STATE OF MICHIGAN

COURT OF APPEALS

In re NAFFZIGER/WILLIAMS, Minors.

UNPUBLISHED
November 26, 2019

Nos. 348885 and 348979
Ionia Circuit Court
Family Division
LC No. 2018-000066-NA

Before: MURRAY, C.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondent-father and respondent-mother appeal by right the trial court's order terminating their parental rights to their two children under MCL 712A.19b(3)(c) (conditions continue to exist) and (j) (risk of harm if returned). Finding no error, we affirm.

The Department of Health and Human Services (DHHS) received a complaint that respondent-mother was living with the children in a house that was known for methamphetamine production and use. Pursuant to a safety plan, the children were removed and placed with their maternal grandmother. However, evidence indicated that the grandmother allowed respondent-mother to see the children and take them back to the methamphetamine house, in violation of the safety plan. The children were then placed in foster care. Respondent-father was eventually released from incarceration. He and respondent-mother were both provided with a parent-agency treatment plan (PATP) to rectify their issues, which included substance abuse, housing, employment, and parenting skills. Both parents completed a parenting education program and participated in parenting visits. But their participation in services was otherwise limited. Respondent-mother continued to test positive for methamphetamine and other substances

[1] See *In re Naffziger/Williams*, unpublished order of the Court of Appeals, entered May 29, 2019 (Docket Nos. 348885 and 348979).

throughout the case. Respondent-father also tested positive for methamphetamine, which was a probation violation, and he was incarcerated as a result.[2]

I. RESPONDENT-FATHER

The sole issue that respondent-father raises on appeal is his claim that the trial court clearly erred in finding that it was in the children's best interests to terminate his parental rights. We disagree.

The trial court must find by a preponderance of the evidence that termination was in the children's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). This Court reviews the trial court's findings of fact for clear error. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). "A finding is 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id*.

"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). In determining a child's best interests, the trial court may consider the child's bond to his parent; the parent's parenting ability; the child's need for permanency, stability, and finality; and the suitability of alternative homes. See *In re Olive/Metts* 297 Mich App 35, 41-42; 823 NW2d 144 (2012). "The trial court may also consider . . . the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, [] the possibility of adoption," *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014), the testimony and opinion of experts, see *In re Conley*, 216 Mich App 41, 45; 549 NW2d 353 (1996), a parent's unwillingness to participate in counseling, see *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001), and a history of substance abuse, *In re Moss*, 301 Mich App at 90.

To begin, respondent-father does not challenge the statutory grounds for termination. Thus, we may presume that the unchallenged statutory grounds were established by clear and convincing evidence. See *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998), overruled on other grounds *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000), superseded by statute as stated in *In re Moss*, 301 Mich App at 83.

Regarding the best interest determination, the evidence indicated that there was a bond between respondent-father and the children. The evidence also indicated that respondent-father did "fairly well" during parenting times. But there were concerns that he could not parent both children at the same time. The DHHS caseworker testified that there were safety concerns for the children during the visits. In fact, respondent-father admitted at the termination trial that he was not currently able to be an appropriate parent. Overall, the caseworker opined that parenting

[2] Respondent-father was incarcerated on charges of possession of methamphetamine on February 27, 2018, released in May 2018, and incarcerated again at the time of the termination hearing.

ability was still an outstanding barrier for respondent-father. The children had been in care for over 14 months. And respondent-father did not have any plans for housing or employment after his release from jail, other than to move to the Jackson or Wayne area. Although he was employed while he was not in jail, he no longer had a job after becoming incarcerated, and there was no evidence that he had employment prospects upon his release. Most notably, respondent-father did not participate in the substantial majority of his PATP. He was offered counseling services, substance abuse services, and housing resources that he did not pursue. Moreover, he had a substantial history with substance abuse, including using methamphetamine during the pendency of this case. In contrast, the children were being well taken care of while in foster care. Their medical and educational needs were being met. The foster family was willing to adopt, as were multiple relatives. The trial court specifically stated that it was considering respondent-father's history, his unfavorable psychological evaluations, his parenting skills, the ages of the children, bonds, visitation history, compliance with treatment plans, the children's well-being while in care, the possibility of adoption, and the children's need for permanence and stability. We conclude that the trial court considered the appropriate factors, and we are not left with a definite and firm conviction that a mistake has been made in the trial court's finding that it was in the children's best interests to terminate respondent-father's parental rights. See *In re HRC*, 286 Mich App at 459.

