

STATE OF MICHIGAN
COURT OF APPEALS

In re BAKER/BELLMORE, Minors.

UNPUBLISHED
January 23, 2020

No. 349541
Wayne Circuit Court
Family Division
LC No. 07-475136-NA

Before: METER, P.J., and FORT HOOD and REDFORD, JJ.

PER CURIAM.

Respondent mother appeals as of right the order terminating her parental rights to her children JB, MB, and AB, under MCL 712A.19b(3)(g) (parent, although financially able to do so, failed to provide proper care and custody and no reasonable expectation parent will be able to provide proper care and custody within a reasonable time) and (j) (reasonable likelihood child will be harmed if returned to parent). A petition for permanent custody was filed in this case alleging that respondent mother was giving the father of JB and MB—who had his parental rights terminated for sexually abusing AB—access to her children. Respondent mother later admitted that she allowed the father to have access to JB and MB, but denied any contact between the father and AB. We affirm the trial court’s statutory grounds determination, vacate its best-interest determination, and remand for further proceedings.

I. PLEA

Respondent mother first argues that she was given an inadequate advice of rights before she made her plea of admission and that the trial court failed to establish the accuracy of respondent mother’s plea. We disagree.

In *In re Ferranti*, 504 Mich 1, 17; 934 NW2d 610 (2019), our Supreme Court held “that an appeal of an adjudication error in an appeal from an order terminating parental rights is not a collateral attack. The collateral-bar rule does not apply within one child protective case, barring some issues from review.” Accordingly, respondent mother may challenge the finding of jurisdiction, even though her rights have now been terminated. However, “adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error.” *Id.* at 14. “[R]espondents 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.* “And the error must have

seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[]” *Id.* (third and fourth alteration in original; quotation marks and citation omitted).

Respondent mother argues that the advice of rights given by the trial court before she made her plea of admission was inadequate. However, at the combined adjudication and termination hearing respondent mother indicated that she was satisfied by the advice of rights given by the court. “Waiver is defined as the intentional relinquishment or abandonment of a known right.” *People v McKinley*, 496 Mich 410, 417 n 7; 852 NW2d 770 (2014) (quotation marks and citations omitted). “A waiver extinguishe[s] any error, thereby foreclosing appellate review.” *Id.* at 418 (quotation marks and citations omitted). Respondent mother waived her right to challenge the adequacy of the advice of rights when she indicated she was satisfied at the termination hearing. Thus, this Court will not consider respondent mother’s argument concerning the adequacy of the advice of rights.

Respondent mother also argues that the court failed to accept the plea pursuant to MCR 3.971(D). MCR 3.971(D) provides:

(1) *Voluntary Plea.* The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.

(2) *Accurate Plea.* The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate.

Before respondent mother made her plea of admission, the court asked if she was making the admissions “freely and voluntarily,” and respondent mother replied that she was. Accordingly, the court satisfied the requirements of MCR 3.971(D)(1). The court also ensured the accuracy of the plea by having respondent mother’s attorney, followed by petitioner’s attorney and the court, question respondent mother at length about the factual basis for the plea. In answering these questions, respondent mother admitted she knew about AB’s abuse and that she, nonetheless, allowed the father to have access to JB and MB. She also acknowledged that, through this access the father was able to hit JB. Accordingly, the court ensured the accuracy of the plea pursuant to MCR 3.971(D)(2) by allowing respondent mother to be questioned and then by questioning respondent mother itself.

II. STATUTORY GROUNDS

Respondent mother next argues that the trial court clearly erred when it found that petitioner established statutory grounds for termination by clear and convincing evidence. We disagree.

This Court reviews the lower court's findings for clear error. MCR 3.977(K). "The clear error standard controls our review of both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009) (quotation marks and citation omitted). A finding is clearly erroneous if, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation marks and citation omitted). Clear error review requires a lower court's decision to strike this Court "as more than just maybe or probably wrong." *Id.* Regard must "be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

"In order to comply with the guarantees of substantive due process, the state must prove parental unfitness by 'at least clear and convincing evidence' before terminating a respondent's parental rights." *In re B & J*, 279 Mich App 12, 23; 756 NW2d 234 (2008). "[T]he liberty interest of the parent no longer includes the right to custody and control of the children" after the court determines that at least one statutory ground for termination was established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000), superseded in part by statute as stated in *In re Moss*, 301 Mich App 76, 83, 88; 836 NW2d 182 (2013). The trial court determined that petitioner established the statutory grounds found in MCL 712A.19b(3)(g) and (j) by clear and convincing evidence.

