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STATE OF MICHIGAN

COURT OF APPEALS

In re L. CHRISTIAN, Minor.

UNPUBLISHED
January 21, 2021

No. 353202
Genesee Circuit Court
Family Division
LC No. 18-135176-NA

Before: GADOLA, P.J., and BORRELLO and M. J. KELLY, JJ.

PER CURIAM.

Mother appeals as of right the order terminating her parental rights to the minor child at the initial disposition. For the reasons set forth in this opinion, we affirm.

Mother was adjudicated by plea, and the trial court's termination decision was based on mother's voluntary consent to the termination of her parental rights. Mother does not directly challenge either of these decisions on appeal. Instead, her appellate challenges relate solely to two hearings that preceded the adjudication hearing.

On appeal, mother first argues that the trial court violated her due-process rights by removing the child from her care at the October 8, 2019 hearing without providing mother "a summons, petition, or notice" before the hearing. Mother claims that she was not a respondent at the time of this hearing, that no petition had been filed against her at the time of this hearing, and that the trial court was therefore without authority to remove the child from her care because "the court could not remove the child from her care if she was not first adjudicated or otherwise a petition was filed against her seeking adjudication." Mother further argues that "[b]ecause DHHS had not filed a petition against her, she was not afforded legal counsel to represent her at the hearing." In advancing these arguments, mother's appellate counsel misstates the underlying facts and the applicable law.

Mother did not raise any of these arguments or objections at the hearing and therefore failed to preserve these issues for appeal. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Our review is therefore limited to plain error affecting substantial rights. *Id.*; *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or

obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citation omitted).

Here, the record reveals that on October 8, 2019, a petition was filed with respect to the minor child that named mother as a respondent, raised various allegations of neglect and unfitness with respect to mother's parenting of the child, and requested termination of mother's parental rights. A hearing was held the same day. Mother was incarcerated in Indiana, but she participated in the hearing by telephone. The trial court also appointed counsel for mother, and counsel was present at the hearing to represent mother.

Leading up to the October 8, 2019 petition involving mother, the child had been removed on May 15, 2018, from the care and custody of the child's maternal grandmother, who was serving as the child's juvenile guardian at that time. The child was placed in the care and custody of the Department. Shortly thereafter, the child was placed with the maternal uncle, with whom the child continued to reside at the time of the October 8, 2019 hearing. The maternal grandmother's guardianship was eventually terminated, precipitating the filing of the October 8, 2019 petition seeking termination of mother's parental rights.

At the October 8, 2019 hearing, the prosecutor explained: "And what we are asking for is just basically an emergency removal placing the child with her uncle . . . ." The trial court granted the request, continued the child's placement in the temporary protective custody of the court, and continued the placement of the child with the maternal uncle.

Turning to mother's appellate arguments, her unsupported assertions that no petition had been filed against her, that she was not a respondent, and that she was not appointed counsel are directly contradicted by the record. The petition was filed on the same day as the hearing, and the petition named her as a respondent. See MCR 3.903(C)(9) and (12) (defining "respondent" to include a parent alleged to have committed an offense against a child, meaning acts or omissions constituting grounds for bringing the child within the court's jurisdiction); see also MCR 3.903(C)(8) ("Nonrespondent parent" means "a parent who is not named as a respondent in a petition filed under MCL 712A.2(b)."). The record reflects that the trial court informed mother on the record that it was appointing counsel to represent her, and the record also indicates that counsel was actually present at the hearing. Accordingly, mother's arguments based on her unfounded factual claims to the contrary are without merit.

With respect to mother's argument that she did not receive a summons or proper notice regarding the October 8, 2019 hearing specifically, the record reflects that mother appeared and participated in the hearing by telephone and that she raised no objections or claim that she did not receive notice or service of process. Mother's appellate arguments regarding notice and service are directed only at this hearing. "The appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record." MCR 3.920(H). Accordingly, mother has not demonstrated plain error requiring reversal on this ground because she waived any defects in service regarding the October 8, 2019 hearing. *Id*. Moreover, in advancing her appellate arguments, mother ignores the existence of this provision in the court rule. She thus has abandoned any further argument that her due process rights were somehow still infringed in light of this provision. "A party cannot simply assert an error or announce a position and then leave it to this

Court to discover and rationalize the basis for [her] claims, or unravel and elaborate for [her her] argument, and then search for authority either to sustain or reject [her] position," *In re TK*, 306 Mich App at 712 (quotation marks and citation omitted; alterations in original).

Next, mother argues that the trial court erred by removing the child from mother's custody at the October 8, 2019 hearing without making findings under MCL 712A.13a(9) and MCR 3.965(C)(2).

MCL 712A.13a(9) provides as follows:

> (9) The court may order placement of the child in foster care 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 risk as described in subdivision (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.

MCR 3.965(C)(2) contains substantially similar language.

As an initial matter, mother did not raise any objection to the removal in the trial court; this issue is therefore unpreserved and reviewed for plain error. *In re TK*, 306 Mich App at 703; *In re Utrera*, 281 Mich App at 8.

Prior to the October 8, 2019 hearing, the minor child had been in a juvenile guardianship with the maternal grandmother, and that guardianship had recently been terminated. Under MCR 3.979(F)(6), when a court terminates a juvenile guardianship and there is no named successor guardian,[1] the court is to next proceed according to MCR 3.979(F)(5), which provides as follows:

> Action Following Motion or Petition to Revoke Juvenile Guardianship. After notice and a hearing on a petition to revoke the juvenile guardianship, if the court finds by a preponderance of evidence that continuation of the juvenile guardianship is not in the child's best interests, and upon finding that it is contrary to the welfare of the child to be placed in or remain in the juvenile guardian's home

[1] These were the circumstances presented in the instant case as well.

> and that reasonable efforts were made to prevent removal, the court shall revoke the juvenile guardianship. The court shall enter an order revoking the juvenile guardianship and placing the child under the care and supervision of the Department of Human Services on a form approved by the state court administrator. Jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding upon entry of the order revoking the juvenile guardianship.

Thus, the minor child was already under the care and supervision of the department, and not in the care and custody of mother, at the time of the October 8, 2019 hearing. We note that mother was being added as a respondent and was therefore entitled to a preliminary hearing at which the court was required "to determine the appropriate action to be taken on the petition consistent with MCR 3.965(B)." MCR 3.961(C)(3); see also MCR 3.965(B)(12) ("Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial."). However, mother fails to acknowledge on appeal that the October 8, 2019 hearing was *not* the preliminary hearing and that the parties expressly discussed on the record at that hearing that a full preliminary hearing would be scheduled next. A preliminary hearing, at which the trial court authorized the petition, was held on November 14, 2019, after having previously been adjourned. At this hearing, the referee also indicated that contrary-to-the-welfare and reasonable-efforts findings had been made in a prior order. See MCR 3.965(B)(13)(b) ("If the court authorizes the filing of the petition, the court . . . may order placement of the child after making the determinations specified in subrule (C), *if those determinations have not previously been made*. . . .") (emphasis added).

Mother does not offer any explanation or argument directed at alleging that these procedural steps were somehow erroneous or deprived her of any rights. Hence, mother has abandoned any such arguments. *In re TK*, 306 Mich App at 712. We additionally note that, contrary to mother's insinuations, the court is not required to wait until after adjudication to place a child in temporary foster care. See MCR 3.965(B)(12) and (13); see also *In re Sanders*, 495 Mich 394, 417 n 12; 852 NW2d 524 (2014) ("[U]pon the authorization of a child protective petition, the trial court may order *temporary* placement of the child into foster care pending adjudication if the court finds that placement in the family home would be contrary to the welfare of the child.").