Respondent-father also asserts that the DHHS did not make reasonable efforts to reunify him with his children. Respondent-father does not take issue with the adequacy of the reunification services provided him, but implies that termination was premature because he was about to be transferred into an inpatient rehabilitation program and, after completion of the program, planned to relocate away from the environment that he alleged caused him to fall into substance abuse. These plans, arising under the pressure of an impending termination, are speculative and open-ended. More importantly, they do not negate the fact that respondent-father either failed to participate in or to benefit from the many services offered him during the prior 14 months. The evidence clearly demonstrates that respondent-father was provided with a plethora of services, including individual counseling, substance abuse counseling, a psychological evaluation, drug screens, and rehabilitation, but he failed to participate in or benefit from those services. Although the DHHS "has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). "Not only must respondent[-father] cooperate and participate in the services, []he must benefit from them." *In re TK*, 306 Mich App 698, 711; 859 NW2d 208 (2014).

II. RESPONDENT-MOTHER

Respondent-mother first argues on appeal that the trial court clearly erred in assuming jurisdiction over the children. Specifically, she argues that her admission to taking the single oxycodone pill that her half-sister provided her is not enough for the trial court to exercise jurisdiction. "[A]djudication errors raised after the trial court has terminated parental rights are reviewed for plain error." *In re Ferranti*, __ Mich __, __; __ NW2d __ (2019) (Docket No. 157907); slip op at 22. To prevail, respondent-mother "must establish that (1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected [her] substantial

rights." *Id*. Furthermore, "the error must have seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. (quotation marks, citation, and alterations omitted).

The court's authority to conduct child protective proceedings is found in MCL 712A.2(b)(1) and (2), which provide in pertinent part that the court has jurisdiction over a child

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
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> * * *
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. . . .

"The court can exercise jurisdiction if a respondent-parent enters a plea of admission or no contest to allegations in the petition, see MCR 3.971, or if the Department proves the allegations at a trial, see MCR 3.972." *In re Ferranti*, __ Mich at __; slip op at 9.

In the present case, the court held the preliminary hearing over three days. On the first day, the court heard testimony from DHHS's Kristal McNally that the department received an initial complaint of substance abuse against respondent-mother on February 13, 2018. When department personnel arrived, they found respondent-mother, respondent-father, and the children living in a residence that law enforcement personnel confirmed was known for methamphetamine production and consumption. At that point, according to McNally, respondent-mother admitted taking a non-prescribed oxycodone pill provided by her half-sister. As part of a safety plan, DHHS removed the children from the environment and placed them temporarily in the home of their maternal grandmother. Respondents participated in a drug screen, and respondent-mother's came back positive for trace amounts of methamphetamine. Three days later, according to McNally, DHHS discovered that respondent-mother had violated the safety plan by taking the children back to the suspect residence. Law enforcement and Child Protective Services personnel discovered them there, along with components commonly used to manufacture methamphetamine. In addition, respondent-mother was "behaving erratically," in a way that "suggested she was under the influence." Further, respondent-mother was "harboring a fugitive" wanted on seven warrants.

On the second day of the preliminary hearing, respondent-mother's attorney represented that respondent-mother was prepared to "waive testimony in regards to authorization of the petition[,]" and to enter a plea of admission to allegations in the petition that she was the mother of the minor children and that she had taken an oxycodone pill provided to her by her half-sister. Respondent-mother affirmed that she understood that she had a right to an adjudication trial in front of a judge or a jury, and that DHHS would have to prove at trial that one or more of the allegations in the petition was true by a preponderance of the evidence. She said she understood

that at such trial, she could call witnesses, cross-examine DHHS's witnesses, and have the court subpoena any witnesses in her favor. See MCR 3.971(B)(3). She also affirmed that she understood she would be waiving these rights if she admitted allegations in the petition, *id*., and she answered other questions indicating that she offered her plea knowingly, understandingly, and voluntarily, see MCR 3.971(C)(1). The trial court informed respondent-mother of the consequences of the plea, MCR 3.971(B)(4), and the course the proceeding would henceforth take.

Respondent-mother contends that this case is similar to *In re Nelson*, 190 Mich App 237; 475 NW2d 448 (1991), where this Court held that insufficient evidence was presented at an adjudicative trial to prove the allegations in the petition by a preponderance of the evidence. Respondent-mother's comparison is inapt. The present case does not involve an adjudicative trial; in fact, respondent-mother waived such trial. Further, the trial court heard testimony from McNally sufficient to support a finding of probable cause that one or more conditions in the petition were true and fell within MCL 712A.19(b). See MCR 3.965(B)(12). Respondent-mother assumes, without citing any supporting authority, that pleading to allegations in the petition prohibited the trial court from considering the testimony already before it. If pleading to a minor allegation could somehow relieve respondents in child protective proceedings of the consequences of factually accurate allegations of a more egregious nature, such would seriously compromise the very purpose of child protection proceedings, which is to protect abused and neglected children. *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993) (observing that the purpose of child protective proceedings is protection of the child).

Further, even if we assumed for the sake of argument that the trial court plainly erred by exercising jurisdiction over respondent-mother's children based on her admission that she took a single non-prescribed oxycodone pill, we cannot say that the alleged error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *In re Ferranti*, __ Mich at __; slip op at 22. As already indicated, McNally's testimony, which could have been supported by legally admissible evidence had respondent-mother not waived her right to a trial, amply supported a finding of probable cause sufficient to allow the trial court to take jurisdiction of the children pursuant to MCL 712A.2(b). Accordingly, we find no plain error requiring remedy.

Respondent-mother next argues that the trial court should have considered the maternal grandmother's request to have the children returned to her care. We disagree.

"Upon the motion of any party, the court shall review custody and placement orders and initial services plans pending trial and may modify those orders and plans as the court considers under this section are in the juvenile's best interests." MCL 712A.13a(17); MCR 3.966(A)(1). Neither respondent moved for a hearing on the children's placement. Thus, the issue is unpreserved. Unpreserved claims are reviewed for plain error affecting substantial rights. See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008).

> Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. When plain error has occurred, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant *or* when an error seriously affect[ed] the fairness,

integrity or public reputation of judicial proceedings independent of the defendant's innocence." [*Id*. (citations omitted).]

The trial court may order foster care as the placement for the children. MCL 712A.13a(9); MCR 3.965(C)(2). As noted, the overriding consideration is the juvenile's best interests. MCL 712A.13a(17); MCR 3.966(A)(1). In this case, the evidence indicated that when the children were initially placed with the maternal grandmother she violated a safety plan. After the children were placed in foster care, the maternal grandmother made multiple requests to have the children placed with her. The trial court instructed the lawyer-guardian ad litem (LGAL) to investigate the matter. The LGAL investigated and recommended that no change in placement occur. After that recommendation, respondent-mother did not request a hearing on the trial court's placement decision. The evidence otherwise indicated that the children were doing well and thriving in foster care. Thus, we conclude that respondent-mother has not demonstrated plain error affecting substantial rights by the trial court keeping the children in foster care.

Respondent-mother lastly argues that the trial court clearly erred in finding that a statutory ground for termination was proven by clear and convincing evidence. We disagree.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence. MCL 712A.19b(3); *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court's determination for clear error. *In re VanDalen*, 293 Mich App at 139.

The trial court terminated respondent-mother's parental rights under MCL 712A.19b(3)(c) and (j), which state:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
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> * * *
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> (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 dispositional order, and the court, by clear and convincing evidence, finds either of the following:
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> (*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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> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified 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.

"Harm" includes physical as well as emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). "[A] parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home." *In re White*, 303 Mich App at 711.

Respondent-mother does not contest that she was a respondent in the proceeding or that 182 or more days had elapsed since the issuance of an initial dispositional order. She only contests the finding that the condition leading to adjudication and other conditions continued to exist and that there was no reasonable likelihood that she could rectify the conditions within a reasonable time.

The condition that led to adjudication for respondent-mother was substance abuse. She admitted at a preliminary hearing that she abused prescription medication. This admission was the primary reason that the trial court assumed jurisdiction. The evidence throughout the case demonstrated that respondent-mother continued to have substance abuse issues. She tested positive for methamphetamine throughout the case. She also tested positive for Tramadol and alcohol during the pendency of the case. She had tested positive for methamphetamine as recently as one month before the termination hearing. The case had been ongoing for over a year, and respondent-mother was provided with counseling and substance abuse services during that time. Despite this, the evidence indicated that she continued to abuse illegal drugs, prescription medication, and alcohol.

The foster-care caseworker testified that respondent-mother needed to rectify issues with emotional stability, parenting skills, housing, and employment. The caseworker developed a PATP for respondent-mother to rectify these issues. The PATP included recommendations and referrals for services, including individual counseling, a psychological evaluation, substance abuse counseling, and an infant mental health program. The evidence indicated that respondent-mother had been diagnosed with depression. She was prescribed medication, but she refused to take it because she did not like the way it made her feel. The evidence also indicated that, although respondent-mother completed a parenting skills program, parenting skills was still a concern. Respondent-mother was not engaged during parenting time. The caseworker testified that respondent-mother would not be able to independently parent both children at the same time. Regarding housing, when the case began, respondent-mother was living with the children in a house known for methamphetamine production and use. After they were removed, she moved to an apartment. However, she was kicked out of that apartment because of concerns that she was allowing others to use drugs there. At the time of the termination hearing, respondent-mother was living with her mother. However, there was no evidence that the maternal grandmother's home was stable or permanent. Respondent-mother was not employed throughout the entire case. There was testimony that she was working toward completing her GED so that she could gain employment, but that had not yet happened as of the date of the termination hearing. Respondent-mother admitted on examination by the trial court that she did not engage in services

for the duration of most of the case. We are not "left with a definite and firm conviction that a mistake has been made," *In re HRC*, 286 Mich App at 459, in the trial court's finding that MCL 712A.19b(3)(c) and (j) were proven by clear and convincing evidence.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Jane M. Beckering