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STATE OF MICHIGAN
COURT OF APPEALS

In re F. J. MCGEE, Minor.

UNPUBLISHED
November 19, 2020

No. 353917
Wayne Circuit Court
Family Division
LC No. 15-519526-NA

Before: O'BRIEN, P.J., and BECKERING and CAMERON, JJ.

PER CURIAM.

In this child protective proceeding, respondent-mother appeals as of right the trial court's order after the preliminary hearing in which the court authorized the temporary custody petition filed by petitioner and determined that the criteria for placing respondent's child, FJM, into foster care had been met. On appeal, respondent argues that petitioner failed to establish that she presented a substantial risk of harm to FJM's life, physical health, or mental well-being, or that continuing FJM's residence in her home was contrary to FJM's welfare. Therefore, contends respondent, the trial court clearly erred when it adopted the referee's factual findings and determined that the criteria for placing FJM into foster care had been met. Finding no errors warranting reversal, we affirm.

These proceedings began when petitioner filed a temporary custody petition requesting that the trial court take jurisdiction over FJM and enter an order making FJM a temporary court ward. At the preliminary hearing, petitioner presented evidence that FJM's four siblings were temporary court wards and that respondent had yet to complete the parent-agency agreement associated with their temporary wardships. Petitioner also presented evidence that respondent tested positive for cocaine approximately two weeks after FJM's birth. As a result, the trial court determined that the criteria for placing FJM into foster care had been met. This appeal followed.

On appeal, respondent contends that the trial court erred when it determined that sufficient evidence supported MCL 712A.13a(9) and MCR 3.965(C)(2). Specifically, respondent contends that petitioner failed to present evidence that respondent harmed FJM or posed a threat of future

harm to FJM, particularly since FJM was in respondent's care for a period of time without any evidence of harm having occurred. We disagree.

We review de novo the interpretation and application of court rules, *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), and we review a circuit court's findings of fact for clear error, *In re McCarrick/Lamoreaux (On Remand)*, 307 Mich App 436, 463; 861 NW2d 303 (2014). "A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the circuit court made a mistake." *Id.* (citation omitted).

When the Department of Health and Human Services (DHHS) petitions for removal of a child under MCL 712A.2(b), "the court must hold a preliminary hearing or hearings and may authorize the petition upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of section 2(b)." *In re Rood*, 483 Mich 73, 94-95; 763 NW2d 587 (2009) (citation and quotation marks omitted). "The preliminary hearing is governed by MCL 712A.13a and corresponding provisions of MCR 3.965." *Id.* at 95. Under MCL 712A.13a(9) and the identical provision in MCR 3.965(C)(2), the trial court may order placement of a child in foster care only if the court finds all of the following conditions:

- (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
- (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).
- (c) Continuing the child's residence in the home is contrary to the child's welfare.
- (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
- (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare. [MCL 712A.13a(9); MCR 3.965(C)(2).]

If the trial court orders placement of the child in foster care, it must make explicit findings that "it is contrary to the welfare of the child to remain at home," MCR 3.965(C)(3), and "reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required," MCR 3.965(C)(4). See also *McCarrick/Lamoreaux*, 307 Mich App at 449.

During the preliminary hearing, Jenae Dixon, a child protective services worker, testified that respondent tested positive for cocaine approximately two weeks after FJM's birth.¹ The referee took judicial notice of the positive drug screen. On the date respondent tested positive for

¹ She also testified that neither respondent nor FJM was tested for drugs at the time of FJM's birth.

cocaine, FJM was still residing in respondent's home. Thus, petitioner presented evidence that respondent used cocaine while caring for FJM. Additionally, Dixon testified that respondent's other four children were already temporary court wards, and respondent had yet to complete the associated parent-agency agreement, which included a prohibition on drug use. According to Dixon, respondent's other children were originally made temporary court wards after one of them was injured in a car accident caused by respondent's driving under the influence of alcohol. Dixon went on to state that respondent's children were eventually returned to respondent's care, but were removed a second time because of allegations that respondent sexually abused another child.

In light of Dixon's testimony, the referee found it clearly contrary to FJM's welfare to continue to reside in respondent's home. The referee took judicial notice of the file involving respondent's other children, observing that they were temporary wards of the court and had not been reunited with respondent because respondent had not completed her parent-agency agreement and "continues to test positive." The referee observed that at a December 3, 2019 hearing in that case, the judge noted that respondent had made some progress on her treatment plan, with the exception of drug screens. The referee also noted that respondent was supposed to have a day visit with her children if she achieved the goal of three consecutive negative screens, but found no record evidence that respondent had met the condition for such visit. The referee also indicated on the form order that: (1) it would be contrary to the welfare of the minor children to remain in respondent's custody; (2) reasonable efforts to prevent removal of the minor children from the home were made; (3) respondent having custody of the minor children would present a substantial risk of harm to the children; (4) no reasonably available service would adequately safeguard the minor children from the risk of harm, and (5) conditions of custody away from the minor children's home were adequate to safeguard the minor children. The trial court adopted the referee's recommendation.

The trial court's findings were not clearly erroneous. The court's order considered all five requirements of MCL 712A.13a(9). Respondent's argument—that petitioner failed to present evidence that respondent had harmed FJM or posed a threat of future harm to FJM—is unpersuasive. While it is true that there is no record evidence that respondent actually harmed FJM during the less than two months she cared for her, there can be no doubt that respondent's continued drug use posed a threat of future harm to FJM, particularly when viewed in light of FJM's vulnerability and dependence on respondent and respondent's history of placing her children at risk through her own substance abuse. This Court has long recognized that how a parent treats one child is probative of how that parent may treat his or her other children, see *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001), and that the probative value of the evidence may increase with the age or medical condition of the child at issue, see *In re LaFrance Minors*, 306 Mich App 713, 730-731; 858 NW2d 143 (2014). The record in this case shows that respondent has yet to complete the substance-abuse portion of her parent-agency agreement, and that previous substance abuse has led to the harm of her children and, allegedly, to her children's siblings. Moreover, respondent had again succumbed to her substance use disorder while FJM, an infant, was in her care.

In light of the foregoing, we conclude that the trial court did not clearly err when it adopted the referee's findings and determined that respondent presented a substantial risk of harm to FJM's

life, physical health, or mental well-being, and that continuing FJM's residence in respondent's home was contrary to FJM's welfare. Thus, the trial court did not clearly err when it placed FJM outside of respondent's home under MCL 712A.13a(9) and MCR 3.965(C)(2).

Affirmed.

/s/ Colleen A. O'Brien
/s/ Jane M. Beckering
/s/ Thomas C. Cameron