STATE OF MICHIGAN

COURT OF APPEALS

In re HAYNES, Minors.

UNPUBLISHED
February 23, 2016

Nos. 327820; 327823
Wayne Circuit Court
Family Division
LC No. 14-516360-NA

Before: RONAYNE KRAUSE, P.J., and SAWYER and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals[1], respondent mother (mother) and respondent father (father) appeal as of right the order terminating mother's parental rights to her minor children LH, SH, DH, and HH, and father's parental rights to his minor children, SH, DH, and HH.[2] In Docket No. 327820, mother appeals the trial court's order terminating her parental rights under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or physical abuse, reasonable likelihood of injury or abuse if returned to the parent), (b)(*ii*) (failure to prevent physical injury or physical or sexual abuse), (g) (without regard to intent, failure to provide proper care or custody), and (j) (child would likely be harmed if returned to the parent). In Docket No. 327823, father appeals the trial court's order terminating his parental rights under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or physical abuse, reasonable likelihood of injury or abuse if returned to the parent), (b)(*ii*) (failure to prevent physical injury or physical or sexual abuse), (g) (without regard to intent, failure to provide proper care or custody), (j) (child would likely be harmed if returned to the parent), and (k)(*i*) (parent abused child or child's sibling, and the abuse included abandonment of young child). With regard to both appeals, we affirm.

This case arises from a domestic incident at the family home in which father disciplined the then two-year-old DH by spanking him, tying his ankles together, and threatening to "snap

[1] *In re Haynes Minors*, unpublished order of the Court of Appeals, entered June 18, 2015 (Docket Nos. 327820 and 327823).

[2] Father was the legal father of both SH and HH and the putative father of DH, but was neither the legal nor putative father of LH. As discussed later, the trial judge also terminated the parental rights of LH's putative father, who did not participate in the lower court proceedings and does not play a role in either appeal.

his neck" or take him down to the basement and kill him. Father struck, choked, and knocked mother to the floor when she attempted to intervene. The children were removed from the home, and the Department of Health and Human Services (DHHS) subsequently filed a petition for temporary custody.

Sometime later, the three eldest children all began disclosing accounts of physical and sexual abuse at respondents' hands to their foster parents. The children's lawyer-guardian ad litem (LGAL) thereafter filed a permanent custody petition and sought to terminate respondents' parental rights. The trial court refused to admit the children's statements to their foster parents after conducting a Tender Years hearing and dismissed the LGAL's petition. Several months later, the children made different, more detailed sexual-abuse disclosures to a Child Protective Services (CPS) worker and a pediatrician, and they reiterated the statements during separate forensic interviews. DHHS filed a supplemental petition seeking termination of respondents' parental rights on the basis of the new allegations. The trial court admitted the statements from the forensic interview and eventually terminated respondents' parental rights.

I. RES JUDICATA

Mother contends that res judicata barred the allegations in the supplemental petition because the court had previously ruled on the same evidence and the action was between the same parties. We disagree.

Generally speaking, an issue is preserved for appellate review if it was raised, addressed, and decided in the trial court. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Counsel for father briefly argued during the May 22, 2015 Tender Years hearing that res judicata barred the allegations in the supplemental petition, but the trial judge told counsel to file a motion if he wanted to raise the doctrine. Counsel failed to do so, and the court never addressed the issue in full or decided it. Thus, the issue is unpreserved for appellate review.

We typically review de novo a question of law, including whether res judicata applies. *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013). We review unpreserved issues, however, for plain error affecting substantial rights. *Demski v Petlick*, 309 Mich App 404, 426-427; ___ NW2d ___ (2015). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights." *Id*. at 427 (quotation marks and citation omitted).

"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*. In any event, this Court has held that the doctrine of res judicata "cannot settle the question of a child's welfare for all time, nor prevent a court from determining at a subsequent time what is in the child's best interest at that time[,]" *id*. at 249, and that the doctrine does not prevent a trial judge in a second termination hearing from "relying on the facts existing before the dismissal of the first petition[,]" *id*. at 250. Further, MCR 3.977(F) authorizes a trial court to

take action on a supplemental petition seeking termination of parental rights "on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction."

