received numerous services throughout her pregnancy with JRH in connection with JLR's case, which had been pending since January 2013, and she completely failed to comply with, or benefit from, those services. For example, respondent was offered, but failed to avail herself of, substance abuse treatment, Family Team Meetings, parenting classes, drug screens, a psychological evaluation, and referrals for counseling and mental health treatment. Even after JHR's birth, respondent had the opportunity for visitation with both children, and she was again referred for mental health services and drug screenings. Respondent's lack of compliance with services led to the filing of the supplemental petition to terminate respondent's parental rights to JLR, and the same circumstances that led to the adjudication of JLR as a court ward, principally respondent's substance abuse and homelessness, were also present with respect to JRH. In sum, contrary to respondent's arguments, petitioner made reasonable efforts to maintain and reunify respondent's family. Petitioner had the authority to seek termination of respondent's parental rights regarding JRH in the initial petition and, given the trial court's assumption of jurisdiction and decision to terminate respondent's parental rights under MCL 712A.19b(3)(g) and (j), petitioner was not required to provide respondent with additional services aimed at reunification. See MCR 3.977(E). Respondent has not shown plain error and she is not entitled to relief on this basis.

anticipatory neglect." *Id.* In this case, unlike in *LaFrance*, the trial court did not merely assume respondent's drug use would lead to abuse or neglect; rather, respondent's drug use had in fact impacted both of her children.

<sup>3</sup> Contrary to respondent's argument, although a petitioner is *required* to request termination in the initial petition when there is evidence of "aggravated circumstances," see MCL 722.638(1), (2); MCL 712A.19a(2)(a), the authority to terminate parental rights at an initial dispositional hearing is not limited to cases involving aggravated circumstances, but includes any of the grounds for terminating parental rights contained in MCL 712A.19b(3). See MCL 712A.19b(4); MCL 722.638(3); MCR 3.977(E).

## II. STATUTORY GROUNDS FOR TERMINATION

Respondent argues that the trial court erred in finding that the evidence supported a statutory ground for termination with respect to both children. Specifically, respondent argues that, at the time of termination, there was evidence that she had started to engage in her treatment plan and to visit her children. She maintains that, with additional time, she would be able to provide proper and care and custody for the children and that there is no evidence she poses a risk of harm to her children.

The trial court's factual findings as well as its ultimate determination that a statutory ground for termination has been proven are reviewed for clear error. *In re Mason*, 486 Mich at 152. A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id.*

In this case, respondent pleaded no contest to the existence of a statutory ground for termination. Given her plea of no contest, she may not now argue on appeal that there was not clear and convincing evidence to support termination of her parental rights. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). In any event, the trial court did not clearly err in finding clear and convincing evidence to support termination of respondent's parental rights.

Although respondent pleaded no contest, the trial court was still required to establish factual support for a finding that one or more of the statutory grounds alleged in the petitions were true. MCR 3.971(C)(2). See also MCR 3.977(E)(3). The factual support for respondent's pleas was established through the testimony of DHS caseworkers at the plea proceeding.<sup>4</sup>

Based on the evidence presented, the trial court found that the testimony at the plea proceeding established factual support for terminating respondent's parental rights to JLR pursuant to MCL 712A.19b(3)(c)(i) and (g), and for terminating her parental rights to JRH pursuant to MCL 712A.19b(3)(g) and (j).<sup>5</sup> Those subsections permit termination of parental rights under the following circumstances:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial

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<sup>4</sup> Because respondent had already pleaded no contest to a statutory ground for termination, and the trial court's finding of a statutory ground for termination was based on the caseworkers' testimony at the plea proceeding, respondent's reliance on appeal on her own testimony and other evidence presented at the best interest hearing is misplaced.

<sup>5</sup> Respondent incorrectly suggests on appeal that the trial court did not actually terminate her rights to JHR under MCL 712A.19b(3)(j) but instead mistakenly checked that box on its written order. Although the trial court did not refer to subsection (j) on the record at the plea proceeding, it identified that subsection as a statutory basis for termination with respect to JRH in its written report and recommendation.

dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The 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.

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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.

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(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.

#### A. JLR

At the plea proceeding, the caseworker testified that JLR became a court ward because of respondent's substance abuse and because respondent had left the child with a relative for more than a month without returning. JLR tested positive for cocaine and marijuana at birth. A treatment plan was established for respondent, but she failed to engage in mental health and other services, and regularly failed to comply with drug screening. She tested positive for cocaine in June 2013, and for marijuana in June and July 2013, and tested positive for adulterants in December 2013. At the time the supplemental petition for JLR was filed, respondent had attended only 9 of 86 possible visits with JLR. Further, respondent still had not obtained suitable housing.

