STATE OF MICHIGAN

COURT OF APPEALS

In re WITHERELL/WHITE, Minors.

UNPUBLISHED
April 22, 2021

No. 355014
Saginaw Circuit Court
Family Division
LC Nos. 20-036157-NA;
20-036158-NA

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Respondent appeals by leave granted[1] the trial court order authorizing removal of her two minor children, EW and BW.[2] We affirm.

I. FACTS

Respondent is the mother of two children, EW and BW. On September 16, 2020, Michigan's Department of Health and Human Services (DHHS) filed a petition seeking jurisdiction over EW and BW, and their removal from respondent's home. The petition alleged that respondent was unable to safely care for EW and BW because of her mental health diagnosis.[3] Also, the petition expressed concern regarding respondent's substance use, homelessness, and erratic behavior as well as her involuntary placements in inpatient mental health treatment facilities and involvement in domestic violence.

[1] *In re Witherell/White Minors*, unpublished order of the Court of Appeals, entered December 14, 2020 (Docket No. 355014).

[2] The parental rights of the minor children's fathers are not subject to this appeal.

[3] The petition stated that respondent "has a mental health diagnosis of Bipolar I with Schizophrenic features and ruling out Schizo effective disorder which negatively impacts her ability to parent her children."

More specifically, the petition alleged that on August 15, 2020, respondent was acting irrationally by yelling and making statements that did not make sense while in the presence of BW. Subsequently, after displaying "irrational behavior and thoughts" on August 29, 2020, respondent was taken by law enforcement to Covenant Hospital for a mental health evaluation. As a result, respondent was admitted to Health Source under an involuntary petition. Thereafter, pursuant to a safety plan, EW was placed with his maternal great-grandfather and BW was placed with his maternal grandmother.

Respondent did not appear for the September 1, 2020 preliminary hearing due to her admission into Health Source. Despite this, the attorney referee conducted the removal hearing as requested by DHHS. Kali Hooper, a Children's Protective Services (CPS) worker, testified that it was contrary to the welfare of EW and BW to remain with respondent because of her mental health, erratic behavior, inability to maintain safe housing, substance abuse, and homelessness. Additionally, Hooper testified that she did not believe there was any provision other than removal to protect EW and BW. Further, Hooper notified the trial court that the following reasonable efforts were made to prevent the removal of EW and BW from respondent's care: general foster care services, substance abuse treatment, team decision-making meetings (TDMs),[4] counseling services, safety planning, and assistance in establishing a power of attorney. Hooper also confirmed that the relative caregivers were left without a power of attorney authorizing them to act in a legal capacity for the benefit of EW and BW.[5]

At the conclusion of the preliminary hearing, the referee stated that the hearing itself was being adjourned so the parents of EW and BW could be notified and have an opportunity to consult with their attorneys. However, the referee found that based on Hooper's testimony, removal of EW and BW was appropriate. The referee reiterated respondent's lack of housing, mental health issues, and involuntary commitment in a facility where EW and BW could not be placed with her. Based on this, the referee concluded that placement of EW and BW with respondent presented a substantial risk of harm to their life, physical health, or mental well-being. The referee further concluded that EW and BW could not be placed with their respective fathers at that time, and no arrangement or provision other than removal was reasonably available to adequately safeguard them.

Also, the referee noted the lack of active powers of attorney necessary for relatives to provide legal care, such as medical treatment and school enrollment. The referee further noted that although reasonable efforts were made to prevent removal, placement of EW and BW away from respondent would provide adequate safeguards. Lastly, the referee ruled that EW and BW would be placed with a maternal uncle and would receive assistance from DHHS to meet their

[4] The record does not identify the meaning of TDM. However, a general search of DHHS policy reveals that TDMs are used to engage families in services planning. Michigan Department of Health & Human Services, <https://www.michigan.gov/mdhhs/> (accessed March 19, 2021).

[5] In addition, Hooper testified that in the morning on the day of the preliminary hearing she attempted to contact respondent on her last known cell phone number to notify her of the preliminary hearing. Also, Hooper left a voicemail with respondent's therapist, and faxed the petition and Zoom information for the preliminary hearing to Health Source.

medical and dental needs, address any mental health issues, provide for education, and ensure they had food and a safe place to live.

The trial court entered an order authorizing the removal of EW and BW from respondent's care. Respondent appeals from that order. Subsequently, following the continued preliminary hearing, the trial court authorized the petition and maintained the removal of EW and BW. Respondent then challenged the factual findings of the referee, and the trial court affirmed those findings.

II. ANALYSIS

A. DUE PROCESS

Respondent contends that the trial court violated her due process rights by conducting a removal hearing that she could not attend because of her involuntary hospitalization. We disagree.

The general rule is that questions regarding whether a child protective proceeding complied with a parent's right to procedural due process presents a question of constitutional law and is reviewed de novo. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). However, in this case, respondent raised her due process argument for the first time on appeal and it is thus unpreserved. This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

Our Supreme Court recognizes "that parents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993) (citation omitted). Further, procedural due process requires that a party be provided notice of the proceeding and a meaningful opportunity to be heard by an impartial decision-maker. *In re TK*, 306 Mich App 698, 706; 859 NW2d 208 (2014). Conversely, substantive due process prohibits arbitrary deprivation of protected interests. *Id.*

Under Michigan law, MCR 3.965(B)(1) allows a preliminary hearing to be adjourned for the purpose of securing the appearance of a party *or* allows the preliminary hearing to be conducted in the absence of a parent or other party if notice has been given or if the court finds that a reasonable attempt to give notice was given. MCR 3.965(B)(3) states that "[t]he court may make temporary orders for the protection of the child pending the appearance of an attorney or pending the completion of the preliminary hearing." Similarly, MCR 3.965(B)(11) provides that "[i]f the preliminary hearing is adjourned, the court may make temporary orders for the placement of the child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrule (C) . . . ."

This Court finds no indication that respondent was prejudiced by any procedural action of the trial court in removing EW and BW. While respondent argues that the results would have been different if the trial court's decision on placement had been adjourned, aside from listing a variety of questions that could have been posed in cross-examination, respondent presents no meaningful argument or support for this assertion. This Court is not required to unravel and elaborate on

respondent's arguments and may deem the argument waived. *People v Cameron*, 319 Mich App 215, 232; 900 NW2d 658 (2017).

Nonetheless, our review of the record suggests that respondent was given an opportunity to attend the adjourned preliminary hearing, where she had an opportunity to dispute and challenge the testimony and evidence before the trial court. This Court finds no indication that the trial court denied respondent her right to witnesses, cross-examination, or the presentation of evidence. Further, at the conclusion of the continued preliminary hearing, the petition was authorized and the removal of EW and BW was continued. Despite's respondent's request for review of the referee's opinion, the trial court affirmed the referee's findings. Given these circumstances, respondent has not established that the trial court's initial placement decision affected her substantial rights and denied her due process. Thus, the trial court did not commit plain error.

B. REMOVAL

Respondent argues that the trial court erred in removing EW and BW from respondent's care because she placed them in the temporary care of relatives pursuant to an approved safety plan. Also, respondent argues that Hooper's testimony during the preliminary hearing was based on speculative opinions rather than facts. We disagree.

"[I]ssues that are raised, addressed, and decided by the trial court are preserved for appeal." *In re TK*, 306 Mich App at 703. Here, although respondent did not appear for the initial preliminary hearing, and her attorney did not raise any objections to the emergency removal of EW and BW, the record suggests that respondent objected to the referee's conclusions, which were ultimately affirmed by the trial court. Because of this, respondent has preserved this issue for appeal.

In addition, our Court reviews a trial court's factual determinations for clear error. *In re La France Minors*, 306 Mich App 713, 723; 858 NW2d 143 (2014). "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). Even if an error occurred, this Court will not disturb the trial court's order unless it would be "inconsistent with substantial justice" to permit the order to stand. MCR 2.613(A); *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002).

The trial court in this case exercised jurisdiction over EW and BW under MCL 712A.2(b)(1) and (2), which provide:

> The court has the following authority and jurisdiction:
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or

her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

* * *

(2) Whose 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.

The Michigan Legislature emphasized that the phrase " '[w]ithout proper care or guardianship' does not mean a parent has placed the juvenile with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the juvenile with proper care and maintenance." MCL 712A.2(b)(1)(C). Here, respondent placed EW and BW with family members who lacked legal authority to act on their behalf. The referee concluded that EW and BW could not be placed with their fathers at the time of the preliminary hearing, and no arrangement other than removal was reasonably available to adequately safeguard them.

Also, given respondent's homelessness and the uncertainty regarding when respondent would be released from her involuntary inpatient services, a continued risk of harm to EW and BW existed if respondent remained able to resume custody of them immediately upon her release without additional safeguards. Accordingly, the referee concluded that the well-being of EW and BW would be best assured if they were placed with their maternal uncle, who would receive assistance from DHHS to meet their medical and dental needs, address any mental health issues, provide for education, and ensure that EW and BW had food and a safe place to live. This court-ordered placement with the maternal uncle and continued supervision by DHHS would safeguard the health and welfare of EW and BW.

Moreover, our Legislature has granted the trial court the ability to order placement of a child in foster care if it finds all of the following:

(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. [MCL 712A.13a(9). See also MCR 3.965(C)(2).]

These "findings may be made on the basis of hearsay evidence that possesses adequate indicia of trustworthiness." MCR 3.965(C)(3). The trial court must make a statement of findings, in writing or on the record, explaining how it is contrary to the welfare of the child to remain in the home, MCR 3.965(C)(3), and the factual basis for determining that reasonable efforts to prevent removal had been made or were not required, MCR 3.965(C)(4).

In this case, the record shows that the trial court considered all of the factors identified by MCL 712A.13a(9) and that it complied with the relevant requirements of MCR 3.965. Hooper's testimony and the petition filed by DHHS offered adequate facts that showed the reasonable efforts made by DHHS to prevent removal and that placement in respondent's household would be harmful to EW and BW in light of respondent's homelessness, mental health issues, and substance abuse. The petition also indicated that respondent acted erratically in front of BW, was unable to provide a safe home, and even exposed EW and BW to domestic violence. These facts were undisputed and were sufficient to support the trial court's conclusion that respondent posed a risk of substantial harm to EW and BW.

Affirmed.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola