Order

Michigan Supreme Court
Lansing, Michigan

April 2, 2021

Bridget M. McCormack,
Chief Justice

161525

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

In re SMITH, Minors.

SC: 161525
COA: 351095
Kalamazoo CC Family Division:
18-000053-NA

_____/

On Thursday, March 4, 2021, the Court heard oral argument on the application for leave to appeal the April 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, and REMAND this case to the Kalamazoo Circuit Court Family Division for further proceedings not inconsistent with this order. MCL 712a.2(b)(1) provides that a court may assume jurisdiction over a juvenile if his or her parent "when able to do so, neglects or refuses to provide proper or necessary . . . education . . . ." Subsection (B) specifies that "neglect" is defined as it is in MCL 722.602. That provision defines "neglect" as "harm to a child's health or welfare by a person responsible for the child's health or welfare that occurs through negligent treatment . . . ." MCL 722.602(1)(d). Therefore, there must be a showing of harm in order for a court to assume jurisdiction over a juvenile under the "neglects" clause of MCL 712A.2(b)(1).[1] Here the children attended school 75% of the time and had several tardies. While that is a greater number of absences than the 85% average attendance rate of their school, the only testimony presented regarding the children's academic performance was from BS, Jr.'s teacher. She testified that he was performing at grade level. Though she also said that she struggled to get a complete picture of his progress and that she feared he would not be able to maintain his academic level in the future, such testimony is speculative and does not show by a preponderance of the evidence that BS,

[1] The Court of Appeals relied on *In re Nash*, 165 Mich App 450, 455-456 (1987), for the proposition that a "child's chronic absence from school is a sufficient basis for the trial court to assume jurisdiction on the ground of educational neglect as contemplated by the statute." *In re Smith, Minors*, unpublished opinion of the Court of Appeals, issued April 30, 2020 (Docket Nos. 351095 and 351178), p 2. But *Nash* did not involve chronic absences without a showing of harm. There, in addition to the children's absences from school, the respondent had no stable residence and one of the children was born with symptoms of a drug overdose. *Nash*, 164 Mich App at 455.

Jr., was actually harmed so as to have been neglected under the statutory definition. See *In re Ferranti, Minor*, 504 Mich 1, 15 (2019). Because there was no showing of harm caused by the children's absences, we agree with Judge Riordan's dissent that the circuit court erred by assuming jurisdiction on that ground alone.

STATE OF MICHIGAN

COURT OF APPEALS

In re SMITH, Minors.

UNPUBLISHED
April 30, 2020

No. 351095; 351178
Kalamazoo Circuit Court
Family Division
LC No. 18-000053-NA

Before: RIORDAN, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

In these consolidated appeals, respondent-father and respondent-mother appeal by right the trial court's order terminating their parental rights to their children, BS and BS, Jr. Finding no error requiring reversal, we affirm.

I. BACKGROUND

The two children in this case were frequently absent from school, with about a 75% attendance rate from November 2017 to January 2018. Although respondents had prior involvement with petitioner dating back to 2013 with these children because of neglect, including domestic-violence and substance-abuse issues, the issue at the adjudication trial was educational neglect stemming from the children's absences from school.

Testimony at the adjudication trial indicated that BS, Jr. was performing at grade level, and there was no indication that he had fallen behind on his school work because of his absences. His teacher testified, however, that he had missed many assessments in reading, spelling, and math. She also testified that she could not get a complete picture of his learning needs and performance because of his absences and missed assessments. Moreover, she stated that he never returned his homework assignments, and that respondents failed to return his report cards with a signature as required by the school. His teacher was concerned that he might not be able to maintain his academic level with his continued absences. Although none of BS's teachers testified, the evidence indicated that she had a 74% attendance record during the same timeframe as BS, Jr. Additionally, the children's attendance rate was below the school's average attendance of 85%.

In his closing argument at the adjudication trial, respondent-father opposed the trial court's exercise of jurisdiction over the children. At the conclusion of the proofs, the trial court assumed

jurisdiction over the children based on its finding of educational neglect stemming from their absences from school.

After the trial court placed the children in foster care, it provided both respondents with a parent-agency-treatment plan (PATP) that required drug screens, parenting-time visits, counseling, and a psychological evaluation. In addition, the PATP required both respondents to obtain suitable employment and an appropriate home. It appears from the record that respondents had several family tragedies during the year leading to the children's removal. After their removal, respondents attended parenting-time visits, but otherwise refused to engage in any services to help them address the barriers for reunification with their children. After about 18 months of this lack of participation, the trial court terminated both respondents' parental rights.

Respondent-mother was unemployed for the entirety of the case. She was also homeless for the majority of the proceedings, and her housing was still not verified as of the termination hearing. Although she was required to participate in weekly drug screens, she refused to attend any of those screens, which petitioner therefore considered to be positive. She also failed to engage in any counseling or participate in her two scheduled psychological evaluations. She only participated partially in the court proceedings during this case, and she walked out of multiple family-team meetings with the caseworkers. The caseworkers suspected respondent-mother of being under the influence of drugs during parenting-time visits and believed that she fell asleep during those visits.

At the time of termination, the children had been in foster care for about 21 months. The trial court noted that they were in a foster home that was familiar to them, provided them with love and affection, and ensured that all of their needs were being met. Although the potential for adoption was uncertain, the trial court found that the foster home and a potential adoption family provided the children with substantially more permanence and stability than they experienced in respondents' care.

After the termination of respondents' parental rights, these appeals followed.

II. ANALYSIS

A. RESPONDENT-FATHER

On appeal, respondent-father only contests the trial court's exercise of jurisdiction over the children. He does not contest the trial court's findings of fact or ultimate decisions regarding the statutory grounds for termination or the best interests of the children.

Both parties agree that the trial court's exercise of jurisdiction is unpreserved and should be reviewed for plain error. As noted above, however, respondent-father opposed the court's assumption of jurisdiction during his closing argument at the adjudication trial. When a party raises an issue in the trial court and pursues it on appeal, the issue is appropriately before this Court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

"We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). A decision

is "clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009) (cleaned up). We review de novo the interpretation and application of statutes. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

"The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019) (cleaned up). The trial court may exercise jurisdiction after an adjudication trial if the petitioner has demonstrated that one or more of the statutory grounds for jurisdiction were proven by a preponderance of the evidence based on the allegations in the petition. *Id.* "Proof by a preponderance of the evidence means that the evidence that a statutory ground alleged in the petition is true outweighs the evidence that the statutory ground is not true." M Civ JI 97.37.

MCL 712A.2 governs jurisdiction in child neglect proceedings, and provides that the trial court may exercise jurisdiction over a juvenile under 18 years of age whose parent "when able to do so, neglects or refuses to provide proper or necessary support, education . . . or other care necessary for his or her health or morals." MCL 712A.2(b)(1). A child's chronic absence from school is a sufficient basis for the trial court to assume jurisdiction on the ground of educational neglect as contemplated by the statute. See *In re Nash*, 165 Mich App 450, 455-456; 419 NW2d 1 (1987).

In light of the evidence regarding the children's chronic absenteeism from school, we conclude that educational neglect was proven by a preponderance of the evidence. Respondent-father has not demonstrated clear error with regard to the trial court's assumption of jurisdiction over the children.

B. RESPONDENT-MOTHER

Respondent-mother does not contest the trial court's exercise of jurisdiction over the children. Rather, she challenges the trial court's finding that statutory grounds existed to terminate her parental rights and its decision that termination was in the children's best interests.

1. STATUTORY GROUNDS

Respondent-mother first argues that the trial court clearly erred in finding that a statutory ground for termination was proven by clear and convincing evidence. The trial court terminated respondent-mother's parental rights under MCL 712A.19b(3)(c)(*i*), (c)(*ii*), and (j). To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been met by clear and convincing evidence. MCL 712A.19b(3); *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court's determination for clear error. *Id.*

Termination under MCL 712A.19b(3)(j) is appropriate when "there 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." Meanwhile, "harm" includes physical as well as emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011). "[A] parent's

failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home." *In re White*, 303 Mich App 701, 711; 846 NW2d 61 (2014).

In this case, the evidence indicated that respondent-mother failed to comply with nearly every aspect of her PATP. The only thing that respondent-mother did comply with was parenting time. And even then, the evidence indicated that the caseworkers suspected respondent-mother of being under the influence of drugs during parenting-time visits and that respondent-mother would fall asleep during those visits. Respondent-mother was homeless for the majority of the proceedings, and her housing was still not verified as of the termination hearing. She was also unemployed for the entirety of the case. Respondent-mother was supposed to participate in weekly drug screens, but she refused to attend any of her screens, which petitioner considered positive screens. She also did not engage in any counseling or participate in her two scheduled psychological evaluations. Respondent-mother only partially participated in the court proceedings during this case, and she walked out of multiple family-team meetings with the foster-care caseworkers.

The evidence of respondent-mother's lack of participation and benefit from the PATP is indicative of her inability to parent her children adequately, and of the risk of physical and emotional harm that she posed to the children if they were returned to her care. Thus, we are not "left with a definite and firm conviction that a mistake has been made," *In re HRC*, 286 Mich App at 459, in the trial court's findings and decision that MCL 712A.19b(3)(j) was proven by clear and convincing evidence. Because only one statutory ground need be established by clear and convincing evidence to terminate respondent-mother's parental rights, MCL 712A.19b(3); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), we decline to address the additional statutory grounds.

2. BEST INTERESTS OF THE CHILDREN

Respondent-mother also argues that the trial court clearly erred in determining that termination of her parental rights was in the best interests of the children. Before it may terminate parental rights, a trial court must find by a preponderance of the evidence that termination was in the children's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). We review for clear error a trial court's findings of fact. *In re HRC*, 286 Mich App at 459.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). In determining the children's best interests, the trial court may consider the children's bond to their parents; the parents' parenting ability; the children's need for permanency, stability, and finality; and the advantages of a foster home over the parent's home. *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). "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 children, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App at 714. Further, the trial court may consider a parent's substance-abuse problems and willingness to participate in counseling. *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

As discussed above, respondent-mother failed to participate in nearly every aspect of her PATP. Although we recognize that respondent-mother shared a bond with the children, they had been in foster care for about 21 months. Although the potential for adoption was uncertain, the foster home and a potential adoption family still provided the children with substantially more permanence and stability than they experienced in respondent-mother's care. Thus, we are not "left with a definite and firm conviction that a mistake has been made," see *In re HRC*, 286 Mich App at 459, in the trial court's findings and decision that termination of respondent-mother's parental rights was in the best interests of the children.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle

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Riordan, P.J. (*dissenting*).

I respectfully dissent. Based on the reasoning articulated by the trial court in its orally issued opinion at the adjudication phase of this matter, there is insufficient evidence to support the trial court taking jurisdiction over the children.

At the adjudication phase, significant evidence was presented to the trial court about domestic violence, substance abuse, drug dealing, neglect, eviction, dishevelment, and other issues. However, the trial court looked beyond those behaviors and specifically found it was not against the law for a parent to drink one or two beers, argue with a spouse, be in the middle of an eviction process, or leave a 10-year-old at home alone. Although BS told the trial court that respondent-father had fallen asleep after drinking beer and left food cooking on the stove, the trial court noted that it was not clear whether respondent-mother had taken over the cooking at that point. Thus, the trial court concluded, this evidence was not a basis for the court to assume jurisdiction over BS and BS, Jr. Instead, the trial court based jurisdiction solely upon an allegation of educational neglect, which it characterized as child abuse.

MCL 712A.2 governs jurisdiction in child neglect proceedings, and provides that the trial court may exercise jurisdiction over a juvenile under 18 years of age whose parent "when able to do so, neglects or refuses to provide proper or necessary support, education . . . or other care necessary for his or her health or morals." MCL 712A.2(b)(1). A child's chronic absence from school is a sufficient basis for the trial court to assume jurisdiction on the ground of educational neglect as contemplated by the statute. See *In re Nash*, 165 Mich App 450, 455-456; 419 NW2d 1 (1987).

"We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). A decision

is " 'clearly erroneous' if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). We review de novo the interpretation and application of statutes and court rules. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014).

"The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) . . . ." *In re Ferranti*, 504 Mich 1, 15; 934 NW2d 610 (2019) (parentheses in original). The trial court may exercise jurisdiction if the petitioner has demonstrated that one or more of the statutory grounds for jurisdiction were proven by a preponderance of the evidence based on the allegations in the petition. *Id*. Preponderance of the evidence means "such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests." *Jones v E Mich Motorbuses*, 287 Mich 619, 642; 283 NW 710 (1939) (quotation marks and citation omitted).

The evidence presented at the adjudication phase shows that the children attended school about 75% of their total class time—slightly less than the school's average attendance record of approximately 85%. There is no evidence in the record of harm to the children or poor progress at school. BS, Jr., was achieving at his grade level and was described by a teacher as "doing just fine" in school. The only evidence presented about BS' school work was her absenteeism rate.

Of course, it would be ideal for all children to attend school without appearing disheveled, to always be punctual, and to have their parents take an active interest in homework assignments. However, I disagree with the trial court that the record here supports a finding "well beyond a preponderance of the evidence that the children have not regularly attended school and are often late." The evidence shows that BS, Jr., performs at the appropriate education grade level and there is no documentation or indication in the record that the child is falling behind, only a possibility that it could happen in the future. One teacher testified that BS, Jr. missed some assessments of reading, spelling, and math skills because of absences and did not turn in some homework assignments. However, these things alone do not amount to a preponderance of the evidence of educational neglect rising to the level of child abuse. Instead, it may be more reflective of the educational condition of a great many school-age children. Further, there is no evidence in the record as to the educational progress of BS other than her school attendance rate.

A review of the evidence does not result in the greater probability in favor of the petitioner in this case. *Jones*, 287 Mich at 642. Ideally, every child should have perfect school attendance, but I cannot conclude that a 75% average absenteeism rate is a convincing force of there being educational neglect that is on the level of child abuse. *Id.*

As educational neglect was not proven by a preponderance of the evidence, I am left with a definite and firm conviction that a mistake has been made. *In re HRC*, 286 Mich App at 459. The trial court committed clear error by asserting jurisdiction solely on the basis of educational neglect over the children in these matters. Thus, I would reverse the trial court's order terminating the respondents' parental rights and remand for further proceedings.

/s/ Michael J. Riordan