STATE OF MICHIGAN

COURT OF APPEALS

In re BILLS/BALL/SCHULTZ/EARLEY, Minors.

UNPUBLISHED
April 16, 2020

Nos. 351318, 351319, 351324, 351350
Jackson Circuit Court
Family Division
LC Nos. 18-001029-NA; 12-003920-NA; 12-003916-NA

Before: CAVANAGH, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

In Docket No. 351318, 351319, and 351350, respondent-father appeals as of right the trial court orders terminating his parental rights to his nine minor children under MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions of adjudication) and (j) (reasonable likelihood that child will be harmed if returned to parent). In Docket No. 351324, respondent-mother appeals as of right the trial court order terminating her parental rights to CE and six of the minor children shared with respondent-father under the same statutory grounds. We affirm.

In April 2018, the Department of Health and Human Services (DHHS) submitted three separate petitions seeking termination of respondents' parental rights to their respective children. Mother was the parent of CE. Father was the parent of AS, DBJr, and DSB. Respondents were both the parents of DEB, DBI, DBII, DBIII, DDB, and DJB. The DHHS alleged that father's home was in deplorable living conditions and that respondents physically abused the minor children on a daily basis. Two months after the petition was filed, respondents entered a no-contest plea to the allegations contained in the petition. Respondents began to engage in the case service plan recommended by the DHHS.

In February 2019, the DHHS filed three supplemental petitions seeking termination of respondents' parental rights. The DHHS alleged, in more detail, occasions of physical abuse by respondents. Then, three months later, the DHHS filed three new supplemental petitions. These petitions contained similar allegations of physical abuse and deplorable living conditions, but these amended supplemental petitions included allegations about respondents' psychological

evaluations. The DHHS alleged that, consistent with the psychological evaluations, father lacked insight and self-awareness, and he believed that he did not need services because there was nothing wrong with his children. The DHHS also alleged that mother easily became overwhelmed, frustrated, and inconsistent with delivery of care, and mother was at risk for patterns of abuse and neglect.

At the July 2019 bench trial, the trial court heard testimony from CE about respondents' physical, mental, and emotional abuse. The DHHS caseworker also testified about the minor children's trauma assessments, and the severity of the complex trauma that the minor children experienced as a result of the physical, emotional, and mental abuse. The DHHS caseworker stated that respondents had exhausted the services the DHHS had to offer. According to the DHHS caseworker, the minor children were doing well in their respective placements outside the home since removal. Respondents also testified and admitted to the emotional and mental abuse, but they did not admit or acknowledge that there was physical abuse. The trial court read into the record the trauma assessments of the minor children, as well as respondents' psychological evaluations. The trial court concluded that, on the basis of the psychological evaluations, trauma assessments, and respondents' testimonies, termination of the parental rights of both respondents was proper under MCL 712A.19b(3)(c)(*i*) and (j). The trial court also concluded that it was in the minor children's best interests to terminate their parental rights to all the minor children.

On appeal, father contends that the trial court erred because it terminated his parental rights on the basis of a supplemental petition that contained new allegations, and thus, the trial court could only rely on legally admissible evidence under MCR 3.977(F). We disagree.

Generally, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). However, unpreserved issues are reviewed for "plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "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 citation 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 at 9.

Child protective proceedings include two phases: an adjudicative phase and a dispositional phase. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). An important distinction between the two phases is the use of the rules of evidence. The rules of evidence apply during the adjudicative phase, but do not ordinarily apply during the dispositional phase. *Id*. at 406. During the dispositional phase, "[a]ll relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value," even if that evidence is not legally admissible. MCR 3.977(H)(2). However, if "the termination is sought on the basis of grounds new or different from those that led the court to assert jurisdiction over the children, the grounds for termination must be established by legally admissible evidence." *In re Jenks*, 281 Mich App 514, 516; 760 NW2d 297 (2008), citing MCR 3.977(F)(1)(b).

MCR 3.977(F) allows a trial court to "take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court

on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction." MCR 3.977(F) states:

> (1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if
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> (a) the supplemental petition for termination of parental rights contains a request for termination;
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> (b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:
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> (*i*) are true; and
>
> (*ii*) come within MCL 712A.19b(3)(a), (b), (c)(*ii*), (d), (e), (f), (g), (i), (j), (k), (l), or (m); and
>
> (c) termination of parental rights is in the child's best interests.

