

STATE OF MICHIGAN
COURT OF APPEALS

In re K. B. NEILL, Minor.

UNPUBLISHED
March 12, 2020

No. 350436
St. Joseph Circuit Court
Family Division
LC No. 2017-000020-NA

Before: MURRAY, C.J., and METER and K. F. KELLY, JJ.

PER CURIAM.

Respondent-father appeals as of right the trial court’s order placing his minor child, KN, in foster care. We affirm.

I. BACKGROUND

This case concerns petitioner’s petition to remove respondent-father’s minor child, KN, from the care of respondent-father and respondent-mother. Respondent-mother’s two elder children, CN and JN were also removed from the home. The petition was predicated on an incident of inadequate supervision that occurred on August 1, 2019. The family’s history with petitioner, however, dates back to at least 2017.

In 2017, CN and JN were removed from respondent-mother’s care on the grounds that respondent-father, who is not the biological father of CN and JN, was abusing the minor children. At the time, respondent-mother was pregnant with KN. Petitioner instituted a safety plan with the family that stated that neither respondent was to physically discipline the children. Shortly thereafter, a caseworker saw the family driving in a car; father pulled the car over, took one of the children out of the car, and spanked him. The children were removed shortly thereafter. Moreover, throughout the 2017 case, there were several instances of domestic violence between the respondents. Respondent-father broke into mother’s apartment and assaulted her while she was pregnant with KN. Respondent-father was arrested and convicted of domestic violence for the incident. Eventually, JN and CN were returned to respondent-mother’s care. Respondent-mother informed caseworkers that she was no longer in a relationship with respondent-father; however—despite respondent-mother having a personal-protection order against respondent-father—the respondents married in June 2018.

A second investigation occurred in fall 2018, after KN, who was one year old at the time, was left alone in a vehicle outside a restaurant. The respondents blamed each other for the incident, each stating that the other left the child in the car. During the subsequent investigation, each respondent reported domestic violence. In November 2018, law-enforcement officers were called several times because of domestic violence. In one particular incident, respondent-father pushed respondent-mother into a closet door while she had KN in her arms. Respondent-mother reported that she was no longer in a relationship with respondent-father and the case was closed in May 2019.

Then, in August 2019, CN was found wandering unsupervised near a busy highway and was taken into protective custody. CN was four years old at the time. Respondent-mother indicated that she left CN with respondent-father while she took the other children to an appointment. When she left the home, she left CN sitting close to a door; she texted respondent-father to get CN and close the door, but never received a return message. Respondent-father indicated that he brought CN upstairs and that they both fell asleep but, at some point, CN escaped the home. CN, however, reported that respondent-father never came downstairs.

After this incident, respondent-mother refused to give respondent-father a ride home from the police station because she was scared that respondent-father would assault her. Respondent-mother indicated that respondent-father was only at the home because she had strep throat and needed help with the children. Respondent-father claimed that he did not live with respondent-mother and provided an alternative address; respondent-father, however, had to look up the address when asked and stated that petitioner could not send him mail there. Caseworkers reported that respondent-father paid for respondent-mother's cellular phone. After respondent-mother spoke to police about the highway incident, respondent-father shut off the service for the phone so that respondent-mother could not contact petitioner or the police.

Following this last incident, petitioner filed a petition to remove all three children from the respondents' care. The respondents did not contest that probable cause existed for the trial court to authorize the petition and assume jurisdiction over the children. The respondents argued, however, that the trial court should not place the children in foster care; instead, the respondents proposed that the trial court should return the children to respondent-mother's care and order respondent-father to stay away from respondent-mother's home. The trial court disagreed and placed the children in foster care. This appeal followed.

II. ANALYSIS

Respondent-father argues that the trial court erred by removing KN¹ from the home and placing him in foster care. At the preliminary hearing, the trial court must determine whether there is probable cause to authorize the petition and may order temporary placement of the minor children. MCR 3.965(B)(12). We review de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). “We review for clear

¹ Respondent-mother is not a party to this appeal and, given that respondent-father is not the legal or biological father of CN and JN, respondent-father has not challenged their removal from respondent-mother's care.

error the trial court's findings of fact underlying the legal issues." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 463; 861 NW2d 303 (2014). "A finding is clearly erroneous if, after reviewing the entire record, [the Court is] definitely and firmly convinced that the trial court made a mistake." *Id.*

Both MCR 3.965 and MCL 712A.13a govern the preliminary hearing. *In re Rood*, 483 Mich 73, 95; 763 NW2d 587 (2009). MCR 3.965(B)(12) provides that "[u]nless 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." MCR 3.965(B)(13)(a) provides that "the [trial] court 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."

If the trial court does not release the child to a parent, guardian, or legal custodian, the trial court may place the child in foster care. MCR 3.965(C)(2). MCR 3.965(C)(2) provides that all the following conditions must be met for the trial court to order a foster-care placement:

(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.

In regard to preliminary hearings, MCL 712A.13a provides in relevant part:

(4) The court may order a parent, guardian, custodian, nonparent adult, or other person residing in a child's home to leave the home and, except as the court orders, not to subsequently return to the home if all of the following take place:

(a) A petition alleging abuse of the child by the parent, guardian, custodian, nonparent adult, or other person is authorized under subsection (2).

(b) The court after a hearing finds probable cause to believe the parent, guardian, custodian, nonparent adult, or other person committed the abuse.

(c) The court finds on the record that the presence in the home of the person alleged to have committed the abuse presents a substantial risk of harm to the child's life, physical health, or mental well-being.

