

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* A. K. R. MOSES, Minor.

UNPUBLISHED  
December 20, 2018

No. 343715  
St. Clair Circuit Court  
Family Division  
LC No. 16-000358-NA

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Before: MURRAY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Respondent appeals by right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

Respondent first argues that the trial court violated his right to procedural due process when it arbitrarily suspended supervised visitation without making findings that the visits were harming the child.

This issue was not raised in the trial court, and it is not preserved for appeal. Unpreserved claims of constitutional error are reviewed under the plain error rule. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009).

There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. First, there must have been an error. Second, the error must be plain, meaning clear or obvious. Third, the error must have affected substantial rights. This “generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” The defendant bears the burden of establishing prejudice. Fourth, the error must have . . . “seriously affected the fairness, integrity or public reputation of judicial proceedings[.]” [*Id.* at 196-197 (citations omitted).]

“Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker.” *In re TK*, 306 Mich App 698, 706; 859 NW2d 208 (2014). “Ultimately, due process requires fundamental fairness.” *Id.*

Respondent’s right to procedural due process was not violated when the court suspended respondent’s visitation rights due to his continued use of alcohol and drugs and his failure to comply with the treatment plan. Neither MCL 712A.18(1)(n), nor the Foster Care Manual (which essentially mirrors the statute), support his argument. Both provide for the suspension of

parenting time if the court determines that parenting time, even if supervised, may be harmful to the child. MCL 712A.18(1)(n) provides that the court may suspend parenting time if it determines that parenting time, even if supervised, “may be harmful to the juvenile’s life, physical health, or mental well-being.”<sup>1</sup> Although neither requires that the court articulate its findings on the record or issue a written opinion, the court still has an obligation to state pertinent findings for its decisions. MCR 2.517(A)(1) and (2). Here, the court heard the evidence of respondent’s continued use of alcohol and marijuana and his failure to comply with the requirements of the treatment plan. The workers reported that respondent smelled of alcohol during some visits and often acted inappropriately. The court also heard evidence that the child was disturbed after visitation and acted out aggressively. An unannounced visit to respondent’s home revealed beer bottles scattered throughout and a medicine bottle full of marijuana roaches on the table.

Following the introduction of the evidence of respondent’s failure to comply with the treatment plan and his continued use of alcohol and drugs, the court adopted the caseworker’s request to suspend visitation until respondent could demonstrate 30 days of sobriety. Although not articulated, the basis for the decision was clear as the evidence showed that respondent posed a danger to his child with his continued use of alcohol and drugs. Respondent was clearly informed and knew exactly why his visitation was suspended and what he needed to do to regain his visitation. Respondent testified that he knew his visitation was suspended because of his failure to drug test and his continued abuse of alcohol and other drugs. In light of these facts, the court did not act arbitrarily, and no plain error affected respondent’s substantial rights. Additionally, respondent had the opportunity to challenge the evidence, object to the case worker’s recommendation, and seek reconsideration of the trial court’s order. As a result, we hold that respondent’s right to procedural due process was not violated when the court suspended respondent’s visitation rights.

Next, respondent argues that the trial court erred when it found clear and convincing evidence to support the statutory grounds for termination of his parental rights. On appeal from termination of parental rights proceedings, this Court reviews the trial court’s findings under the clearly erroneous standard. MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). A finding of fact is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). Further, regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appear before it. MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Respondent’s parental rights were terminated under MCL 712A.19b(3)(c)(i), (g), and (j), which provide:

(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>1</sup> The Foster Care Manual states that the court “may order frequent or no-parenting time, if parenting time, even when supervised, may be harmful to the child.”

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.

\* \* \*

(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.<sup>2</sup>

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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.

The petitioner must prove by clear and convincing evidence at least one statutory ground for termination. *In re Trejo*, 462 Mich 341, 351; 612 NW2d 407 (2000); *In re Moss*, 301 Mich App 76, 88; 836 NW2d 182 (2013).

Record evidence supports the trial court's findings that statutory grounds existed. At the time of the adjudication, the conditions that existed were that the home respondent and his wife, the child's mother, lived in with the two children was unsuitable and in disarray. Food, garbage, and dog feces were scattered throughout, and it was infested with bedbugs. Respondent's child and the mother's older child were not being provided with proper care and custody and were not safe. Respondent had a serious drug and alcohol abuse problem that caused him to neglect the children. He was found sleeping in his car with the older child on his lap and very loud music playing on the radio and did not awaken when the child was removed from the car. He admitted that he had taken two pills and drank two beers. He drank alcohol daily and used marijuana almost daily, claiming medical need although he did not have a medical marijuana card. Respondent had an extensive criminal history, which included criminal sexual conduct with a lifetime registry, retail fraud, and operating while intoxicated third offense. The children had been medically neglected through failure to attend medical appointments. Respondent's substance abuse assessment showed a high probability of substance abuse dependent disorder.

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<sup>2</sup> MCL 712A.19b(3)(g) has been amended, effective June 12, 2018. See 2018 PA 58. The new version, which was not in effect when the challenged order was entered in this case, provides: "(g) The parent, although, in the court's discretion, financially able to do so, 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."

The record also supports the finding that DHHS provided services to respondent. Respondent's parent-agency agreement required that he: obtain a sufficient legal source of income to meet the family's needs; obtain and maintain safe, suitable, and independent housing, free of illegal substances, drug paraphernalia, and unrelated people; participate in random drug and alcohol screens; participate in parenting classes, a life skills program, and substance abuse therapy; and participate and benefit from services. Later, he was also required to complete an anger management class. Strong evidence supports the trial court's conclusion that respondent failed to comply with services and was noncompliant in taking his prescribed medications, as he continued to use alcohol and marijuana daily to the point where he lost his supervised visitation rights to his child. An unannounced visit to the home revealed empty beer bottles all over the house and a large collection of marijuana roaches in plain view. He was required to demonstrate 30 days of sobriety in order to regain his supervised visitation but was never able to show 30 days of sobriety. He rejected the opportunity to attend outpatient or inpatient programs for his alcoholism.

The trial court did not clearly err in finding that, at the time of the termination hearing, the conditions had worsened. Respondent had been evicted from his home, and he initially stayed with friends or slept in a park. At the termination hearing, respondent still did not have his own housing and was living in a home with other convicted sex offenders. He had just started to address his alcoholism through counseling and was drinking alcohol less frequently. Respondent did not attend AA or NA and was still using alcohol, and was on probation for open intoxication. Throughout the case, respondent failed to comply with his treatment plan, and had tested positive for cocaine just two months earlier. He attended the provided services sporadically and then stopped compliance altogether. After over 15 months of offered services, respondent had failed to make enough progress to be able to provide a safe home and proper care and custody for his child.

The trial court did not clearly err in finding that the conditions that led to the adjudication continued to exist. Respondent had never truly addressed his substance addiction, which made it impossible for respondent to address his additional problems of domestic violence, homelessness, and insufficient income. Only probation and the threat of going back to jail provided motivation for respondent to try to gain control over his alcohol consumption. Losing his visitation rights and not being able to see his child for months was not enough motivation for respondent to stop drinking for 30 days. Respondent had demonstrated that he would not sufficiently address the issues that caused the removal of his child and the suspension of his visitation. After 15 months of attempts to provide services to respondent, there was clear and convincing evidence to support the conclusion that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the child's young age. The trial court did not clearly err in finding clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(c)(i).

The same evidence supported termination of respondent's parental rights under MCL 712A.19b(3)(g) and (j). A parent's failure to comply with his or her service plan is evidence that the parent will not be able to provide a child with proper care and custody and 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). By his failure to comply with services and make a serious attempt to address his substance abuse problems, respondent had demonstrated that there was no reasonable

expectation that he would be able to provide proper care and custody for his child within a reasonable time considering her age. Therefore, the trial court did not clearly err in finding clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(g).

Further, it was clear that the child would be at risk of harm if placed with respondent. Respondent did not have a suitable home and had not addressed his substance abuse problems. He had not visited her for so many months that she no longer knew who he was. He was living in a home with other sex offenders. The trial court did not clearly err in finding clear and convincing evidence to support termination of respondent's parental rights under MCL 712A.19b(3)(j).

Finally, respondent argues that the trial court clearly erred in finding that termination of his parental rights was in the best interests of his child. Once the petitioner has established a statutory ground for termination by clear and convincing evidence, the trial court must find that termination is in the child's best interests before it can order termination of parental rights. MCL 712A.19b(5). Whether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App at 88-90. This Court reviews a trial court's decision regarding a child's best interests for clear error. *In re Laster*, 303 Mich App 485, 496; 845 NW2d 540 (2013). "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 has been made." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

"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). The trial court must weigh the evidence available on the whole record in determining the child's best interests. *In re Trejo*, 462 Mich at 356. It may consider such factors as "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 Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). Other considerations include the length of time the child has been in foster care or placed with relatives, the likelihood that "the child could be returned to her parents' home within the foreseeable future, if at all[,]" and compliance with the case service plan. *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012). "[A]t the best-interest stage, the child's interest in a normal family home is superior to any interest the parent has." *In re Moss*, 301 Mich App at 89.

Upon review of the record, we hold that the trial court did not clearly err in determining that termination of respondent's parental rights was clearly in the best interests of this child. After over 15 months, respondent was just starting to "slow down" on his alcohol and drug consumption and acknowledged that he was more motivated by the fact that he was on probation and feared being put back in jail than he was by possible loss of his parental rights. He knew that in order to be able to start visiting his child again, he had to stay alcohol and drug free for 30 days. For seven months respondent refused to comply with services that were meant to specifically address his substance abuse. After seven months there was no longer a bond between respondent and his child who, at the time of the termination hearing, was not yet three years old. In addition, respondent was homeless and had insufficient income to provide proper

care and custody for his child. The trial court did not clearly err in finding by a preponderance of the evidence that termination of respondent's parental rights was in the best interests of the child.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Riordan