

STATE OF MICHIGAN
COURT OF APPEALS

In re NEILL, Minors.

UNPUBLISHED
June 24, 2021

No. 355990
St. Joseph Circuit Court
Family Division
LC No. 2017-000020-NA

Before: STEPHENS, P.J., and BECKERING and O’BRIEN, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court order removing his child, KN, from the care of respondent-father and respondent-mother.¹ We affirm.

I. BACKGROUND

On December 15, 2020, a petition was filed by the Department of Health and Human Services (DHHS) requesting that the trial court take jurisdiction of KN and issue an order removing the child from the care of respondent-father and respondent-mother due to abuse and neglect. The petition alleged that on December 11, 2020, a domestic violence incident occurred between respondent-father and respondent-mother.² The petition stated that during the altercation, respondent-mother attempted to remove KN from the car, and respondent-father became upset and grabbed KN to keep him in the car, so the two began to pull on KN in opposite directions. The petition stated that respondent-father then struck respondent-mother’s face in the presence of KN.

The petition next stated that approximately one month prior to the December 11, 2020 incident, a similar incident occurred at a relative’s home, where respondent-father gained access

¹ Respondent-mother’s other two children were also removed by this order. However, respondent-father is not the father of these children, and respondent-mother is not a party to this appeal.

² Although not stated in the petition, the DHHS caseworker who filed the petition testified at the preliminary hearing on December 15, 2020, that the altercation on December 11, 2020, took place at respondent-mother’s aunt’s home.

to respondent-mother's vehicle and both began pulling on KN to gain control of him, resulting in a physical altercation in KN's presence.³ The petition also stated that respondent-mother and respondent-father have a significant history of law enforcement contact for domestic violence and civil disputes occurring on May 25, 2020, August 7, 2020, and twice on August 31, 2020.

The petition continued on to describe respondent-mother's and respondent-father's extensive history with Children's Protective Services (CPS) and prior removals. The petition stated that the children were removed in 2017 for physical abuse by respondent-father.⁴ During the 2017 case, respondent-father broke into respondent-mother's apartment and assaulted her while she was pregnant with KN. Respondent-father was arrested and convicted of domestic violence for the incident. Despite respondent-mother having a personal protection order against respondent-father, they were married in June 2018. The petition also stated that the children were removed in 2019 for improper supervision and concerns of domestic violence in the home. In addition, the petition stated that during the removal in 2019, a minor child was found running down a busy highway. Finally, the petition stated that there is an ongoing investigation involving one of respondent-mother's other children due to him sustaining a skull fracture and the inconsistent stories reported as to the cause.

Following a preliminary hearing on December 15, 2020, a referee ordered that the children, including KN, be removed from parental care. Respondent-father requested that the trial court judge review the referee's recommendations. In a written decision, the trial court concluded that removal of the children from both parents was supported by a preponderance of the evidence, and it entered an order adopting the referee's recommendations and removing the children. After a pretrial hearing held a week later on December 22, 2020, the referee determined that continued removal was appropriate, and the trial court adopted the referee's decision. Respondent-father now appeals, challenging the removal order only to the extent that it pertains to KN.

II. SUFFICIENT EVIDENCE OF HARM

Respondent-father argues that the trial court erred by finding that the DHHS presented sufficient evidence of harm to support removal of KN. We disagree.

We review de novo the trial court's interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 403; 852 NW2d 524 (2014). We review the factual findings underlying a legal issue for clear error, and a finding is clearly erroneous if a review of the record leaves this Court with a firm and definite conviction that a mistake was made. *In re McCarrick/Lamoreaux (On Remand)*, 307 Mich App 436, 463; 861 NW2d 303 (2014). "Further,

³ The November 22, 2020 incident also occurred at the maternal aunt's home according to testimony by the DHHS caseworker.

⁴ Respondent-father also appealed that removal order, and this Court affirmed. *In re Neill*, unpublished per curiam opinion of the Court of Appeals, issued March 12, 2020 (Docket No. 350436).

regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

When the DHHS petitions the court to take jurisdiction in a child protection matter, “the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true” *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019). “At the preliminary hearing, 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.” *In re Benavides*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 352581); slip op at 3 (quotation marks and citation omitted).

MCR 3.965(C) provides, in relevant part:

(2) The court may order placement of the child into foster care if the court 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 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.

An identical list of factors that the court must find is provided in MCL 712A.13a(9). “The ‘preponderance of the evidence’ standard applies to cases where the court is merely assuming jurisdiction over the child and not terminating the parent’s rights in that child.” *In re Williams*, 333 Mich App 172; 958 NW2d 629, 635 (2020) (quotation marks and citation omitted).

The trial court did not clearly err by finding that petitioner presented sufficient evidence to satisfy the mandates of MCL 712A.13a(9) and MCR 3.965(C)(2). At the preliminary hearing on December 15, 2020, the trial court found that the DHHS made reasonable efforts to avoid removal and that these efforts were evidenced by the fact that the DHHS had been engaged with the family for a long time without removing the children. This satisfied MCR 3.965(C)(2)(d) (requiring a finding that reasonable efforts were made to prevent removal). The trial court also found that

respondents' home⁵ was not safe because one of respondent-mother's other children had recently suffered a skull fracture, there was a history of violence in the home between respondent-father and respondent-mother, and there was a recent incident of violence that involved KN. These findings were reasonable in light of the testimony from the DHHS caseworker describing the latest domestic violence incidents and detailing the parties' history of violence.

At the pretrial on December 22, 2020, the trial court, in ordering that the removal continue, made similar findings. The trial court noted the two previous petitions and removals, which both involved allegations of domestic violence. The trial court also stated that criminal charges against respondent-father resulted from one of the removals, including a charge for assault on a pregnant woman, respondent-mother, who was pregnant with KN. Further, the trial court noted two prior personal protection orders filed by respondent-mother against respondent-father. The trial court stated that it was particularly concerned about a threatening text message that the infant mental health therapist testified about. The message was from respondent-father to the maternal aunt and stated that respondent-mother was violent and that next time he would not allow her to walk away. This text caused the trial court great concern because in respondent-mother's previous application for a personal protection order, she wrote about a similar threat following a physical assault, when respondent-father told respondent-mother that if she called the police on him, he would make her life a living hell. The trial court found that the volatile relationship between the respondents that resulted in the most recent incidents involving KN justified continued removal of the children. Specifically, the trial court stated that the potential for harm from removal was outweighed by the risks associated with living "in an environment where there is constant arguing between parents that could easily escalate into physical violence." The trial court also stated that it did not want the children to learn that domestic violence was normal. The trial court's findings at both the preliminary hearing and the pre-trial hearing satisfied MCR 3.965(C)(2)(a) (requiring a finding that custody with the parent presents substantial risk of harm) and (b) (requiring a finding that continuing residence in the home is contrary to child's welfare).

Respondent-father argues that petitioner failed to prove that KN was at risk because the only witness of the domestic violence incident was the maternal aunt, and she was not a credible witness. However, this Court generally defers to the trial court's findings concerning issues of credibility. *Ellis*, 294 Mich App at 33. Removal from the respondents was adequate to safeguard the child's health and welfare because the threat to the child's safety and welfare arose from violence within the home. MCR 3.965(C)(2)(e) (requiring a finding that removal of the child was adequate to safeguard the child's health and welfare) was therefore satisfied. The fact that the violence between the respondents continued notwithstanding that the DHHS had an extensive history of engagement with the family supported a finding that removal was the only way to safeguard the children, and MCR 3.965(C)(2)(b) (requiring a finding that no other arrangement is reasonably available to safeguard the child) was therefore satisfied. The trial court also found on

⁵ When referring to "respondents' home," we are referring to the home primarily lived in by respondent-mother with the children. Respondent-father testified at the preliminary hearing that he is "more often" at respondent-mother's home, but also tries to keep a separate residence.

the record that it would be contrary to the welfare of the children to leave them in the care of respondents, as required by MCR 3.965(C)(3).

Respondent-father also contends that the trial court ignored that the lawyer guardian ad litem (LGAL) argued against removal at the preliminary hearing. What respondent-father fails to mention is that the LGAL changed her position at the pretrial hearing. The LGAL testified that after completing her independent investigation, she was in support of removal of the children, including KN. The LGAL stated that she “had some other messages that are reported to be between [respondent-father] and [respondent-mother] that are very credible and give us great concern where there are threats made” and that she believed “the domestic violence [did] rise to a level of concern that removal [was] appropriate.” Therefore, respondent-father’s argument that the trial court ignored the recommendation of the LGAL and based its removal decision on speculation rather than evidence fails.

Respondent-father also argues that the trial court ignored the testimony at the pretrial hearing from the children’s infant mental health therapist that the respondents’ were cooperative and that she never had any concerns regarding domestic violence in the home. Although the therapist testified that she had never witnessed domestic violence, she stated that she did observe respondents arguing a lot, she opined that they have no ability to communicate, and she stated that she had no way of knowing exactly what was happening between respondents in the home. The therapist testified that even though there was a risk with removal, there was also a risk of harm present in the home where domestic violence is occurring in the presence of the children. She testified that she received concerning information about what was going on in the home. When asked to elaborate, the therapist testified that she saw a text message from respondent-father to the maternal aunt admitting that respondent-mother was violent, and that next time he would not allow her to walk away. The trial court specifically referenced this text message in making its finding for continued removal of KN, and the trial court stated that the risk of harm in keeping KN with respondents outweighed the risk associated with removal. Therefore, respondent’s argument that the trial court ignored the therapist’s testimony fails.

III. FUNDAMENTAL RIGHT TO DUE PROCESS

Respondent-father argues that the lower court denied him his fundamental due process right to have a fair and impartial judgment when it removed KN. We disagree.

“Whether child protective proceedings complied with a parent’s right to due process presents a question of constitutional law” which this Court reviews de novo. *Ferranti*, 504 Mich at 14. Because respondent-father failed to raise any due-process issues in the trial court, this issue is unpreserved. *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). Unpreserved claims of error in child protection proceedings are reviewed for plain error. *In re Pederson*, 331 Mich App 445, 463; 951 NW2d 704 (2020). A plain error occurs if three requirements are “met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted).

“Due process requires fundamental fairness” *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). “At its core, [d]ue process requires the opportunity to be heard at a meaningful time and in a meaningful manner.” *In re BGP*, 320 Mich App 288, 343; 906 NW2d 288 (2017) (quotation marks and citation omitted; alteration in original). “At the preliminary hearing, 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.” *Benavides*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted).

MCR 3.965 provides in relevant part:
(B) Procedure.

* * *

(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. . . .

(13) If the court authorizes the filing of the petition, the court:

(a) may release the child to a parent, guardian, or legal custodian and may order such reasonable terms and conditions believed necessary to protect the physical health or mental well-being of the child; or

(b) may order placement of the child after making the determinations specified in subrule (C),^[6] if those determinations have not previously been made. . . .

In this case, the trial court followed the procedures outlined in MCR 3.965(B), and respondent-father received a meaningful hearing. The trial court held a preliminary hearing less than a week after the alleged domestic violence incident occurred. Respondent-father’s attorney had the opportunity to cross-examine petitioner’s witness, respondent-father had the opportunity to testify, and the LGAL testified in opposition of removal. The referee gave a detailed explanation of the evidence he relied on in making his decision. The referee also scheduled the next hearing only a week later so that the removal decision could promptly receive additional review. At the pretrial hearing, the trial court heard again from the LGAL, who changed her position and testified in support of removal, and the trial court heard testimony from the children’s infant mental health therapist. Respondent-father’s attorney had the opportunity to question the therapist and also the opportunity to argue against removal. Given these facts, respondent-father was clearly given “the opportunity to be heard at a meaningful time and in a meaningful manner.” *BGP*, 320 Mich App at 343.

Respondent-father argues that he was denied his right to due process because the referee only granted the removal in order to give the DHHS more time to investigate the matter.

⁶ The contents of subrule (C) are included above in section II.

Respondent-father also argues that providing the petitioner more time to gather information to justify the removal placed the trial court in an adversarial position to respondent-father, thus denying him the right to a fair and objective fact finder. Respondent-father has mischaracterized the referee's decision. The referee did state that "we're still at the point of gathering evidence" and that after the ensuing pretrial hearing they would "hopefully have a lot more insight about whether or not the circumstances justify the continued removal of parental care." However, there is nothing in the record to support a conclusion that the referee's decision was based on a desire to allow for more investigation rather than a finding that the available evidence established that the children, including KN, faced a substantial risk of harm if left in the care of respondents. The referee's comments were an acknowledgment of the fact that all of the information was not yet available and that the factual findings could change upon the submission of additional evidence. The additional evidence, if favorable to respondent-father, could have led to KN being returned to father, so the trial court never placed itself in an adversarial position to respondent-father. Further, after respondent-father requested review of the referee's recommendation of the preliminary hearing, the trial court, in a written decision, stated that it reviewed the video of the hearing and agreed that the "removal of the children from both parents was established by a preponderance of the evidence." The trial court also reviewed the pretrial hearing at the request of respondent-father and issued a written decision in which it affirmed the referee's recommendation. Plain error has not been established.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane M. Beckering
/s/ Colleen A. O'Brien