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STATE OF MICHIGAN

COURT OF APPEALS

In re K. M. HILTS, Minor.

UNPUBLISHED
April 23, 2020

No. 350147
St. Joseph Circuit Court
Family Division
LC No. 2017-001015-NA

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

Respondent appeals by right the trial court order terminating her parental rights to her minor child under MCL 712A.19b(3)(g) (proper care and custody) and (j) (risk of harm if returned). Finding no merit to the issues raised on appeal, we affirm.

The child at issue in this case was removed from respondent's care following a domestic violence incident involving respondent and her boyfriend. The child was present and the incident was not isolated. Moreover, it was determined that respondent was using illegal substances, including methamphetamine. Respondent was provided numerous services, including individual counseling, domestic violence counseling, and drug screening. She had supervised parenting visits with transportation assistance, was required to undergo a psychological evaluation, and was required to meet the requirements of a parent agency treatment plan. From the onset of proceedings on November 27, 2017 to the date of the termination proceedings on May 20, 2019, respondent had tested positive for methamphetamine three times, amphetamines three times, most recently on March 26, 2019, and THC 59 times; she missed 19 screens. At the hearing on the petition to terminate her parental rights, she claimed that she was only using marijuana for medical purposes. She did not have a medical marijuana card. The trial court found that respondent's substance abuse problem was serious and persisted.

On appeal, respondent first claims that, in light of the Michigan Regulation and Taxation of Marihuana Act [MRTMA], MCL 333.27955(1) and (3), the court erred by considering her marijuana use in its decision to terminate her parental rights. Although the Act does not explicitly mention that marijuana use was not to be considered in termination of parental rights cases, respondent contends that it does preclude denial of "any other right or privilege," and states that "a person *shall not* be denied custody of or visitation with a minor for conduct that is permitted by

this act" (emphasis added.) Respondent argues that her use was consistent with MRTMA, that she was very clear about her use, and that no evidence was presented that her use would create an unreasonable risk of harm to her child. We disagree.

Respondent did not argue below that the trial court's decision to terminate her parental rights was in violation of MCL 333.27955. Therefore, this issue is not preserved. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). This Court's review of unpreserved issues is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error is plain if it is clear or obvious, and the error affected substantial rights if it affected the outcome of the lower court proceedings. *Id*. at 763. This Court reviews de novo the interpretation and application of statutes and court rules. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

MCL 333.27952, effective December 6, 2018, provides, in pertinent part:

> The purpose of this act is to make marihuana legal under state and local law for adults 21 years of age or older . . . . The intent is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older; . . . .

MCL 333.27955(1) and (3), effective December 6, 2018, provides:

> 1. Notwithstanding any other law or provision of this act, and except as otherwise provided in section 4 of this act, the following acts by a person 21 years of age or older are not unlawful, and not an offense, and not grounds for seizing or forfeiting property, and not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege:
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> * * *
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> 3. A person shall not be denied custody of or visitation with a minor for conduct that is permitted by this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.

The Michigan Medical Marihuana Act [MMMA], which legalized the use of marijuana under certain articulated conditions for medical purposes, similarly provides, in relevant part: "[a] person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated." MCL 333.26424(d). If a person is in possession of a registry identification card and an amount of marijuana that does not exceed the amount allowed under the act, the act provides for a presumption that the person is engaged in the medical use of marijuana in accordance with the act, which could only be rebutted by evidence that the use of marijuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or system. MCL 333.26424(e).

"[D]rug use alone, *in the absence of any connection to abuse or neglect*, cannot justify termination solely through operation of the doctrine of anticipatory neglect." *In re LaFrance*, 306 Mich App 713, 731; 858 NW2d 143 (2014) (emphasis added). Moreover, "[t]ermination of parental rights requires 'both a failure and an inability to provide proper care and custody,' which in turn requires more than 'speculative opinions . . . regarding what *might* happen in the future.'" *Id*. at 732, quoting *In re Hulbert*, 186 Mich App 600, 605; 465 NW2d 36 (1990) (emphasis in original). We conclude that the evidence was sufficient to show that respondent's use of marijuana was connected to her abuse and neglect of her daughter.