MCL 712A.19b(3)(g) provides: "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 trial court determined that respondent mother could not provide the children with proper care and custody because, based on respondent's admission, she allowed the father access to the children after his rights to JB and MB were terminated. As a result of this access, the father was able to hit JB. Respondent mother also failed to provide proper care for AB because of her failure to make the child attend counseling. Thus, the court did not clearly err when it found that petitioner established MCL 712A.19b(3)(g) by clear and convincing evidence, even if respondent mother is employed and maintains housing.

MCL 712A.19b(3)(j) provides a statutory ground for termination when "[t]here 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 or abuse. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). Respondent mother was either unable or unwilling to protect the children from the father. The father sexually assaulted AB and yet respondent mother admitted to allowing the father to continue to see JB and MB. Moreover, as noted above, during an occasion where the father was allowed access to JB, he hit the child. Respondent mother's failure to protect the children from the father put the children at risk of both physical and emotional harm. Thus, the court did not

clearly err when it found that MCL 712A.19b(3)(j) was established by clear and convincing evidence.

III. BEST INTERESTS

Respondent mother lastly argues that the trial court erred when it failed to consider the best-interest factors, each child's individual best interests, and the children's relative placement with the maternal grandmother when making its best-interest determination. We agree only with respondent mother's argument that the court erred when it failed to consider the children's relative placement.

As previously stated, this Court reviews the lower court's findings for clear error. MCR 3.977(K). MCL 712A.19b(5) provides that, "[i]f 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 must terminate the parent's rights. "The trial court should weigh all the evidence available to determine the [child's] best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The focus must be on the child, rather than the parent. *In re Moss*, 301 Mich App at 87. In making the best-interest determination, "the court may consider 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) (citations omitted). "The trial court may also consider a parent's history of domestic violence, 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, and the possibility of adoption." *In re White*, 303 Mich App at 714.

Respondent mother argues that the trial court erred by failing to consider each of the aforementioned best-interest factors. However, the court was not required to consider each of the best-interest factors set forth in caselaw, it simply "may" consider those factors. The court found that respondent mother's failure to protect the children from the father outweighed other factors, such as their bond. The father sexually abused AB and hit JB, and despite having knowledge of the father's sexual abuse of AB, respondent mother allowed the father to have continued access to the children. The trial court determined that this demonstrated an inability—or an unwillingness—on the part of respondent to protect the children from the father, and we see no clear error on that finding.

Respondent mother also argues that the court failed to consider the individual interests of the children. In *In re Olive/Metts Minors*, this Court held "that the trial court has a duty to decide the best interests of each child individually." *In re Olive/Metts Minors*, 297 Mich App at 42. "[I]f the best interests of the individual children significantly differ, the trial court should address those differences when making its determination of the children's best interests." *In re White*, 303 Mich App at 715. This does not mean "that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *Id.* at 716. We conclude that the trial court did not err in this case in making redundant factual findings.

Finally, however, respondent mother argues that the trial court erred when it failed to explicitly address the children's relative placement as a best-interest factor. "A trial court's

failure to explicitly address whether termination is appropriate in light of the children's placement with relatives renders the factual record inadequate to make a best-interest determination and requires reversal." *In re Olive/Metts Minors*, 297 Mich App at 43. Although the trial court mentioned that the children were placed with their maternal grandmother, it did not explicitly address whether termination was appropriate in light of the children's placement with their grandmother. The failure to address this factor "renders the factual record inadequate to make a best-interest determination and requires reversal." *Id.* Therefore, this Court must vacate the trial court's best-interest analysis.

The trial court's statutory grounds determination is affirmed, but its best-interest determination is vacated. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Karen M. Fort Hood
/s/ James Robert Redford