(5) If a petition alleges abuse by a person described in subsection (4), regardless of whether the court orders the alleged abuser to leave the child's home under subsection (4), the court shall not leave the child in or return the child to the child's home or place the child with a person not licensed under 1973 PA 116, MCL 722.111 to 722.128, unless the court finds that the conditions of custody at the placement and with the individual with whom the child is placed are adequate to safeguard the child from the risk of harm to the child's life, physical health, or mental well-being.

* * *

(9) The court may order placement of the child in foster care if the court finds all of the following conditions:

(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.

Respondent-father first argues that "there appears to be an inherent inconsistency between MCL 712A.13a(5) and MCR 3.965(C)(5) as to the further criteria for the court to place children into foster care." As MCR 3.965(C)(5) addresses placement in a relative's home and the duties of the Family Independence Agency—now the Department of Health and Human Services—to perform criminal record checks, central registry checks, and a home study, we presume that respondent-father is actually referring to MCR 3.965(C)(2), the criteria for placing a child into foster care. In this regard, respondent-father argues that the statute "provides narrower abuse grounds for removal, whereas the court rule is not so limited" Respondent-father avers, "If the Legislature had intended the criteria to include neglect, it would have done so." Respondent-father concludes that, because a substantive statute has priority over a court rule, and because the petition in this case was premised on neglect rather than abuse, we must reverse the trial court's foster-care order.

In other words, defendant argues that neglect is not sufficient grounds to place a child in foster care. This argument is nonsensical. MCL 712A.13a(5) addresses situations in which abuse has been adequately alleged and states that the trial court may not return a child to a home where the child's physical or mental health is at risk or otherwise place the child in such a situation MCR 3.965(C) on the other hand, is broadly worded, authorizing the trial court to place a child in foster

care where the child's well-being is at risk in his current home and placement in foster care is necessary to protect the child. In laymen's terms, the statute prevents the trial court from returning a child to an abusive home or a home where the abuser is likely to access the child; while it may be that an abusive home necessitates a foster-care placement under MCR 3.965(C)(2), it is not the only situation justifying such a placement. MCL 712a.13a(5) addresses a specific—and grave—situation and does not impose any limit on the trial court's general authority to place a child into foster care other than requiring the trial court to ensure that the abuser will have an opportunity to further harm the child after placement. Accordingly, we find no conflict between MCL 712A.13a(5) and MCR 3.965(C)(2).

Moreover, we must note that, while respondent-father quotes MCL 712A.13a(9) in his brief, respondent-father does not quote MCR 3.965(C)(2). Perhaps the reason why respondent-father has failed to quote the court rule is that MCR 3.965(C)(2) and MCL 712A.13a(9) set forth *identical* requirements for a trial court to place a child into foster care. See *In re Rood*, 483 Mich at 95. It is impossible to reconcile respondent-father's argument that MCR 3.965(C)(2) grants the trial court a broader authority to place a child into foster care than the Legislature intended when the Legislature itself set forth this allegedly broad authority in the statute itself. Either respondent-father has failed to carefully read these authorities or respondent-father has attempted to misdirect this Court. Either way, his argument is without merit.

Addressing MCL 712A.13a(9), respondent-father argues that the trial court erred by finding that subsections (a), (c), (e), and “possibly” (d) applied. We disagree. Respondent-father does not provide any particularized argument with regard to these subsections. Rather, respondent-father argues only that the trial court should have ordered him out of the home under MCL 712A.13a(5), which would have rendered the home appropriate for the minor child.² We disagree. While it appears that respondent-father's abuse of respondent-mother and the children would justify removing him from the home under MCL 712A.13a(5), we agree with the trial court that this removal would be inadequate to protect the child's physical and mental health.

First, the record indicates that respondent-mother previously obtained a personal-protection order against respondent-father. Despite the order, the respondents married. Moreover, while respondent-father indicated that he was not living with respondent-mother at the time of the petition, the record indicated that he had stayed with respondent-mother for at least a week previously and, although he offered petitioner an alternative address, he stated that he could not receive mail there, rendering suspect his assertion of alternate living arrangements. Additionally, the record indicates that respondent-father controlled respondent-mother's telephone access and that he would turn off the service for the telephone so that respondent-mother could not talk with caseworkers or the police. Thus, there is little in the record for us to conclude that respondent-father would abide by the court order. The insufficiency of a court order to remove respondent-

² This argument logically implicates subsections (a), (c), and (e); however, regarding subsection (d), respondent has not explained what services he was denied or how petitioner otherwise failed to provide reasonable efforts to avoid the removal. Accordingly, respondent-father has abandoned any argument concerning subsection (e). *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

father from the child's life is particularly troubling in light of respondent-father's previous assaults of respondent-mother on at least two occasions: one while she was pregnant with KN and another while KN was in her arms.

Second, respondent-father was not the only danger in KN's life. Rather, the trial court found both respondents responsible for two severe instances of inadequate supervision. In the first instance, the respondents left KN alone in a vehicle outside a restaurant. Each blamed the other for the incident, but it is clear that neither parent was adequately supervising KN. Then, necessitating the instant petition, respondent-mother left CN with respondent-father while respondent-father was sleeping. Respondent-mother sat CN by the door and text-messaged respondent-father to get CN and close the door. Respondent-mother never received any confirmation from respondent-father that he got the message. CN was later found wandering near a busy highway. Again, this incident makes clear that respondent-mother has difficulty ensuring her children's safety. Moreover, there were concerns that respondent-mother was also engaged in domestic violence, though charges against her were ultimately dropped.

Fortunately, both CN and KN were rescued before any serious physical harm befell them. Nonetheless, these incidents and the respondents' storied relationship indicate that KN was at a risk of physical and mental harm in respondent-mother's home. Because this risk could not be alleviated by ordering respondent-father out of the home, we conclude that the trial court did not err by placing KN in foster care.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly