STATE OF MICHIGAN

COURT OF APPEALS

In re T. D. SISCO, III, Minor.

UNPUBLISHED
August 19, 2021

No. 356425
Genesee Circuit Court
Family Division
LC No. 20-137035-NA

Before: LETICA, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court's order removing her child, TS, from her custody after a preliminary hearing.[1] Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

In November 2020, TS's infant brother, KS, died under suspicious circumstances. As a result, respondent-mother was arrested and charged with torture, first-degree murder, first-degree child abuse, and child abuse in the presence of another child. Thereafter, in January 2021, the Department of Health and Human Services (DHHS) filed an amended petition requesting the removal of TS from respondent-mother's custody and termination of her parental rights.[2]

According to the allegations in the petition, on November 11, 2020, respondent-mother hosted a party at her home. During the party, respondent-mother was drinking alcohol and smoking marijuana. It was reported that no one was really watching TS and KS and that respondent-mother left them alone in the basement for approximately 30 minutes while she was getting food with TS's father. Respondent-mother told DHHS that she placed KS in his rock-n-play bassinet at bedtime. The next morning, on November 12, 2020, KS died.

[1] TS's father is also a respondent in the proceedings before the trial court. He has not, however, appealed the removal order and is not a party to this appeal.

[2] The original petition did not seek termination of respondent-mother's parental rights.

At some point during the night, respondent-mother recounted that "she was on the floor next to [KS, who was inside his rock-n-play bassinet], went to stand up, and leaned on the rock and play sleeper to assist in her standing up." She claimed that the left leg of the bassinet snapped and fell to the ground. KS fell with it, hitting his head on the floor. Later, at approximately 8:00 a.m., respondent-mother was feeding KS, went to take care of TS, and when she returned KS was unresponsive. Respondent-mother called 9-1-1, and when emergency medical services (EMS) arrived, he was unresponsive and in cardiac arrest. EMS observed that KS's eyes were bruised, swollen, and unresponsive when they arrived. EMS was unable to resuscitate KS, and he was pronounced dead at 9:34 a.m. The preliminary autopsy showed physical injuries indicative of abuse; however, it could not be ruled out that those injuries were sustained "from birth" and/or from resuscitation attempts. KS was approximately 11 weeks old when he died.

Law enforcement and hospital authorities began an investigation into the death. According to the allegations in the petition, the police detective investigating the case was alarmed that respondent-mother was intoxicated while attempting to care for the children. The detective was also concerned with evidence suggesting that respondent-mother posted a photograph of KS to Facebook the night before she called 9-1-1. In the photograph, KS appeared to be discolored and there were concerns that he was already dead when the picture was taken.

The petition alleged that respondent-mother told her sister and another individual that the version of events she reported to law enforcement and the DHHS was not accurate. Her sister reported that respondent-mother told her that what actually happened was that in the night she put KS on her chest and fell asleep. She forgot he was on her chest when she woke up, and, when she rolled over to get up, he fell off the bed and hit his head on the floor. The other witness recalled respondent-mother telling her that the bassinet broke when she leaned on it, but KS did not hit his head at that time. Instead, respondent-mother told her that after the bassinet broke, she fell asleep with KS on her chest and when she got up he fell to the floor. That witness added that respondent-mother panicked and did not call 9-1-1 until hours after KS's death and that she posted a photograph of KS's dead body on Facebook.

In addition to the details surrounding KS's death, the petition also alleged that the children were frequent "no-shows" to their well-child checkups at the pediatrician, and that, despite concerns that TS was underweight, respondent-mother did not bring him to his pediatrician for regular "weight checks."

Following the preliminary hearing, an order authorizing the amended petition and removing TS from respondent-mother's care was entered.

II. DUE PROCESS

A. STANDARD OF REVIEW

Respondent-mother argues that her due-process rights were violated when, (1) contrary to MCR 3.965(B)(14), the hearing referee failed to ask her questions "regarding the identity of relatives of the child who might be available to provide care," and (2) contrary to MCR 3.965(C)(1), the hearing referee did not give her an "opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence." She also suggests that

her due-process rights were violated when she was precluded from speaking with her lawyer during the preliminary hearing. At the preliminary hearing, respondent-mother objected to the placement of TS with his paternal grandmother, but she did not argue that her due process rights were violated by the court's alleged failure to follow the requirements in MCR 3.965(B)(14) and MCR 3.965(C)(1), and she raised no challenge related to her inability to speak to her lawyer during the hearing.

"Generally, whether child protective proceedings complied with a respondent's substantive and procedural due process rights is a question of law that this Court reviews de novo." *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). However, because respondent-mother failed to preserve this issue by raising it in the trial court, our review is for plain error affecting substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009). "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 citations omitted). "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).

B. ANALYSIS

"It is well established that parents have a significant interest in the companionship, care, custody, and management of their children." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993). "This interest has been characterized as an element of 'liberty' to be protected by due process." *Id*. 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 at 706. Conversely, substantive due process prohibits arbitrary deprivation of protected interests. *Id*. "Due process requires fundamental fairness, which is determined in a particular situation first by considering any relevant precedents and then by assessing the several interests that are at stake." *In re Brock*, 442 Mich at 111. "In Michigan, procedures to ensure due process to a parent facing removal of his child from the home or termination of his parental rights are set forth by statute, court rule, [DHHS] policies and procedures, and various federal laws . . . ." *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *In re Brock*, 442 Mich at 111 (quotation marks and citation omitted; alteration in original).

During a 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." MCR 3.965(B)(12). In cases where a trial court authorizes a petition for abuse or neglect, the trial court may "release the child to a parent, guardian, or legal custodian." MCR 3.965(B)(13)(a). Or, in the alternative, the trial court may place the child in foster care after finding certain criteria set forth in MCR 3.965(C) are present. MCR 3.965(B)(13(b)).

As relevant here, MCR 3.965(B)(14) provides:

> (14) The court must inquire of the parent, guardian, or legal custodian regarding the identity of relatives of the child who might be available to provide care. . . .

Here, the record does not show that the hearing referee made this inquiry. However, respondent-mother cannot show that the failure affected her substantial rights.

The preliminary hearing was first scheduled for November 16, 2020. Respondent-mother and TS's maternal aunt attended that hearing via telephone. Before the hearing was adjourned, there was a discussion that a safety plan had been developed for TS. No details of the plan were recounted on the record. However, the next day, November 17, 2020, at the continued preliminary hearing, petitioner explained that under the safety plan TS was with his maternal aunt. Although respondent-mother did not attend the November 17, 2020 hearing, her lawyer was present.[3] Thereafter, at the January 12, 2021 final preliminary hearing, respondent-mother was permitted to directly state her concerns regarding TS's placement outside of her care. She did not identify any relatives of TS "who might be available to provide care." Instead, she argued that TS should not be placed with his paternal grandmother. Thus, although the hearing referee did not make an "inquiry" into the identity of TS's relatives who might be available to provide care, the record plainly shows that respondent-mother was nevertheless presented with an opportunity at the hearing to disclose such information. She did not do so. And, even on appeal, although she complains that the referee did not ask her to identify TS's relatives who might be available to provide care, she has not actually identified any relatives that she would have identified if such an inquiry had been directly made.

Finally, we note that the court rule only requires an inquiry into the identity of relatives who *might* be available to provide care. It does not mandate that the court place the child with any relative so identified. In this case, TS's father advocated for TS being placed with TS's paternal grandmother. Yet, although the paternal grandmother was a relative of TS who was available to provide care, the referee declined to place him with her. Since November 2020, the safety plan had TS in the care of his maternal aunt, and the referee was disinclined to disrupt that relative placement. Thus, even if respondent-mother had been asked to identify other potentially available relatives of TS, and even if she had identified someone, given that the referee's decision to not bounce TS from relative placement to relative placement, there is nothing to suggest that the referee would have made a different placement decision if the inquiry required by MCR 3.965(B)(14) had been made. Respondent-mother, therefore, cannot show that her substantial rights were affected by the failure to comply with MCR 3.965(B)(14).

[3] Respondent-mother was at the police station. Her lawyer represented to the hearing referee that a police detective was going to assist respondent-mother "so she can be on this preliminary hearing." Before that could occur, the referee adjourned the hearing so that respondent-mother could address her "other issues."

Next, respondent-mother argues that the hearing referee did not comply with the requirement in MCR 3.965(C)(1). That court rule provides:

> (1) *Placement; Proofs*. If the child was not released under subrule (B), the court shall receive evidence, unless waived, to establish that the criteria for placement set forth in subrule 3.965(C)(2) are present. The respondent shall be given an opportunity to cross-examine witnesses, to subpoena witnesses, and to offer proofs to counter the admitted evidence.

There is nothing on the record to support a finding that respondent-mother attempted to subpoena witnesses, but was precluded from doing so. Again, the preliminary hearing was first scheduled for November 16, 2020, but was ultimately adjourned until January 12, 2021. That gave respondent-mother a lengthy opportunity to subpoena any witnesses that she wanted. She did not take advantage of that opportunity. Further, at the January 12, 2021 hearing, the caseworker who submitted the amended petition was sworn as a witness and gave a brief statement while under oath. Thereafter, the hearing referee advised respondent-mother (and TS's father) of their rights, and then asked if there was anything "[o]n behalf of mother." Respondent-mother's lawyer responded:

> Your Honor, given the fact that there's a criminal matter pending regarding my client, I would just enter a denial and ask the Court to set it for—schedule a contested pretrial.

Thus, although given the opportunity, respondent-mother did not seek to cross-examine the caseworker, nor did she attempt to present additional proofs. By giving respondent-mother the opportunity to present her case, the hearing referee complied with MCR 3.965(C)(1) and there is no error.

Finally, respondent-mother argues that her due-process rights were violated because she was precluded from speaking privately with her lawyer during the January 12, 2021 preliminary hearing. Again, the preliminary hearing was originally scheduled for November 16, 2020, but was adjourned until November 17, 2020. At those two hearings, TS's placement was discussed, including the fact that the safety plan placed him in the care of his maternal aunt. Respondent, therefore, was aware that placement was an issue and she had a lengthy opportunity to discuss her concerns with placement with her lawyer prior to the January 12, 2021 hearing.

During the January 12, 2021 hearing, which was being conducted via Zoom videoconferencing, respondent-mother raised her hand after the guardian ad litem suggested that TS's father could provide proper care because he was living with TS's paternal grandmother. Respondent-mother's lawyer asked the hearing referee for permission to go into a breakout room to speak with her briefly, but due to malfunctions with the videoconferencing technology, the referee was unable to facilitate her request. The referee asked respondent-mother's lawyer how she wanted to proceed. In response, after cautioning respondent-mother regarding her pending

criminal charges, the lawyer asked respondent-mother if she has issues "regarding placement." Respondent-mother stated that she did.[4] The lawyer then stated:

> [Respondent-mother] wanted to address the Court regarding her concerns with placement. If that's all, then I would ask—I would ask that the Court would hear her position?

The referee responded by saying "Okay. Mother?" Respondent-mother was then allowed to freely present her position on TS's placement with relatives.

During her statement, she did not identify any relatives that might be available—or desirable—to provide TS with care. Instead, she opposed TS's father's suggestion that TS should be placed with TS's paternal grandmother. At the conclusion of her statement, respondent-mother again stated that she would like to speak one-on-one with her lawyer. The hearing referee responded, "Well she'll be able to talk to you about that at a later time, because I'm not able to get you into a breakout room right now, okay." Respondent-mother stated that that would be "okay." Then, while the hearing referee was making his findings, respondent-mother again raised her hand when the referee was discussing placement of the child. The referee did not permit her to speak at that point, noting that she had a lawyer to represent her. However, the court concluded by telling respondent-mother that, if after speaking to her lawyer, "if there's something you want to have said that the attorney believes would have impacted my decision, you can file a review of this recommendation[.]" The record does not reflect that she sought any such review.

Thus, although respondent-mother was precluded from speaking with her lawyer privately during the hearing, she cannot show that her substantial rights were affected. She was able to confer with her lawyer regarding placement in the roughly two-month period between when the preliminary hearing was originally scheduled and when it was finally held. During the hearing, despite technological difficulties, she was able to present her position on placement. Both respondent-mother and her lawyer agreed with that course of action, and respondent-mother agreed with the hearing referee when she was told that the referee could not arrange for her to speak with her lawyer privately. Finally, respondent-mother was given an opportunity after the hearing to privately confer with her lawyer and then, if she believed that the conversation yielded something that she believed would have affected the referee's decision, she had the opportunity to seek review of the recommendation before the trial court. Stated differently, respondent-mother cannot show outcome determinative error given the pre- and post-hearing opportunities to confer with her lawyer and given her acquiescence to the procedure used during the hearing after technological difficulties prevented her from private conversation with her lawyer.

[4] This suggests that respondent-mother and her lawyer had previously conferred regarding respondent-mother's problems related to placement.

III. GROUNDS FOR REMOVAL

A. STANDARD OF REVIEW

Respondent-mother next argues the trial court failed to establish particular grounds for removal under MCR 3.965(C)(2) and MCL 712A.13a(9). Generally, a trial court's factual findings are reviewed for clear error. *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "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." *Id*. at 296-297.

B. ANALYSIS

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). In order to place a child in foster care, the criteria in MCR 3.965(C)(2) must be met. The court must find:

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

These "findings may be made on the basis of hearsay evidence that possesses adequate indicia of trustworthiness." MCR 3.965(C)(3). If placement is ordered, the court must make a statement of findings, in writing or on the record, explicitly including the finding that it is contrary to the welfare of the child to remain at home and the reasons supporting that finding." MCR 3.965(C)(3). A trial court must also state the factual basis underlying its determination that reasonable efforts to prevent removal were made or were not required. MCR 3.965(C)(4). In this case, respondent-mother challenges the trial court's findings under factors MCR 3.965(C)(2)(a), (b), and (d). We address each in turn.

As it related to MCR 3.965(C)(2)(a), respondent-mother argues that there was no evidence that TS was malnourished, abused, neglected, or otherwise not provided with proper care. However, the caseworker testified that respondent-mother admitted to being under the influence

of substances while caring for TS and KS. Further, she stated respondent-mother made suicidal statements on her Facebook page, which in the caseworker opined "concerns for [respondent-mother's] emotional stability and ability to care for [TS]." The petition also stated respondent-mother failed to seek medical attention for TS despite the pediatrician's opinion that TS was underweight. There was the summary of KS's preliminary autopsy, which indicated that KS had a number of suspicious injuries. There were also inconsistencies in respondent-mother's recitation of the events surrounding KS's death. Finally, respondent-mother was incarcerated and facing serious criminal charges relating to that death. In light of the above, the court did not err by finding that custody of TS with respondent-mother presented a substantial risk of harm to his life, physical health, or mental well-being.

Respondent-mother suggests that TS was not at a substantial risk of harm because it was undisputed that TS was being adequately cared for by his maternal aunt. She directs this Court to our Supreme Court's decision in *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010). In *Mason*, our Supreme Court held that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Id*. at 160. In doing so, the Court recognized that, "Michigan traditionally permits a parent to achieve proper care and custody through placement with a relative." *Id*. at 161 n 11. However, in *Mason*, 486 Mich. at 160-166, this Court was reviewing termination of parental rights under MCL 712A.19b(3)(h), not removal of the child from a parent's care under MCR 3.965(C)(2)(a) and MCL 712A.13a(9)(a). Moreover, although TS was placed with his maternal aunt, that placement was ordered by the trial court following the preliminary hearing after the court had made the required findings. Thus, it was the court, not respondent-mother who placed TS with a relative. Respondent-mother, therefore, did not provide proper care and custody for TS by placing him with a relative.[5]

Next, respondent-mother next challenges the trial court's finding that, "[n]o provision of service except removal will protect the child." However, it was undisputed that respondent-mother was incarcerated at the time of the hearing and unable to directly care for TS. Respondent-mother contends "[t]he [trial] court erred [under MCR 3.965(C)(2)(b)] by not making further inquiry about voluntary placement to avoid removal." Yet, under the court rule, there is no requirement that a trial court inquire about voluntary placement. See MCR 3.965(C)(2); MCL 712A.13a(9). Further, as noted above, the trial did provide TS a relative placement and, when given the opportunity to address the trial court, respondent-mother only argued against placement with the paternal grandmother. As noted above, a trial court may place a child in foster care if there is evidence of certain criteria. MCR 3.965(C)(2); MCL 712A.13a(9). Because it was undisputed that respondent-mother was incarcerated at the time of the hearing, the trial court did not err by finding evidence that "[n]o provision of service except removal will protect the child."

Finally, respondent-mother challenges the trial court's findings under MCR 3.965(C)(2)(d), which requires evidence that "[c]onsistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child." In addressing this subsection, the trial court stated, "[respondent-mother is] currently facing charges, criminal

[5] Indeed, she is currently challenging the court's decision to remove TS from her care and place him in the care of his maternal aunt.

felonies resulting from the death of another child, a half sibling of [TS]; and . . . reasonable efforts . . . to prevent the removal of the child was made by the agency." In its written order, the court listed those efforts as a Child Protective Services (CPS) and police investigation, both of which included interviews with witnesses. Additionally, we note that the court adjourned the preliminary hearing from November 17, 2020 until January 12, 2021 so that respondent-mother could address her issues arising from incarceration. The fact that the trial court did not make additional efforts, such as asking respondent-mother about a voluntary placement or a power of attorney, does not render the court's findings invalid. Instead, on this record, we conclude that the court made findings, consistent with the circumstances, showing that reasonable efforts to prevent removal had been made.

Affirmed.

/s/ Anica Letica
/s/ Deborah A. Servitto
/s/ Michael J. Kelly