In this case, father pleaded no contest to the allegations contained in the initial petitions filed by the DHHS in April 2018. Consistent with MCR 3.971(B)(4), the trial court informed father that his plea could be used later as evidence in a proceeding to terminate his parental rights. Moreover, the trial court used dispositional findings contained in a CPS report that was admitted as "Respondent's A" for the factual basis to support a finding that "one or more of the statutory grounds alleged in the petition [were] true." MCR 3.971(D)(2). The dispositional findings, on which the trial court relied, contained allegations of unsanitary and deplorable living conditions, as well as physical abuse by father of the minor children.

The trial court terminated father's parental rights under MCL 712A.19b(3)(c)(*i*) and (j). The trial court's reasoning relied heavily on the trauma assessments of the children, and the psychological evaluations of father. We note that the May 2019 supplemental petition contained allegations that were not contained in the initial petition. These "new" allegations are what father refers to in his brief on appeal. However, these "new" allegations related to the same issues that led the trial court to assume jurisdiction over the minor children in the first place. Although the trial court relied on the trauma assessments and psychological evaluations, these reports did not constitute evidence of "new" allegations.

Importantly, it appears that father does not argue that the trial court terminated his rights on the basis of issues new, different, or unrelated to the initial petition. His argument only suggests that because there were new allegations contained in the DHHS's supplemental petition that were different from the initial petition, the trial court could only rely on admissible evidence under MCR 3.977(F)(1). The court rules do not define "new" or "different," but we have indicated that "new" or "different" circumstances are those that are "unrelated" to the circumstances that led the trial court to assume jurisdiction. *In re Snyder*, 223 Mich App 85, 89-90; 566 NW2d 18 (1997). These "new" allegations contained in the DHHS's supplemental petition were not unrelated to the circumstances that led the trial court to assume jurisdiction. Rather, the allegations contained more

detail about the physical abuse endured by the minor children; the minor children's trauma was inextricably linked to father's physical abuse and the deplorable living conditions of the home. Therefore, there were no "grounds new or different" that required legally admissible evidence, and the trial court did not commit plain error by relying on the reports.

Father also contends that, because the DHHS did not make reasonable efforts toward family reunification, the trial court committed plain error when it terminated his parental rights. Again, after review of this claim for plain error affecting substantial rights, we disagree.

Generally, "the [DHHS] has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2). MCL 712A.18f provides that the DHHS must provide

> a case service plan, which must include, among other things, a "[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement." [*In re Mason*, 486 Mich 142, 156; 782 NW2d 747 (2010), quoting MCL 712A.18f(3)(d).]

Notwithstanding the general duty to make reasonable efforts to reunify, the petitioner "is not required to provide reunification services when termination of parental rights is the agency's goal." *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). MCL 722.638(1)(a)(*iii*) and (2) mandate that the DHHS "shall include a request for termination of parental rights at the initial dispositional hearing" if the DHHS determines that a parent has "abused the child or sibling of a child and the abuse included . . . [b]attering, torture, or other severe physical abuse."

In this case, the DHHS submitted its initial petition seeking termination of father's parental rights, alleging that father physically abused the minor children on a daily basis. Father pleaded no contest to allegations of deplorable living conditions and physical abuse after the trial court amended the petition to temporary removal. In accepting father's no contest plea, the factual basis on which the trial court relied contained facts that the minor children were physically abused daily. Because continuous, daily physical abuse constituted "severe physical abuse" under MCL 722.638(1)(a)(*iii*), the DHHS was not required to seek reunification as its goal.

For similar reasons, father's argument that the DHHS did not accommodate his needs under the American with Disabilities Act (ADA), 42 USC 12101 *et seq.*, is misplaced. The DHHS has "obligations under the ADA that dovetail with its obligations under the Probate Code." *In re Hicks/Brown*, 500 Mich at 86. The DHHS "must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . the modifications would fundamentally alter . . . the service provided." *Id.* (quotations marks omitted; ellipses in original). Absent reasonable modifications, "efforts at reunification cannot be reasonable under the Probate Code if the [DHHS] has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA." *Id.* As noted above, the DHHS never had the obligation to reunify the family in the first place, which meant that the DHHS was never required to provide services.

Next, mother argues that the trial court erred in finding statutory grounds existed to terminate her parental rights under MCL 712A.19b(3)(c)(*i*) and (j). We disagree.

