STATE OF MICHIGAN

COURT OF APPEALS

In re STANDISH, Minors.

UNPUBLISHED
January 21, 2021

Nos. 353868; 353869
St. Joseph Circuit Court
Family Division
LC No. 18-000299-NA

Before: REDFORD, P.J., and MARKEY and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal by right the trial court's order terminating their parental rights to their three minor children. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondents are the divorced parents of three minor children born between 2005 and 2009. On January 15, 2019, the Department of Health and Human Services (petitioner) filed a petition with the trial court seeking emergency removal of the children from respondent-father's home and requesting that the court take jurisdiction over the children. Specifically, petitioner alleged that Children's Protective Services (CPS) had investigated respondents repeatedly in 2017 for issues relating to domestic violence. Respondent-father had admitted to assaulting respondent-mother on multiple occasions in front of the children, and had assaulted their oldest daughter at least once. Petitioner further alleged that respondent-mother had left the children in respondent-father's care and moved out of the home in 2017, and that "a new CPS referral was received on 1/13/2019 because to [sic] the children not feeling safe at [respondent-father's] home." Petitioner alleged that respondent-father had violated a personal protection order (PPO) that respondent-mother had obtained against him. One of the children disclosed that respondent-father had shoved her head into a wall on January 15, 2019. Further, respondent-father had lost his home to foreclosure and moved the children into a dilapidated trailer heated only by space heaters. Petitioner also alleged that respondent-father and respondent-mother, as well as respondent-mother's boyfriend, all tested positive for methamphetamine on January 15, 2019.

Respondents waived their rights to a preliminary hearing and the trial court authorized the petition. The children were placed in non-relative foster care. At a pretrial hearing a few days later, respondent-mother admitted to the allegation in the petition that she had tested positive for

methamphetamine. Respondent-father requested an adjudication trial; however, he ultimately entered a plea of admission to the allegations in the petition concerning his methamphetamine use. Respondents were ordered to undergo substance abuse assessment and treatment, and their parenting time was suspended until they could produce three negative drug screens.

From January to October 2019, respondents continued to test positive for methamphetamine and frequently missed drug screens. They never significantly participated in services; for example, respondent-mother attended only a single substance-abuse therapy appointment. In October 2019, the trial court permitted petitioner to change the goal of the proceedings from reunification to termination, but again ordered respondents to participate in services, including parenting education, counseling, and Narcotics Anonymous (NA), with parenting time contingent on negative drug screens.

Petitioner filed a petition for termination in February 2020, alleging that respondents continued to use methamphetamine, did not participate in drug screens, and had not followed through with the recommended services ordered by the trial court. The termination of parental rights hearing was held on May 22, 2020. Respondent-father was not present and his attorney had lost contact with him.[1] Respondents' caseworker testified that respondent-father had tested positive for methamphetamine throughout the proceedings, most recently in March 2020, and had resisted any form of substance abuse treatment. He had not completed substance abuse therapy, had failed an intensive outpatient program, and had not attended NA. Respondent-father had completed an anger management class but continued to have frequent anger outbursts. Respondent-father had last participated in parenting time in August 2019.

The caseworker further testified that respondent-mother's live-in boyfriend also had a history of substance abuse but refused to participate in services. Respondent-mother had not participated in a drug screen in over a year, had not participated in parenting time in over a year, and had failed to complete any substance abuse services.

The caseworker reported that the children were doing well in foster care, although they were not all placed together. The caseworker opined that termination of respondents' parental rights was in the children's best interests.

The trial court held that statutory grounds for termination under MCL 712a.19b(3)(g) and (j) had been proven by clear and convincing evidence, finding that respondents' drug use was still a significant issue in their lives and that respondents had "done absolutely nothing to get these children returned to them [or] to overcome their problems." The trial court also found that termination of respondents' parental rights was in the children's best interests.

[1] It appears from the transcript that the termination hearing was held on some form of video call, presumably due to the COVID-19 pandemic; respondent-father's attorney stated that respondent-father had previously told him that he was not able to make arrangements to appear "via Zoom or phone." Respondent-father's attorney also stated that he was told by respondent-father's mother that respondent-father may have been having a medical issue that prevented his appearance. Respondent-father's attorney requested an adjournment, but the trial court denied the request.

These appeals followed.

II. DOCKET NO. 353868

In Docket No. 353868, respondent-father argues that the trial court violated his constitutional rights under the First Amendment to the United States Constitution by ordering him to participate in NA. See US Const, Am I. We disagree.

Because respondent-father did not raise this argument before the trial court, it is unpreserved. We review unpreserved claims of error arising out of child protective proceedings for plain error affecting substantial rights. See *In re Pederson*, 331 Mich App 445, 463; ___ NW2d ___ (2020).

> There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. First, there must have been an error. Deviation from a legal rule is error unless the rule has been waived. Second, the error must be plain, meaning clear or obvious. Third, the error must have affected substantial rights. This generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The [respondent] bears the burden of establishing prejudice. Fourth, if the first three requirements are met, reversal is only warranted if the error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings . . . . [*People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009) (quotation marks and citations omitted; third alteration in original).]

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion . . . ." US Const, Am I. "The Establishment Clause guarantees governmental neutrality with respect to religion and guards against excessive governmental entanglement with religion." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 156; 756 NW2d 483 (2008). However, "pinning down the meaning of a 'law respecting an establishment of religion' has proven to be a vexing problem." *American Legion v American Humanist Ass'n*, ___ US ___, ___; 139 S Ct 2067, 2080; 204 L Ed 2d 452 (2019) (discussing flaws in existing Establishment Clause precedent and partially abrogating the application of the "*Lemon* test" set forth in *Lemon v Kurtzman*, 403 US 602; 91 S Ct 2105; 29 L Ed 2d (1971)). Although the Supreme Court's recent decision *American Legion* challenged the continuing supremacy of the *Lemon* test, it did not expressly overrule that analysis. The primary inquiry remains "whether a 'reasonable observer' would conclude that the action constituted an 'endorsement' of religion." *American Legion*, 139 S Ct at 2080, quoting *Allegheny Co v American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 US 573, 592; 109 S Ct 3086; 106 L Ed 2d 472 (1989); see *Scalise v Boy Scouts of America*, 265 Mich App 1, 11-12; 692 NW2d 858 (2005).

Accordingly, applying the *Lemon* test, this Court must discern whether the challenged governmental action (1) has a secular purpose; (2) has a principal or primary effect " 'that neither advances nor inhibits religion' "; and (3) does not foster " 'an excessive government entanglement with religion.' " *Scalise*, 265 Mich App at 11-12, quoting *Lemon*, 403 US at 612-613. "If state action violates any prong of *Lemon*, that action contravenes the clause." *Scalise*, 265 Mich App at 12. Notably, the Establishment Clause does not amount to a "blanket prohibition" of any

governmental association with social-welfare organizations that happen to espouse faith-based philosophies. *Scalise*, 265 Mich App at 14.

The termination of respondent-father's parental rights did not implicate his constitutional rights under the Establishment Clause. To begin, there is no evidence on the record that the trial court or petitioner demanded that respondent-father participate *exclusively* in NA (rather than some other program) for treatment of his substance abuse problem. Moreover, the trial court and petitioner had a secular purpose in recommending such participation, i.e., addressing respondent-father's substance abuse issues so that he could be reunited with his children. And respondent-father has not presented any evidence that the primary effect of participation in NA was the advancement of religion rather than the overcoming of his substance abuse, or that the recommendation by a government entity was akin to an endorsement of religion, or that the trial court or petitioner was "excessively entangled" with NA. The record shows that respondent-father did not participate in substance abuse treatment of any kind as ordered by the trial court; it is pure speculation to suggest that, had he informed the court of a program in which he *would* be willing to participate, the court would have rejected it because it was somehow entangled with NA. On this record, even assuming for the sake of argument that NA espouses a faith-based philosophy,[2] it is clear that the trial court and petitioner recommended the organization in the hope that it would be able to assist respondent-father in improving his life on earth, not to save his soul. See *Scalise*, 265 Mich App at 14.

Moreover, respondent-father admits that he cannot demonstrate prejudice; he freely admits that "[i]t is speculative if another program would have helped him sufficiently overcome substance abuse." In light of this admission, respondent-father cannot establish that the result of the child protective proceedings would have differed if the trial court or petitioner had required him to attend an alternative method of substance abuse treatment, or refrained from involving NA in his plan at all. See *In re Pederson*, 331 Mich App at 463.

III. DOCKET NO. 353869

In Docket No. 353869, relying on our Supreme Court's decision in *In re Ferranti*, 504 Mich 1; 934 NW2d 610 (2019), respondent-mother challenges the adjudication order entered after her plea of admission, arguing that her adjudicatory plea was not knowingly, understandingly, and voluntarily made because the trial court did not advise her that she had the right to appeal directly from her adjudication, and that the trial court lacked a valid factual basis for exercising jurisdiction because there was no "nexus" or "connection" between her admission of methamphetamine use and any resulting harm to the children. We disagree with both arguments. Because respondent-mother never challenged the adjudication in the trial court, we review this issue for plain error. *Id.* at 29.

[2] Because there was no objection at the trial court, the record is devoid of any information concerning the availability of alternative treatment programs. For purposes of this discussion, we assume without deciding that the drug-treatment programming offered by NA espoused a faith-based philosophy.

We have recently summarized the adjudication and admission-by-plea process in child protective proceedings:

> "In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). The family court determines whether to take jurisdiction of the child during the adjudicative phase. *Id*. The "fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court" is called a "trial." MCR 3.903(A)(27). The term "trial" includes a "specific adjudication of a parent's unfitness," which subjects the parent to "the dispositional authority of the court." MCR 3.903(A)(27). A parent may also waive his or her right to a trial and admit the allegations in a petition or plead no contest to them. MCR 3.971(A); *In re Sanders*, 495 Mich at 405.
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> Pleas generally waive certain rights, and [the] respondents' jurisdictional pleas . . . effectively waived, among other things, their rights to a jury trial, to cross-examine the witnesses against them, and to force petitioner to prove grounds for jurisdiction at a trial. See MCR 3.971(B)(3) (enumerating the rights that a respondent must be advised that he or she will waive by entering a jurisdictional plea). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970). Hence, for a plea to constitute a valid waiver of constitutional rights, the person entering it must be made "fully aware of the direct consequences of the plea." *People v Cole*, 491 Mich 325, 333; 817 NW2d 497 (2012) (quotation marks and citation omitted). . . .
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> In the context of jurisdictional pleas in child protective proceedings, "[o]ur court rules reflect this due-process guarantee." *In re Ferranti*, 504 Mich at 21. [*In re Pederson*, 331 Mich App at 463-465.]

In conjunction with its decision in *Ferranti*, our Supreme Court amended MCR 3.971(B) to enumerate additional rights of which the trial court *must* inform a parent at the time of his or her plea in order to comport with due process. See *Ferranti*, 504 Mich at 9 n 1. These include specific notifications "that appellate review is available to challenge any errors in the adjudicatory process," MCR 3.971(B)(6), and that the parent "may be barred from challenging the assumption of jurisdiction in an appeal from the order terminating parental rights if they do not timely file an appeal of the initial dispositional order," MCR 3.971(B)(8). But these particular court rules were not in effect at the time of respondent-mother's adjudication, which took place before *Ferranti*. Moreover, *Ferranti* did not address respondent-mother's argument. Rather, the *Ferranti* Court merely acknowledged that the trial court plainly erred by failing to advise respondents "of the consequences of their pleas and the rights they were giving up." See *Ferranti*, 504 Mich at 30. Simply put, we have never held that a trial court's failure to specifically advise a respondent that she may appeal her plea of admission rendered that plea invalid. There is nothing about this particular plea proceeding that would lead us to do so here. Respondent-mother was made aware that she was giving up certain rights, including the right to a jury trial, by entering a plea of admission, and the trial court followed the court rule as it was written at the time.

Further, even assuming that the trial court did err by failing to advise respondent-mother of her right to appeal the adjudication, the trial court's failure to convey that information still does not entitle her to an automatic reversal. See *Pederson*, 331 Mich App at 469. This case does not involve the "numerous errors that occurred in *In re Ferranti*." *Id*. at 467. Unlike the parents in *Ferranti*, respondent-mother was "informed of most of the rights that [she was] waiving." *Id.* And respondent-mother cannot show that any adjudicatory error by the trial court was outcome determinative. See *id*. at 466. Respondent-mother does not explain, for example, how her lack of knowledge of her appellate rights impacted her decision to enter a plea of admission in the first place, or explain how she otherwise did not knowingly and intelligently waive her rights to contest the allegations to which she pleaded. Nor does respondent-mother argue that her decision to plead affected the dispositional stages of the proceedings. Respondent-mother has not demonstrated prejudice and has not shown plain error. *Id*. at 470-47; *Ferranti*, 504 Mich at 29.

Respondent-mother also argues that the trial court lacked a sufficient basis to its exercise jurisdiction, even considering her admissions. We disagree.

> "To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "Jurisdiction must be established by a preponderance of the evidence." *Id*. "We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *Id*. "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." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). [*In re Long*, 326 Mich App 455, 460; 927 NW2d 724 (2018).]

At her adjudication, respondent-mother expressly admitted to testing positive for methamphetamines and that her methamphetamine use was contrary to her children's welfare. We acknowledge that this Court has stated that "not every ingestion of a substance constitutes abuse, especially when viewed in the larger context of whether there is an effect of the substance use on the child or the parent's parenting ability." See *In re Richardson*, 329 Mich App 232, 255; ___ NW2d ___ (2019). Still, we find it an unremarkable proposition "that substance abuse can cause, or exacerbate, serious parenting deficiencies," see *In re LaFrance Minors*, 306 Mich App 713, 731; 858 NW2d 143 (2014). On this record, the trial court did not clearly err when exercising its jurisdiction because of its concern that respondent-mother's admitted use of methamphetamine presented a risk of physical and emotional harm to her children. The dangerous and addictive nature of methamphetamine is hardly a secret; as respondents' behavior throughout these proceedings demonstrates, it is not a drug that is known for having "casual users" or for being compatible with raising small children. Moreover, methamphetamine possession and use is illegal. Engaging in criminal behavior, even if there is not a conviction, can likewise render a parent's home or environment unfit and provide a basis for the trial court's jurisdiction. See *In re MU*, 264 Mich App 270, 279-280; 690 NW2d 495 (2004).

Affirmed.

/s/ James Robert Redford
/s/ Jane E. Markey
/s/ Mark T. Boonstra