As an initial matter, we note that father—not mother—raised the issue in the lower court but fails to address it on appeal. Mother raises the issue on appeal, but abandons it because she failed to include it in the statement of questions presented in her brief on appeal. See MCR 7.212(C)(5); *Lash v Traverse City*, 479 Mich 180, 201 n 6; 735 NW2d 628 (2007). Nevertheless, assuming that mother had properly preserved, raised, and addressed the issue, principles of res judicata did not bar the allegations in DHHS's supplemental petition.

First, a trial court is permitted to consider circumstances that are "new or different *from the offense that led the court to take jurisdiction*" when the petitioner raises the circumstances in a supplemental petition seeking the termination of parental rights. MCL 3.977(F) (emphasis added). The court initially took jurisdiction over the children based on the unsuitable home environment, the domestic-violence history between respondents, father's threat of violence against DH on April 17, 2014, a failure to benefit from services, and "some" criminality. The court did not take jurisdiction over the children based on the sexual abuse alleged by the foster parents and the LGAL. Accordingly, MCR 3.977(F) allowed the court to consider the new or different sexual-abuse allegations when DHHS raised them in a supplemental petition seeking termination of respondents' parental rights.

Moreover, assuming that MCL 3.977(F) did not exist, mother would still not be entitled to relief on the issue. The children disclosed myriad troubling details of sexual abuse to their foster parents, Jason and Courtney Faraday, including statements that SH and DH had played the "naked game" with respondents, in which father had taught them "how to have sex[;]" SH had learned to touch his own private parts from watching father touch himself during the "naked show[;]" respondents had both touched SH's private area and would make him touch theirs; father had touched SH in the butt with a mirror; and father would lay in bed with LH and watch the "naked show." In its supplemental petition, DHHS alleged that father had touched LH's vagina, butt, and chest; mother made LH touch mother's vagina, butt, and chest; father brought LH to his bed, took her clothes off, and touched her privates with his hand while mother was present; and respondents would reward SH in the "naked game" for touching more private parts. While similar in tone and content, these are new and different allegations, not identical facts, meaning that the subject matter of the second termination hearing was not the same. *In re Pardee*, 190 Mich App at 248. The court properly considered the allegations based on facts that existed before the first termination proceeding but had only arisen after that proceeding. *Id*. at 249-250.

Moreover, although both termination hearings included the same people and organizations, the *parties* to both proceedings were not the same. The LGAL was the petitioner at the first termination hearing, and DHHS did not support the LGAL's permanent-custody petition and actively contended against it through counsel's closing argument and testimony. DHHS was the petitioner in the second proceeding, pursuant to its supplemental petition. Mother and father, obviously, were respondents in both proceedings. Res judicata thus did not bar the allegations because the petitioners were different in the first and second termination proceedings. *In re Pardee*, 190 Mich App at 248. Accordingly, mother fails to demonstrate plain error affecting her substantial rights. *Demski*, 309 Mich App at 427.

II. STATUTORY GROUNDS FOR TERMINATION

Respondents both contend that insufficient evidence existed to support termination of their parental rights under MCL 712A.19b(3)(b)(*i*) and (*ii*), and father additionally argues that the court clearly erred in terminating his parental rights under MCL 712A.19b(3)(g), (j), and (k)(*i*). We agree that the trial court erred in terminating father's parental rights under MCL 712A.19b(3)(k)(*i*), but disagree with the remainder of respondents' contentions.

We review for clear error a trial court's factual findings "as well as its ultimate determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence." *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "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 Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). We review de novo a trial court's interpretation and application of the relevant statutory provisions. *In re Gonzales/Martinez*, 310 Mich App 426, ___; ___ NW2d ___ (2015) (Docket No. 324168); slip op at 2.

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App at 80. If clear and convincing evidence supports termination under any of the statutory grounds that the trial court cites, the court's erroneous reference to another statutory ground constitutes harmless error. *In re Williams*, 286 Mich App 253, 273; 779 NW2d 286 (2009).

In relevant part, MCL 712A.19b(3) authorizes a court to terminate parental rights when

> (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.
>
> * * *
>
> (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.

(k) The parent abused the child or a sibling of the child and the abuse included 1 or more of the following:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

The court clearly erred in terminating father's parental rights under MCL 712A.19b(3)(k)(*i*). As noted earlier, the trial court terminated the parental rights of LH's putative father at the May 26, 2015 termination hearing in which the court also terminated respondents' parental rights. The judge terminated the parental rights of LH's putative father under MCL 712A.19b(3)(a)(*i*) and (k)(*i*), specifically finding that he had abandoned LH. It is possible that the court erroneously imputed to father a statutory ground for termination of parental rights of LH's putative father, and it is equally possible that—as petitioner posits on appeal—the judge intended to list MCL 712A.19b(3)(k)(*ii*) as a statutory ground for termination of father's parental rights. Regardless, the record does not demonstrate that father abandoned the children, whatever else he might have done. To the contrary, evidence established that he consistently attended hearings, procured his own counsel, repeatedly sought supervised visitation, and attended the supervised visits once the court granted his request. We are thus left with a definite and firm conviction that the court made a mistake in terminating father's parental rights under MCL 712A.19b(3)(k)(*ii*). *In re Moss*, 301 Mich App at 80.

The court, however, properly found grounds for termination of respondents' parental rights under MCL 712A.19b(3)(g). Despite services provided by DHHS and well over a year to improve the conditions of the family home, respondents were never able to provide a safe and suitable environment for the children. CPS investigator Alicia Finley noted that respondents had improved the home slightly during the early part of 2014, but her surprise visit on March 19, 2014, revealed trash and empty cans on the floor, an electric heater on the floor with trash near it, the open kitchen stove being used as a heat source, no knobs on the sinks or shower, and illegal electricity. Conditions were similar, if not worse, when Detroit Police Officer William Rice responded to an April 17, 2014 incident; he noted a powerful canine fecal odor in the home, wet and mildewed furniture, accumulated trash, unclean conditions, illegal utilities, and so much clutter that it was difficult to walk through the house. Finally, foster-care worker Jayla Smith, who had no contact with the family until at least January 2015, testified at the April 20, 2015 hearing that the home was still in a "dirty" condition, continued to use illegal electricity, was missing windows, and contained "buckets of feces" inside. And the length of time respondents had to address the issue—nearly 18 months—and the fact that they made little or no progress meant that they were unlikely to do so within a reasonable time. Failure to maintain suitable housing can, on its own, be grounds for termination under MCL 712A.19b(3)(g), so the judge would have been entitled to terminate respondents' rights on the basis of the family home alone. *In re Trejo*, 462 Mich 341, 362-363; 612 NW2d 407 (2000), abrogated in part by statute on other

grounds as stated in *In re Moss*, 301 Mich App 76; 836 NW2d 182 (2013); *In re Laster*, 303 Mich App 485, 493-494; 845 NW2d 540 (2013).

But respondents were unable to provide proper care and custody for the children for numerous reasons aside from the environmental concerns. Throughout the proceedings, neither respondent had a job or a legal source of income. Respondents had a documented domestic-violence history that both refused to acknowledge despite documentary evidence and eyewitness testimony to the contrary. There was also, of course, extensive evidence that respondents had sexually abused at least LH and SH and had physically abused all of the children. There was no evidence that respondents could ameliorate any of those conditions within a reasonable time. Accordingly, clear and convincing evidence supported the trial court's termination of respondents' parental rights under MCL 712A.19b(3)(g).

Thus, we affirm the trial court's finding of statutory grounds for termination based on MCL 712A.19b(3)(g) alone. See *In re Trejo*, 462 Mich at 360 ("it is technically unnecessary to address the second ground for termination alleged in the petition because the petitioner need only establish one ground for termination . . . ."). Nevertheless, for purposes of clarity, we will address the other stated grounds for termination.

The trial court also properly terminated respondents' parental rights under MCL 712A.19b(3)(b)(*i*) and (*ii*). While the trial judge was not convinced at the adjudication that respondents had sexually abused the children, the new allegations and his review of the second forensic interviews persuaded him to reverse course. Further, both CPS investigator Ebony Golden and Doctor Shiny Kunjummen found LH and SH's disclosures of sexual abuse credible. Respondents contend that conflicting evidence existed in light of the facts that none of the children disclosed abuse during the first forensic interviews, there was no physical evidence of sexual abuse, and four different disinterested witnesses all testified in 2014 that they did not suspect respondents sexually abused the children. But this Court gives due regard to the trial court's "special opportunity to observe the witnesses" before it, *In re Moss*, 301 Mich App at 80, including the children themselves, and "[i]t is not for this Court to displace the trial court's credibility determination," *In re HRC*, 286 Mich App 444, 460; 781 NW2d 105 (2009). And assuming the evidence only demonstrated that respondents sexually abused LH and SH, that fact did not prevent the court from terminating their parental rights to DH and HH as well, because MCL 712A.19b(3)(b)(*i*) requires physical injury, physical abuse, or sexual abuse to the child "or a sibling of the child."

Moreover, under MCL 712A.19b(3)(b)(*ii*), there was ample evidence demonstrating that respondents both sexually abused LH and SH, sometimes alone, and sometimes in concert with each other. Thus, both parents had the opportunity to prevent the sexual abuse, both failed to do so, and there was a reasonable likelihood that all of the children would suffer sexual abuse at their hands in the foreseeable future. See MCL 712A.19b(3)(b)(*ii*).

Finally, the court properly found clear and convincing evidence to support termination of respondents' parental rights under MCL 712A.19b(3)(j). Under that provision, a parent's failure to comply with a treatment plan constitutes evidence that the child may be harmed if returned to the parent's home. *In re White*, 303 Mich App 701, 710-711; 846 NW2d 61 (2014). A trial court may also rely on a parent's history, *In re Archer*, 277 Mich App 71, 75-76; 744 NW2d 1

(2007), or a parent's mental health, see *In re AH*, 245 Mich App 77, 87; 627 NW2d 33 (2001), in determining whether the child would be harmed if returned to the parent's care. The contemplated harm may be either physical or emotional. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

Respondents did make progress on some facets of their treatment plan, but the house remained in a clearly unsuitable condition throughout the proceedings. Respondents also had a history of domestic violence, and their psychiatric evaluations noted that the extent of their denial and lack of responsibility suggested serious psychiatric issues. This evidence demonstrated a substantial likelihood that the children would be subject to emotional, if not physical, harm if they returned to respondents' home, a conclusion borne out by the fact that the three eldest children were diagnosed with post-traumatic stress disorder shortly after their removal from the home. See MCL 712A.19b(3)(j). Accordingly, the judge did not clearly err in terminating respondents' parental rights under MCL 712A.19b(3)(b)(*i*), (b)(*ii*), (g), or (j).

III. BEST INTERESTS

Father contends that there was insufficient evidence—and that the trial judge provided insufficient reasoning—to support a conclusion that termination of respondents' parental rights was in the children's best interests. We disagree.

We review for clear error a trial court's finding that termination is in a child's best interest. *In re Hudson*, 294 Mich App at 264. "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction a mistake has been made." *Id*.

To terminate parental rights, a trial court must find by a preponderance of the evidence that termination is in the child's best interest. *In re Moss*, 301 Mich App at 90; see also MCL 712A.19b(5). "A trial court should weigh all the evidence available to determine the children's best interests." *In re White*, 303 Mich App at 713. In doing so, a court "should consider a wide variety of factors that may include 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." *Id*. (citation and quotation marks omitted). A trial court may also consider a parent's history, including a continuing involvement with domestic violence, see *In re Jones*, 286 Mich App 126, 131; 777 NW2d 728 (2009), substance abuse or mental health issues, *In re AH*, 245 Mich App at 89, the parent's compliance with his or her treatment plan, *In re White*, 303 Mich App at 714, and whether the parent has abused the child, see *In re Powers Minors*, 244 Mich App 111, 120; 624 NW2d 472 (2000). In the case of multiple children, a trial court need only address each child's best interest individually if their interests significantly differ. *In re White*, 303 Mich App at 715.

The trial court did not err in concluding that termination of respondents' parental rights was in the children's best interests. The trial judge explicitly stated that his findings were "based on the record as a whole." See *In re White*, 303 Mich App at 713. He also addressed the bond between respondents and the children and opined that at least LH and DH clearly feared their parents. The judge further noted that he considered respondents' parenting ability to be "extremely doubtful" based on their history and found that the Faradays' home was "safe, and

secure, and stable over the parents' home[.]" See *id*. Additionally, the judge considered respondents' "history of abuse and neglect[,]" the findings of sexual abuse, and the opinions and testimony of the witnesses throughout the proceedings. All of these factors supported the trial court's finding that termination of respondents' parental rights was in the children's best interests.

Moreover, the evidence demonstrated that respondents had a history of domestic violence with each other, not simply a tendency to abuse their children. Troublingly, too, the domestic violence did not stop even after respondents came to the attention of DHHS and CPS, as illustrated by the April 14, 2014 incident. Respondents' potential psychiatric issues—evidenced by their obdurate denial of any family domestic-violence history and refusal to take responsibility for their own actions—and the fact that they never complied with their treatment plan by maintaining suitable housing or obtaining employment or a legal source of income also weighed in favor of termination, and the court could have considered those factors in its decision. *In re White*, 303 Mich App at 714; *In re Jones*, 286 Mich App at 131; *In re AH*, 245 Mich App at 89. The trial judge, admittedly, did not address each of the children's best interests individually, but he was not required to because there was no evidence that their best interests differed significantly. *In re White*, 303 Mich App at 715. Accordingly, we are not definitely and firmly convinced that the trial court made a mistake in finding that termination of respondents' parental rights was in the children's best interests. *In re Hudson*, 294 Mich App at 264.

IV. DUE-PROCESS VIOLATION

Father contends that the court's order terminating his parental rights constituted a due-process violation because there was insufficient evidence to support the court's findings of a statutory basis for termination. We disagree.

As noted, an issue is preserved for appellate review if it was raised, addressed, and decided in the trial court. See *In re Frey*, 297 Mich App at 247. Father raises the issue of a due-process violation for the first time on appeal, rendering it unpreserved for appellate review.

We typically review de novo whether child-protective proceedings complied with a parent's constitutional right to due process. *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). As noted, however, we review unpreserved issues for plain error affecting substantial rights. *Demski*, 309 Mich App at 426-427. "To avoid forfeiture under the plain error rule, three requirements must be met: (1) the error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights." *Id*. at 427 (quotation marks and citation omitted).

"Due process applies to any adjudication of important rights." *In re Brock*, 442 Mich 101, 110; 499 NW2d 752 (1993). Due process rights protect a parent's interest in the companionship, care, custody, and management of his or her children. *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). A trial court's decision to terminate parental rights, however, does not violate the parent's due-process rights so long as the court provides the parent with fundamentally fair procedures, including a specific adjudication hearing regarding his or her parental fitness, and

bases its termination decision on legally admissible evidence. *In re Sanders*, 495 Mich 394, 418-420; 852 NW2d 524 (2014); *In re Rood*, 483 Mich at 91.

The record demonstrates that father received adequate procedural safeguards, and he makes no contrary assertions on appeal. In addition to a multitude of preliminary and dispositional hearings, the court provided respondents an adjudication trial and a termination hearing where both had the opportunity to be heard and to contest the evidence against them. As discussed earlier, the trial judge properly found that clear, convincing, and legally admissible evidence supported termination of respondents' parental rights on several different statutory grounds. Father takes issue with the court's ultimate conclusion, but he alleges no constitutional defects in the *process*, nor does a review of the lower court record reveal cause for alarm on that score. Consequently, he fails to demonstrate plain error affecting his substantial rights. *Demski*, 309 Mich App at 427.

Affirmed.

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Cynthia Diane Stephens