In *In re Richardson*, ___ Mich App ___; ___ NW2d ___ (2019) (Docket Nos. 346903; 346904), the respondent-mother had a medical marijuana card and had presented evidence by two doctors that medical marijuana was a valid treatment for her epilepsy. Nevertheless, the referee found that respondent's marijuana use was not for a legitimate medical purpose because, in the referee's opinion, marijuana was not "medically necessary." This Court stated that this was not the standard under MCL 333.26424(d) and (e), and that the referee's finding required the referee to completely discount the unrebutted evidence submitted by the two doctors and the respondent's testimony that it actually helped her manage her seizures. In addition, this Court noted that "seizures" and "epilepsy" were included within the MMMA's definition of "debilitating medical condition." MCL 333.26423(b)(2). The Court further noted that there was no evidence on the record of any significant concerns about the respondent's parenting time visits or that the respondent was impaired or "high" during her parenting visits. In fact, the respondent had testified that her use of medical marijuana reduced the frequency of her seizures and that her parenting ability would be negatively affected if she had more seizures. The Court held that the referee's factual findings were clearly erroneous and that the statutory grounds were not established by clear and convincing evidence.

The present case is clearly distinguishable from *Richardson* and *LaFrance*. Respondent did not produce a medical marijuana card or any documentation by medical professionals to establish that she had a "debilitating medical condition" that was alleviated only by the use of marijuana. This case came into court because of the domestic violence in the household that was impacting the mental health of the child, who was traumatized by the home situation and frightened of respondent's partner, and *because* of respondent's use of substances, including methamphetamine and marijuana. After 18 months of services and court hearings, the evidence showed that respondent had used amphetamines as recently as two months before the termination hearing and at least three times in the five months preceding the termination hearing. Respondent claimed that the tests were false positives or resulted from other substances. Regardless, respondent continued her use of marijuana. It should be noted that, when this case first came before the court, the recreational use of marijuana was not legal. It did not become legal until December 6, 2018, over a year later. More importantly, it was clear from respondent's psychological evaluation that she had been using marijuana since early in her teens, and prior to the development of the stomach problems for which she claimed she was using the marijuana. Respondent lost her visitation with her child on November 2, 2018, because she continued to use substances. At the termination hearing, on May 20, 2019, she had not regained visitation, because she could not demonstrate that she had stopped using substances. Early on, the court made it very clear to respondent that she would have to stop using both methamphetamine and marijuana if she wanted to regain visitation and custody. Respondent clearly demonstrated that her use of

substances was more important to her than her daughter. More importantly, the drug use in this case was not in the absence of any connection to abuse or neglect. *In re LaFrance*, 306 Mich App at 731. It was directly related to the abuse and neglect.

At the time of the removal of the child, the MMMA was in effect. If respondent truly needed to use marijuana for a medical condition, she could have applied for a registry identification card. Even if, as she claimed, she could not afford to get or use a registry identification card[1], she certainly had ample time to get affidavits and medical records from her doctors to present to the court to show that her use of marijuana was necessary to treat a serious medical condition. Instead, despite her loss of visitation and the threat of termination, she continued to use marijuana and she presented no evidence to the court, other than her testimony, that she had a serious medical condition that could not be relieved with any prescribed medication and could only be controlled by marijuana use.

MRTMA does provide that if the person's use of marijuana "creates an unreasonable danger to the minor that can be clearly articulated and substantiated," the person can be "denied custody of or visitation with a minor." MCL 333.27955(3). Respondent's danger to her child had clearly been articulated and substantiated by the evidence in this case showing that her child had post-traumatic stress disorder and other psychological conditions at least partially as a result of respondent's use of methamphetamine and marijuana and the domestic violence within the home. Moreover, even though alcohol is legal under certain conditions for persons over 21 years of age, the abuse of alcohol can be grounds for termination of parental rights. See, e.g., *In re Powers*, 244 Mich App 111, 119; 624 NW2d 472 (2000), and *In re Conley*, 216 Mich App 41, 43-44; 549 NW2d 353 (1996). In the present case, the fact that marijuana use was permitted by law did not preclude the fact that respondent's abuse of it could be considered as a factor in the termination of her parental rights. Therefore, we conclude that the trial court did not clearly err as a matter of law in considering respondent's continued use of marijuana, given evidence of substance abuse and absent any attempt on her part to obtain supporting evidence of need from her doctors and to obtain a medical marijuana card.

Respondent also contends that the court clearly erred in assuming jurisdiction, asserting that her admission that she had been using and abusing methamphetamine, contrary to the welfare of her child, was an insufficient factual basis under MCL 712A.2(b)(2). Respondent contends that the use of methamphetamine was not evidence of neglect or that the home was unfit. She further argues that there was no evidence that the child was "in the county," i.e., in respondent's care, when respondent used methamphetamine.

Respondent makes this argument for the first time on appeal. While a parent may raise an issue with jurisdiction for the first time on appeal following an order terminating parental rights, *In re Ferranti*, 501 Mich 1, 28-29; 934 NW2d 610 (2019), "adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error." *Id*. at 29.

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[1] This claim belied by evidence that respondent had sent her child a $1000 telephone for Christmas.

At the preliminary hearing on November 27, 2017, respondent was present, but not yet represented by an attorney. Thus, the referee simply explained some procedural information to respondent. The referee informed respondent that the preliminary hearing would determine whether there was enough truth to the allegations in the petition for the court to find that it would be contrary to the child's welfare to remain in respondent's care. The referee added that it could take temporary emergency measures if there was sufficient evidence of potential harm to the child if left in parental care, and that the court would therefore be taking testimony from petitioner to determine if temporary removal was justified. The court observed that "some of the allegations in the petition involve potential criminal conduct by you." The Child Protective Services worker testified about incidents of "volatile" domestic violence that occurred in the child's presence, that there were injuries and a personal protection order (PPO), that the child had reported being afraid of respondent's partner, and that, since the PPO had issued, respondent had been arrested, had contacted the partner to bail her out, and had let him stay overnight while the child was in the home. The worker also reported that respondent was "arrested again last week," that respondent had continued to use methamphetamine, and that her most recent screens, on November 3, 7, and 15, 2017, showed high levels. Respondent denied using methamphetamine and suggested the screens were positive because of an old toothbrush. The child was aware of respondent's substance use "and that mom is having trouble with that." The worker explained that when respondent got arrested, she called the worker and reported that the child was staying with her sister, which the worker stated was an appropriate safety plan until jurisdiction was acquired.

The order following this preliminary hearing stated, in pertinent part, that it was contrary to the child's welfare to remain in the home because respondent had been involved in a physical altercation with her domestic partner in the presence of the child and had allowed him back in the home after a PPO was filed, and that the child was aware of respondent's use of methamphetamine. The order further provided that custody of the child with the parent presented a substantial risk of harm.

On December 7, 2017, after stating that she understood her rights, that her admissions were voluntary and understanding, and that she understood the potential consequences, respondent came before the court and made admissions concerning her methamphetamine use. She admitted that, at the time of the petition, she had "tested positive for, and had been using and abusing, methamphetamine," and that the "use is contrary to the welfare of" her minor child. All parties agreed that respondent's admissions established a factual basis for the court to take jurisdiction on the basis that "the home or environment, at the time the petition was filed, was an unfit place for the child to live in."

MCL 712A.2(b)(1) and (2), provide, in pertinent part:

> The court has the following authority and jurisdiction:
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age found within the county:
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> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or

> her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

In *In re MU*, 264 Mich App 270, 279-280; 690 NW2d 495 (2004), the Court held:

> [I]n order for the trial court to assume jurisdiction over the minor child on the basis of criminality, the petitioner does not need to prove that the respondent was convicted of a crime. "[T]he state of being criminal" differs from the state of being prosecuted and convicted of a criminal offense because an activity can be criminal in nature regardless of whether the violated criminal law is enforced. The petitioner, therefore, must demonstrate by a preponderance of the evidence only that the respondent engaged in criminal behavior. As the petitioner aptly notes, if the Legislature intended to require proof of a conviction, it would have said so as it did in MCL 712A.19b(3)(n), which permits the trial court to terminate parental rights if it finds by clear and convincing evidence that the parent is "convicted" of violating specific sections of the penal code and that termination is in the child's best interests. Because the Legislature did not state that a petition founded on MCL 712A.2(b)(2) must be predicated on a conviction, we conclude that it did not intend such a requirement.

Respondent admitted that she had tested positive for and had been using and abusing methamphetamine and that her use was contrary to the welfare of her minor child. She therefore admitted to being a criminal by engaging in criminal activity. She admitted that her use of methamphetamine was contrary to the welfare of her minor child. This was sufficient to establish, by a preponderance of the evidence, that the child was "subject to a substantial risk of harm to his or her mental well-being," and that the child's "home or environment by reason of . . . criminality. . . is an unfit place for the juvenile to live in." In addition, the record indicates that had respondent made this argument in the trial court, the court could have taken proofs to establish domestic violence in the home carried out in the presence of the child and, given that respondent tested positive for methamphetamine on November 3, 7, and 15, 2017, that respondent used methamphetamine while the child was in the home. The evidence showed that when respondent had been arrested on either November 15 or 16, 2017, her sister took the child. There was no evidence that the child was not "within the county." Respondent has failed to establish that the court plainly erred in finding that it had jurisdiction.

Affirmed.

/s/ David H. Sawyer
/s/ Anica Letica
/s/ James Robert Redford