The caseworker's testimony established factual support for a finding that the conditions that led to the adjudication, principally respondent's substance abuse and need for mental health services, continued to exist more than a year later. Further, considering respondent's significant lack of progress during the preceding year, and particularly her unwillingness to comply with drug screening and mental health services, as well as her continued positive drug tests, the testimony established factual support for a finding that there was no reasonable likelihood that the conditions that led to JLR's adjudication would be rectified within a reasonable time considering JLR's age. Accordingly, the trial court did not err in finding that the testimony established factual support for terminating respondent's parental rights to JLR under § 19b(3)(c)(i).

The caseworker's testimony that JLR tested positive for cocaine and marijuana at birth, and that respondent left JLR with a relative and failed to return for more than a month, also established factual support for a finding that respondent failed to provide proper care and custody for the child. In addition, the caseworker's testimony regarding respondent's unwillingness to comply with services and her continued positive drug tests established factual support for a

finding that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering JLR's age. Accordingly, the trial court did not err in finding that the testimony supported terminating respondent's parental rights to JLR under § 19b(3)(g).

### B. JRH

At the plea proceeding, the DHS caseworker testified that she investigated JRH's case after that child's birth in November 2013. She learned that respondent had three other children in a guardianship with their grandmother, and that JLR had been a court ward since January 2013. She also learned that respondent had not complied with her parent-agency agreement in JLR's case, that respondent had a history of substance abuse involving marijuana and cocaine, and that respondent tested positive for marijuana in July 2013, when she was six months pregnant with JRH. The caseworker discovered that JRH tested positive for both marijuana and cocaine at birth. In addition, at the time the petition for JRH was filed, respondent did not have income or resources to care for JRH.

The caseworker's testimony that respondent tested positive for marijuana while pregnant with JRH and that JRH tested positive for marijuana and cocaine at birth established factual support for a finding that respondent failed to provide proper care and custody for the child. In addition, the testimony that respondent had three other children who were in a guardianship and another child who had been a court ward since January 2013, that respondent had not complied with services in JLR's case, and that respondent did not have income or resources to care for JRH, established factual support for a finding that there was no reasonable expectation that respondent would be able to provide proper care and custody for JRH within a reasonable time considering the child's age. Accordingly, the trial court did not err in finding that the testimony established factual support for terminating respondent's parental rights to JRH under § 19b(3)(g).

In addition, the caseworker's testimony that respondent had a history of substance abuse, that JRH tested positive for marijuana and cocaine at birth, and that respondent had failed to comply with services in the case involving JLR, which had been pending for more than a year, established factual support for a finding that there was a reasonable likelihood, based on respondent's conduct or capacity, that JRH would be harmed if returned to respondent's home. Accordingly, the trial court did not err in finding that the testimony also established factual support for terminating respondent's parental rights to JRH under § 19b(3)(j).

### III. BEST INTERESTS

Respondent also argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. Specifically, respondent claims that she had begun building a bond with her children through visitation and that the children's placement with family members weighs against termination. She further maintains that she has recognized a need for change, that she is capable of finding employment and suitable housing, and that she should be given more time to correct her shortcomings.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of

parental rights and order that additional efforts for reunification of the child with the parent not be made.” MCL 712A.19b(5). Whether termination is in the child’s best interests is determined by a preponderance of the evidence. *In re Moss*, 301 Mich App at 90. In determining what is in a child’s best interests, the trial court may consider a variety of factors, including 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, *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012), as well as a respondent’s history and psychological evaluation, *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009). Because a child’s placement with a relative weighs against termination, MCL 712A.19a(6)(a), the fact that a child is living with relatives is an explicit factor the trial court must consider when determining a child’s best interests. *In re Olive/Metts Minors*, 297 Mich App at 43. On appeal, we review a trial court’s decision regarding a child’s best interests for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

Although respondent asserts that she loves her children and claims that she should be given more time to engage in services and rehabilitate herself, she was given ample time and opportunity to participate in services and she failed to do so. Respondent continued to use drugs while pregnant with JRH, who, like JLR, tested positive for marijuana and cocaine at birth. Respondent also failed to address her mental health issues and continued to deny that she needed mental health treatment. A psychologist who evaluated respondent opined that respondent was unlikely to engage in treatment and that, without treatment, respondent was likely to engage in impulsive behavior and substance abuse in the future. The psychologist opined that there was little to suggest that respondent would be able to make the necessary long-term changes to allow her to establish a stable environment for the children. In addition, despite respondent’s professed love for her children, her attendance at visitations was abysmal. She failed to attend well more than half of her possible visits and, after JRH was born, she failed to pay attention to JLR during the visits that she attended. As a result, there was little bond between the children and respondent. Further, contrary to respondent’s arguments on appeal, the trial court expressly considered the children’s placement and determined that, although the children lived with relatives, this did not obviate the finding that termination was in the children’s best interests because the children were bonded to their caregivers, not respondent, and respondent was in fact not welcome in the caregivers’ homes. Given the evidence presented, the trial court did not clearly err in finding that termination of respondent’s parental rights was in the children’s best interests.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Pat M. Donofrio