We review the trial court's determination of statutory grounds for clear error. *In re VanDalen*, 293 Mich App at 139. "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). A determination that the trial court did not clearly err by finding one statutory ground is sufficient to terminate a parent's parental rights. See *In re HRC*, 286 Mich App at 461.

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 under MCL 712A.19b(3)(j) includes emotional harm as well as physical harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). The record supports a finding that this statutory ground for termination existed by clear and convincing evidence. CE testified to situations of physical abuse against herself and AS. Mother also entered a no-contest plea to allegations of daily physical abuse, but never acknowledged the existence of trauma because of physical abuse. The trauma assessment reports indicated that the minor children feared their parents and suffered complex trauma. There was also evidence that the minor children engaged in post-trauma behavior after visiting their parents before parenting time was suspended. On the basis of this evidence, the trial court determined that the minor children would continue to suffer severe trauma if returned to mother's care. We conclude that the trial court did not clearly err when it found a reasonable likelihood that returning the minor children to mother would result in further physical and psychological damage. In light of this conclusion, we need not consider whether termination of mother's parental rights was proper under MCL 712A.19b(3)(c)(*i*). See *In re HRC*, 286 Mich App at 461. Nevertheless, the trial court did not clearly err in that regard either.

Mother also asserts that the termination of her parental rights was not in the minor children's best interests. We review the trial court's determination of best interests for clear error.

"Even if the trial court finds that the Department has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children." *In re Gonzalez/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). Thus, the trial court was required to find by a preponderance of the evidence that termination of mother's parental rights was in the best interests of the children. See *In re Olive/Metts Minor*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "In making its best-interest determination, the trial court may consider the whole record, including evidence introduced by any party." *In re Medina*, 317 Mich App 219, 237; 894 NW2d 653 (2016) (quotation marks and citation omitted).

> "[T]he 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," are all factors for the court to consider when deciding whether termination is in the best interests of the child. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). A child's placement with relatives is a factor that the trial court is required to consider. *In re Mason*, 486 Mich [at] 164. See MCL 712A.19a(6)(a). Generally, "a child's placement with relatives weighs against

termination . . . ." *In re Olive/Metts*, 297 Mich App [at 43] (quotation marks and citation omitted). [*In re Gonzalez/Martinez*, 310 Mich App at 434.]

In this case, a preponderance of the evidence supported the trial court's decision that termination of mother's parental rights was in the best interests of the children. Despite mother's no-contest plea to allegations of physical abuse, mother only acknowledged that the minor children suffered emotional and mental abuse. There was also evidence that mother was involved with CPS on numerous previous occasions and that the children were removed once before. Mother's psychological evaluation demonstrated that she was at risk for patterns of abuse and neglect, was inconsistent in the delivery of care, and had difficulty maintaining a consistent flow of reinforcement. Furthermore, there was evidence that the minor children were doing extremely well in their foster-care placements. This evidence was adequate to prove that termination was in the best interests of the minor children. See *In re Brown/Kindle/Muhammad Minors*, 305 Mich App 623, 638; 853 NW2d 459 (2014) (holding that termination of parental rights was in a child's best interests where the mother "lacked the ability to keep her children safe or effectively parent them").

Mother also argues that the trial court must consider the best interests of each individual child but the trial court's statement "[a]s I consider best interest across the board" shows that it lumped the children together which was error. However, mother misconstrues the record and the holding in the case of *In re Olive/Metts*. A "trial court has a duty to decide the best interests of each child individually." *In re Olive/Metts*, 297 Mich App at 42. Notably, that case involved evidence that three of the five children loved the respondent-mother and that the respondent-mother struggled to cope with all five children. *Id*. at 43. There was also evidence that two of the children lived with a paternal relative. *Id*. at 43-44.

In this case, the trial court read into the record the trauma assessments for each minor child of whom mother's rights were terminated, which involved evidence of severe complex trauma. Moreover, CE testified about instances of physical and emotional abuse, and mother also admitted to instances of mental and emotional abuse. Two years after *In re Olive/Metts* was published, we clarified that "*In re Olive/Metts* stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests." *In re White*, 303 Mich App at 715. In this case, no such significant difference existed. All the minor children suffered severe complex trauma, did not want to return to mother's care, and feared their mother. The trial court noted that all the children needed permanency, love, and nurture. The case of *In re Olive/Metts* "does not stand for the proposition that the trial court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *In re White*, 303 Mich app at

716. Therefore, the trial court did not clearly err by finding that termination of mother's parental rights was in the children's best interests.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher