STATE OF MICHIGAN

COURT OF APPEALS

In re R. TENELSHOF, Minor.

UNPUBLISHED
February 27, 2020

No. 349678
Ottawa Circuit Court
Family Division
LC No. 10-066301-NA

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Respondent-father appeals by right the court's order terminating his parental rights to his minor daughter pursuant to MCL 712A.19b(3)(b)(*i*) (child suffered physical injury and is likely to suffer from injury or abuse in the foreseeable future), (c)(*i*) (conditions of adjudication continue to exist), (g) (failure to provide proper care or custody), (j) (reasonable likelihood that child will be harmed if returned to parent), and (k)(*iii*) (parent abused minor child and abuse included severe physical abuse).[1] We affirm.

At the outset, the Department of Health and Human Services (DHHS) filed a petition on August 24, 2018, seeking to terminate the mother's parental rights. This petition also contained allegations against respondent, but the DHHS did not seek to terminate his parental rights at the time. The DHHS alleged that respondent threw the child to the floor and slammed her into a chair, that he severely abused alcohol, that respondent was intoxicated on multiple occasions, including twice when he transported the child from school on his bike, that he told the child not to provide information to Children's Protective Services (CPS), and that the child had seven unexcused absences from school. On October 25, 2018, the date scheduled for trial on adjudication, respondent entered a mixed plea of admission and no contest. Although the court advised respondent of the rights that he was waiving in entering the plea and of some of the consequences of the plea, the court failed to advise respondent that the plea could be used as evidence in a subsequent proceeding to terminate his parental rights. MCR 3.971(B)(4) requires a court to so

[1] The minor child's mother was also a respondent and had her parental rights terminated. She is not a party to this appeal and does not have an appeal pending in this Court.

advise a respondent when a plea is entered. The DHHS concedes that the court erred by failing to fully inform respondent of the consequences of his plea.

The court took jurisdiction over the child on the basis of the plea; the DHHS implemented a case service plan, and respondent was given supervised visitation. Respondent complied with the case service plan until early January 2019. At a January 2019 hearing, a DHHS caseworker testified that the child was doing well living with her aunt and uncle. The DHHS caseworker also explained that respondent tested positive for alcohol during a supervised visit on January 16, 2019, resulting in respondent's incarceration the next day for a probation violation. Respondent remained jailed, and during an April 2019 review hearing, the assistant prosecuting attorney informed the court that a month earlier respondent had pleaded guilty to third-degree child abuse arising out of the assault against his daughter. The plea resulted in respondent's continuing incarceration.

Subsequently, on May 24, 2019, the DHHS filed a supplemental petition against respondent seeking termination of his parental rights. Importantly, this supplemental petition contained many of the same allegations that were in the previous petition. The supplemental petition provided some additional details regarding the original allegations, including information regarding specific physical injuries the child suffered from the physical abuse by respondent, e.g., a fractured arm. There were also some new allegations, including that respondent pleaded guilty to third-degree child abuse, that the minor child would hide from respondent due to his aggressive behavior, and that respondent had been charged with first-degree criminal sexual conduct involving his daughter.[2]

On June 20, 2019, the court held a hearing on the supplemental petition. Although the court had previously taken and exercised jurisdiction on the basis of respondent's plea, the court dedicated the first portion of the hearing to adjudicating the new allegations in the supplemental petition. Respondent made no demand for a jury trial on adjudication. After testimony was presented during the adjudicative phase of the proceeding, the court addressed all of the allegations in the supplemental petition, even though some of the allegations had been encompassed by respondent's plea. While the court struck some portions of the allegations, the court ruled that the allegations for the most part were established by a preponderance of the evidence. The court found that respondent had physically assaulted and injured the child, that respondent had regularly abused alcohol, and that respondent was intoxicated while exercising care and custody of his daughter on numerous occasions. The court concluded that it had jurisdiction because respondent had not provided the child with proper care and custody. The court then proceeded to the dispositional phase and held the termination hearing, finding that the alleged statutory grounds for termination had been proven by clear and convincing evidence and that termination was in the child's best interests. This appeal ensued.

Respondent first contends that the court did not properly advise him of the consequences of his plea, necessitating reversal because the plea was not knowingly and voluntarily made, which deprived the court of jurisdiction. At the time of the initial adjudication when respondent entered

[2] The court ended up striking the sexual abuse allegations.

his plea, he did not challenge and appeal the court's exercise of jurisdiction. Instead, respondent waited to appeal until after the termination order was entered.

The DHHS, following an investigation, may petition a court to take jurisdiction over a child. *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019), citing MCR 3.961(A). The petition must contain essential facts that if proven, would permit the court to assume and exercise jurisdiction over the child. MCR 3.961(B)(3); MCL 712A.2(b); *In re Ferranti*, 504 Mich at 15. If a petition is authorized, the adjudication phase of the proceedings takes place, and the "question at adjudication is whether the 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." *In re Ferranti*, 504 Mich at 15.

A court can take and exercise jurisdiction if a respondent "make[s] a plea of admission or of no contest to the original allegations in [a] petition." MCR 3.971(A); see also *In re Ferranti*, 504 Mich at 15. "The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest." MCR 3.971(C)(2), now found in MCR 3.971(D)(2), effective June 12, 2019, 503 Mich __ (2019).

We note that until the Michigan Supreme Court decided *In re Ferranti*, a jurisdictional challenge such as the one posed by respondent would have been dismissed on appeal as an impermissible collateral attack on the adjudication determination, considering that respondent did not immediately appeal the jurisdictional ruling and that termination was not sought at the initial dispositional hearing. *In re Ferranti*, 504 Mich at 7-8, 18-19. Our Supreme Court explained:

> This Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The *Hatcher* rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. With that procedural (mis)understanding, we held that a posttermination appeal of a defect in the adjudicative phase is prohibited because it is a collateral attack. This foundational assumption was wrong; *Hatcher* was wrongly decided, and we overrule it. [*In re Ferranti*, 504 Mich at 7-8.]

Now, under similar procedural circumstances, the proper approach is not to dismiss the appeal but to examine the appellate challenge under the plain-error test. *Id*. at 29 ("adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error"). Under plain-error review, a respondent is required to establish that "(1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected . . . substantial rights." *Id*. Also, it must be shown that the error seriously affected the integrity, fairness, or public reputation of the child protective proceedings. *Id*.

"Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing . . . of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." MCR 3.971(B)(4). In this case, the court plainly erred by failing to inform respondent in

a manner consistent with the demands of MCR 3.971(B)(4). We note that the court did inform respondent that a consequence of the plea was that his parental rights could be terminated at a later date. But this disclosure did not suffice to satisfy the particular requirements of MCR 3.971(B)(4).

Although the court plainly erred, we cannot conclude that the plain error affected respondent's substantial rights, nor has it been shown that the error seriously affected the integrity, fairness, or public reputation of the child protective proceedings. Under the unusual and unique circumstances in this case in which the court conducted an adjudication trial after the earlier plea, the jurisdictional defect was effectively cured. Had the court properly informed respondent of the consequences of his plea, respondent would have either decided to forgo the plea or to proceed with it. We surmise that he would likely have proceeded with entering the plea. But if respondent had decided against entering a plea, he would have been entitled to an adjudication trial to determine jurisdiction. And under the circumstances that actually transpired, respondent indeed received an adjudication trial in which the court found by a preponderance of the evidence that respondent failed to provide proper care and custody of the child, thereby giving the court jurisdiction that had been lacking because of the earlier error. See MCL 712A.2(b)(1). The court made findings against respondent of physical abuse, severe alcohol use, and child endangerment due to intoxication, all of which had been touched on in the plea. There simply was no prejudice to respondent. This case is nothing like *Ferranti* wherein the lower court failed to advise the respondent of the rights being waived and of the consequences of the plea, and in which there was no subsequent adjudication trial. *Ferranti*, 504 Mich 1. Under these facts, reversal is unwarranted.

Respondent next argues that the court clearly erred when it found that five statutory grounds for termination were proven by clear and convincing evidence and that termination was in the child's best interests. If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding . . . is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed[.]" *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). In applying the clear error standard in parental termination cases, this Court is advised that "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 Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); see also MCR 2.613(C).

Termination under MCL 712A.19b(3)(j) is appropriate when "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The harm contemplated by MCL 712A.19b(3)(j) includes both emotional and physical harm. See *In re Hudson*, 294 Mich App at 268. Here, ample evidence was presented to terminate respondent's parental rights under this subsection. There was evidence that the child was terrified of respondent, that she threatened suicide if returned to respondent's care, that respondent physically assaulted and harmed his daughter, and that he endangered her safety through his chronic alcohol abuse and by regularly being intoxicated while

caring for her. Accordingly, the court did not clearly err when it found that there existed a reasonable likelihood that returning the child to respondent would result in further physical and emotional harm. The same evidence also supported termination under the other grounds set forth in MCL 712A.19b(3) relied on by the court.

With respect to the child's best interests, we focus on the child rather than the parent. *In re Moss*, 301 Mich App at 87. In assessing a child's best interests, a trial court may consider such factors as a "child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014).

In this case, substantial evidence supported the court's finding that termination of respondent's parental rights was in the child's best interests. There was testimony showing that no healthy bond existed between respondent and his daughter, that the child feared respondent and hid from him when he became intoxicated, and that the child threatened to commit suicide and to run away if returned to respondent's care. On this record, the court properly determined that respondent could not provide stability and permanency because of his alcoholic tendencies. Additionally, the court noted the child's current placement with relatives and that they were more than willing to adopt the child. The court opined that although a child's placement with a relative generally weighs against termination, the child's relatives, her counselor, and the DHHS caseworker all spoke in support of termination. Finally, the physical abuse and respondent's endangerment of his daughter's well-being by his drinking and intoxication weighed heavily in favor of a finding that termination was in the child's best interests. Therefore, we are not left with a definite and firm conviction that a mistake was made when the court determined that it was in the child's best interests to terminate respondent's parental rights.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens