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STATE OF MICHIGAN
COURT OF APPEALS

In re SMIELEWSKI, Minors.

UNPUBLISHED
November 12, 2020

No. 353405
Sanilac Circuit Court
Family Division
LC No. 18-036243-NA

Before: BOONSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Respondent appeals by right the trial court’s order terminating her parental rights to her minor children, JS and KS, under MCL 712A.19(b)(3)(c)(i) (conditions that led to adjudication continue to exist), (g) (parent failed to provide proper care and custody), and (j) (reasonable likelihood the child would be harmed if returned to the parent). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On October 23, 2018, the Department of Health and Human Services (petitioner) filed a petition seeking the removal of JS and KS from respondent’s home. The petition alleged that respondent’s financial instability, substance abuse, and criminality rendered her home unfit for the children, and specifically alleged that respondent had recently been in a car accident, had subsequently tested positive for numerous controlled substances, had been the subject of several fraud complaints in 2018, had been arrested for non-sufficient funds¹ earlier in 2018, and had

¹ See MCL 750.131(1) (“A person shall not make, draw, utter, or deliver any check, draft, or order for the payment of money, to apply on account or otherwise, upon any bank or other depository with intent to defraud and knowing at the time of the making, drawing, uttering, or delivering that the maker or drawer does not have sufficient funds in or credit with the bank or other depository to pay the check, draft, or order in full upon its presentation.”).

significant prior involvement with Children’s Protective Services. The children were removed and placed with their father.²

At a settlement conference held before her adjudication trial, respondent entered a no-contest plea to allegations in the petition that she was involved in a traffic accident on September 26, 2018, and that she tested positive for amphetamines the following day, September 27, 2018. She also pleaded no-contest to the allegation that she had been arrested for non-sufficient funds earlier in 2018. Before accepting respondent’s plea, the trial court asked respondent’s counsel the reason for the no-contest plea, to which her counsel responded, “There is potential for criminal or civil liability, Your Honor.” The trial court accepted respondent’s plea and took jurisdiction over the children.

At the initial dispositional hearing on January 10, 2019, the trial court ordered that respondent complete a psychological evaluation, attend individual counseling, complete a substance abuse evaluation, participate in in-home services, undergo random drug screens, maintain a legal source of income adequate to meet the needs of her family, obtain safe suitable housing, and follow any recommendations of her service providers. The court suspended respondent’s parenting time as recommended by JS’s therapist, and because of the observations of the caseworker that parenting time caused the children significant stress and anxiety.

From January 10, 2019 until the first day of the termination hearing on January 10, 2020, respondent missed a significant number of drug tests, and she tested positive multiple times for nonprescribed opioids, amphetamines and methamphetamine. Respondent had a prescription for Adderall (an amphetamine), but she also admitted to abusing it, and the caseworker was told by one doctor that he had stopped filling the prescription. Respondent failed to complete the intake required to engage in group therapy with the children. Respondent missed 14 out of 33 scheduled visits with her individual therapist. The caseworker opined at the termination hearing that respondent had not actually benefited from offered services and had not addressed her substance abuse or mental health issues. Respondent never obtained suitable housing or provided proof of a legal source of income.

Following the termination hearing, the trial court terminated respondent’s rights to JS and KS as described. This appeal followed.

II. ACCURACY OF RESPONDENT’S PLEA

Respondent argues that the trial court erred when it accepted her plea of no-contest to certain allegations in the amended petition, because it failed to establish the factual basis for her plea.³ We disagree. Because respondent did not challenge the validity of her plea before the trial

² The children’s father was not a respondent in the proceedings below, and he is not a party to this appeal.

³ Respondent also argues that she was not advised of her appellate rights under MCR 3.971(B)(7)-(8); however, these subsections did not exist at the time her plea was entered, see MCR 3.971, as amended June 12, 2019, 504 Mich xcvi-xcviii (2019). Therefore, the trial court could not have

court, this issue is unpreserved and we review it for plain error. See *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019).