Moreover, there is also no dispute that mother was incarcerated in Indiana at the time of the October 8, 2019 hearing, and mother does not claim to have taken any steps before the hearing to formalize a placement arrangement with her brother on her own. See *In re Baham*, ___ Mich App ___, ___, ___ n 9; ___ NW2d ___ (2020) (Docket No. 349595) (opinion by M. J. KELLY, J.); slip op at 5-7, 9 n 9 (recognizing that an incarcerated parent may provide proper care and custody sufficient to prevent a court from properly exercising jurisdiction under MCL 712A.2(b) if the "*parent* places a child in the care of a relative whose home is not unfit" *before* the filing of a petition in child-protective proceedings); accord *In re Curry*, 113 Mich App 821, 823-827, 830; 318 NW2d 567 (1982). At the time of the hearing in this case, the child was not in mother's custody since the child had previously been placed with the maternal uncle when the child was removed from the custody of the juvenile guardian (who was also the maternal grandmother) pursuant to the trial court's order. Mother has thus failed to show how the outcome would have

been different under these circumstances and thus has not demonstrated plain error affecting her substantial rights. *In re VanDalen*, 293 Mich App at 135.

Accordingly, we conclude that mother has failed to demonstrate the existence of any plain error requiring reversal with respect to the October 8, 2019 hearing.

Next, mother generally challenges the trial court's decision to authorize the petition at the November 14, 2019 hearing. Mother lists a host of complaints, primarily disputing the strength of the evidence against her. However, although she cites general legal principles applicable to the authorization of a petition in child-protective proceedings, she does not cite any authority to support her foundational proposition that because (in her view) the trial court erred by authorizing the petition, the trial court's adjudication of her—which was established by mother's *plea*—is void. We therefore consider her appellate arguments regarding the authorization of the petition abandoned. *In re TK*, 306 Mich App at 712. Even if we were to consider her arguments we conclude they are without merit. Mother does not raise any challenge on appeal to her plea-based adjudication. Instead, she only challenges the authorization of the petition that preceded the adjudication. A trial court may authorize the petition at the preliminary hearing "upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b)." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019), citing MCR 3.965(B); see also MCL 712A.13a(2). At the hearing held on February 19, 2020, after the hearing at which the petition was authorized, mother entered a plea permitting the trial court to exercise jurisdiction over her. Our Supreme Court has explained the adjudicative phase of child-protective proceedings as follows:

> If the court authorizes the petition, the adjudication phase follows. The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights. The court can exercise jurisdiction if a respondent-parent enters a plea of admission or no contest to allegations in the petition, or if the Department proves the allegations at a trial. "If a trial is held, the respondent is entitled to a jury, the rules of evidence generally apply, and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition." And "[w]hile the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead. [*In re Ferranti*, 504 Mich at 15-16 (some citations omitted; alteration in original).]

At the February 19, 2020 hearing, mother specifically admitted that she continued to struggle with substance abuse; that she was still incarcerated; that she would remain incarcerated for approximately one to two years; that she was not in a position to care for the child; and that she did not believe that she would be able to be free from substance abuse or secure housing and income within a reasonable time. The petition included allegations regarding mother's substance abuse and incarceration. Mother further agreed to the voluntary termination of her parental rights at the initial disposition.

Because mother subsequently entered her plea permitting the trial court to obtain jurisdiction over her, she cannot now challenge the trial court's prior petition authorization determination within this single proceeding, see *In re Ferranti*, 504 Mich at 23 (stating that a child-protective proceeding is considered a single continuous proceeding from the petition to the termination decision), which was made under the lower probable-cause standard regarding the truth of the petition allegations. See *People v Wilson*, 469 Mich 1018; 677 NW2d 29 (2004) ("If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover. Because defendant was fairly convicted of the crimes at trial, he could not appeal the sufficiency of the evidence at the preliminary examination and the Court of Appeals erred in reviewing his claim.") (citations omitted); MCR 3.971(B)(3) (providing that a plea waives the right to a trial on the allegations in the petition); see also *In re Baham*, ___ Mich App at ___; (opinion by M. J. KELLY, J.); slip op at 4-6 (concluding that a respondent-parent could not show prejudice in challenging the trial court's assumption of jurisdiction in a child-protective proceeding on the ground that the facts she admitted to in the petition at her plea allegedly did not satisfy the statutory jurisdictional requirement because the respondent-parent "made a decision to enter a plea of admission to the allegations in the petition" and "[a]s a result, the adversarial process was never engaged.").

Accordingly, we decline to entertain mother's challenge to the trial court's decision to authorize the petition that preceded her plea and voluntary consent to termination of her parental rights.

Affirmed.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Michael J. Kelly