A respondent in a child protective proceeding may enter a plea of admission or no contest to the allegations in a petition to terminate his or her parental rights. MCR 3.971(A). The trial court must advise a respondent of the rights the respondent is giving up by doing so, including the right to a jury trial to determine whether grounds exist for the trial court to exercise its jurisdiction over the children. Additionally, before accepting a respondent's plea, a trial court is required to ensure that the plea is accurate under MCR 3.971(D)(2), which provides:

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

MCL 712A.2(b)(2) permits the trial court to take jurisdiction over a child

[w]hose 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. As used in this subdivision, "neglect" means that term as defined in section 2 of the child abuse and neglect prevention act, 1982 PA 250, MCL 722.602.

Criminality, even in the home, is not per se sufficient to support a finding under this subsection; rather, a parent's home must be unfit because of the criminality of the parent. See *People v Tennyson*, 487 Mich 730, 745; 790 NW2d 354 (2010). Criminality does not require that the parent have been convicted of a crime; the trial court may determine that a preponderance of the evidence shows that the parent engaged in criminal behavior. *In re MU*, 264 Mich App 270, 279-280; 690 NW2d 495 (2004).

erred by failing to advise her of her rights under it. Conversely, petitioner argues that because MCR 3.971 had not yet been amended, respondent's claim is an impermissible collateral attack on the order of adjudication after termination. This argument implicates the "collateral bar rule" articulated by *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), overruled by *In re Ferranti*, 504 Mich 29; 934 NW2d 610 (2019). Petitioner's argument is also incorrect. While it is true that *Hatcher* was in effect at the time of respondent's plea, it was subsequently overruled by *Ferranti* while respondent's case was pending on appeal. *Hatcher* does not bar us from reviewing respondent's claim of error in the adjudication phase of the proceedings. See *W.A. Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 176; 909 NW2d 38 (2017), vacated in part on other grounds by 504 Mich 985 (2019) (noting the "general rule" that judicial decisions operate retroactively and apply to all cases still open on direct review).

Respondent argues that the allegations to which she pleaded no contest did not provide support for the trial court's finding that a factual basis for accepting her plea existed. We disagree. In the first instance, the trial court asked respondent's counsel what the basis for the no contest plea was, and counsel stated that the allegations to which respondent had admitted had "the potential for criminal or civil liability." Counsel thus affirmatively responded that the allegations could be used to establish respondent's criminality. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006) (citation omitted). In light of this express agreement, it is at least questionable whether respondent may now challenge her plea at all.

In any event, there was sufficient evidence at the settlement conference for the trial court to establish support for a finding that one or more of the statutory grounds for termination alleged in the petition were true. MCR 3.971(D)(2). The petition alleged that respondent's substance abuse and financial instability were causing harm to JS and KS, for whom she was the sole live-in caretaker. Respondent pleaded no contest to specific acts that included a car accident, testing positive for amphetamines,⁴ and a recent arrest for non-sufficient funds. These acts were acknowledged by her counsel as potentially giving rise to criminal and civil liability. The trial court did not err by concluding that a preponderance of the evidence supported the conclusion that respondent had engaged in criminality by this conduct; further, it did not err by concluding (implicitly) that JS and KS would be negatively impacted by their mother resorting to illegal methods of obtaining funds (and getting caught doing it), and getting into a car accident while possibly under the influence of amphetamines. *MU*, 264 Mich App at 279-280. At this early stage of the proceedings, nothing more was required. We find no plain error. *Ferranti*, 504 Mich at 29.

III. STATUTORY GROUNDS FOR TERMINATION

Respondent also argues that the trial court erred by finding that statutory grounds for termination had been proven by clear and convincing evidence. We disagree. We review for clear error a trial court's determination that the statutory grounds for termination have been met. *In re Frey*, 297 Mich App 242, 244; 824 NW2d 569 (2012). Termination is appropriate when one or more statutory grounds are proven at trial by clear and convincing evidence. *Id.* "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 BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). "We give deference to the trial court's special opportunity to judge the credibility of the witnesses." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). Only one statutory ground needs to be proven by clear and convincing evidence to terminate a parent's parental rights. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

⁴ Although respondent now argues that she only tested positive for her prescription medication, she took no such position before the trial court at the time of her plea.

The trial court terminated respondent's parental rights under MCL 712A.19(b)(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 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, 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.

* * *

(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 trial court did not err by terminating respondent's parental rights under MCL 712A.19b(3)(c)(i). The conditions that led to adjudication continued to exist. Respondent continued to use drugs throughout the case. She attended only 23 of 111 drug screens, and she tested positive for nonprescribed opioids in 11 of the 23 drug screens that she attended. Respondent also admitted to having an addiction to Adderall, and the caseworker believed that respondent may have been "shopping around" for Adderall prescriptions. The caseworker testified that a doctor had informed her that he had stopped prescribing Adderall to respondent out of concern that she was abusing the medication. Further, respondent also tested positive for methamphetamine. A toxicologist testified at the termination hearing that methamphetamine is rarely prescribed, and when it is it is usually prescribed as a medication known as Desoxyn. Respondent's did not have a Desoxyn prescription. Although the positive drug screens could not distinguish between therapeutic or recreational drug levels of the drug for which she did have a prescription, there was evidence that respondent was abusing Adderall, that she had missed a significant number of her drug tests, and that she had tested positive for drugs for which she did not have a prescription. The trial court did not clearly err by finding that the drug use conditions continued and were unlikely to be rectified. Moreover, respondent never provided proof of a legal source of income to address her financial instability. The trial court did not clearly err by finding that the statutory ground for termination in MCL 712A.19b(3)(c)(i) had been proven. *Frey*, 297 Mich App at 244. Because only one statutory ground is required to terminate parental rights, we need not address the other grounds for termination relied upon by the trial court.

IV. BEST-INTEREST DETERMINATION

Respondent also argues that the trial court erred by determining that the termination of her parental rights to JS and KS was in their best interests. We disagree. We review for clear error the trial court's determination regarding the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

If the trial court finds that the statutory grounds for termination are met, it is only permitted to terminate parental rights if it also finds by a preponderance of the evidence, *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013), that termination is in the children's best interests. See *White*, 303 Mich App 713. In making this determination, the trial court may consider factors such as the children's bond with the parent, the parent's parenting ability, the children's need for permanency, stability, and finality, and the advantages of the foster home over the parent's home. *Id.* The trial court may also consider the parent's past history of domestic violence, the parent's compliance with the service plan, the parent's visitation with the children, the children's well-being in care, and the possibility of adoption. *Id.* at 714.

In this case, the trial court did not err by determining that termination was in the children's best interests. The record shows that, contrary to respondent's argument, there was little bond between the children and respondent; in fact, there was testimony from JS's therapist and the caseworker that the children were afraid of respondent and had developed behavioral issues after being around her. Respondent's parenting visits were suspended for these reasons, yet respondent never even completed the intake process to begin group therapy with her children. The children's behavioral issues subsided after the parenting visits stopped; the trial court also heard testimony that the children were doing well placed with their father and were bonded with him.

Even if a bond did exist between respondent and her children, during more than year of proceedings, respondent continued to use drugs, did not maintain suitable housing or employment, and made little, if any, progress in rectifying the issues that had led to JS and KS's removal in the first place. The trial court did not err by finding that termination was in the children's best interests.⁵ *White*, 303 Mich App at 713.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

⁵ Respondent also argues that the trial court improperly suspended her parenting time without a finding of harm; presumably, respondent is arguing that the erroneous denial of her parenting time led to an erroneous best-interest determination. However, the trial court may suspend parenting time without a finding of harm after adjudication and before termination. *In re Laster*, 303 Mich App 485, 491; 845 NW2d 540 (2013). And the record shows that the trial court did in fact make a finding of harm before suspending respondent's parental rights. This argument lacks merit.