

STATE OF MICHIGAN
COURT OF APPEALS

In re HUBBELL, Minors.

UNPUBLISHED
June 18, 2020

Nos. 350963; 350964
Lenawee Circuit Court
Family Division
LC No. 17-000900-NA

Before: MURRAY, C.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

In these consolidated¹ appeals, respondent mother and respondent father appeal as of right the order terminating their parental rights to their children, DH, TH, EH, and KH under MCL 712A.19b(3)(c)(i) (conditions that led to adjudication continue to exist), (g) (failure to provide care and custody), and (j) (reasonable likelihood that the child will be harmed if returned to parent). We affirm.

The Department of Health and Human Services (DHHS) received a complaint alleging physical and medical neglect of TH by respondents. On the same day, a worker from Children’s Protective Services (CPS) conducted an unannounced visit to respondents’ home. The home was found in deplorable condition, and the children were found with significant sunburns. The CPS worker found TH in a bedroom with the door pulled shut with a bungee cord, and respondents admitted that the bungee cord was used to keep the children in the room as a form of punishment. Respondents were unemployed, and both suffered from mental health issues. On June 14, 2017, a petition for removal was filed requesting that the court take jurisdiction of the four children. The court took jurisdiction of the children, and respondents entered into a case service plan. On September 5, 2019, the court terminated their parental rights.

I. JURISDICTION

¹ *In re Hubbell Minors*, unpublished order of the Court of Appeals, entered October 23, 2019 (Docket Nos. 350963 and 350964).

Respondent mother argues that the trial court violated her due-process rights and failed to properly take jurisdiction of the children because the children were not appointed a lawyer-guardian ad litem (LGAL) at the adjudicatory hearing.

“In general, issues that are raised, addressed, and decided by the trial court are preserved for appeal.” *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014). In the trial court, respondent mother did not contest the court’s jurisdiction or assert that the court violated her due-process rights on the basis that the children had not been appointed a LGAL at the adjudication. Thus, this issue is not preserved for appeal.

Because this issue was not preserved, this Court reviews for plain error. *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) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.*

“To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists.” *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). “Jurisdiction must be established by a preponderance of the evidence.” *Id.* This Court reviews the lower court’s decision to exercise jurisdiction for clear error in light of the court’s findings of fact. *Id.* “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.” *Id.* at 296-297. “Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase.” *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). A court’s authority to take jurisdiction is governed by MCL 712A.2(b). *Id.* “[D]ue process requires that every parent receive an adjudication hearing before the state can interfere with his or her parental rights.” *Id.* at 415.

Although respondent mother acknowledges that she does not have standing to challenge the rights of the children to have counsel at every hearing, see *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009) (providing that “a respondent in a child protective proceeding lacks standing to challenge the effectiveness of the child’s attorney.”), she does contend that the trial court violated her due-process rights when it failed to appoint a LGAL at the preliminary hearing and adjudication, thereby depriving the trial court of jurisdiction over the proceedings. A respondent can challenge an adjudicatory error on appeal. *In re Ferranti*, 504 Mich 1, 26, 29; 934 NW2d 610 (2019). In *Ferranti*, the Supreme Court held that, while a respondent can challenge an adjudicatory error on appeal, “adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error.” *Id.* at 29.

MCL 712A.17c(7) provides that, when the court seeks jurisdiction over a child under MCL 712A.2(b), the court “shall appoint a lawyer-guardian ad litem to represent the child.” Moreover, MCR 3.915(B)(2)(a) provides that, in child protective proceedings, “[t]he court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing.” The first hearing held in this matter was the preliminary hearing and adjudicatory hearing. A LGAL had not been appointed at the time of the hearing, and the court stated that a LGAL would be appointed at the next hearing. “The phrases ‘shall’ and ‘shall not’ are

unambiguous and denote a mandatory, rather than discretionary action.” *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002), superseded in part on other grounds as noted in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009). Thus, the court erred by failing to appoint a LGAL at the preliminary hearing, and that error was plain.

However, the error did not affect respondent mother’s substantial rights. For one, not appointing an LGAL did not deprive the court of jurisdiction, because the court first takes jurisdiction before the duty to appoint arises. Second, at the preliminary hearing, respondents admitted to allegations in the petition, and these admissions allowed the trial court to take jurisdiction over the children. Respondent mother voluntarily and knowingly made these admissions. Moreover, respondent mother does not assert how exactly the presence of a LGAL would have resulted in a different outcome. The LGAL’s duty is to the child, MCL 712A.17d(1), so the LGAL’s role would have been to advocate on behalf of the minor children, and not respondent mother. Thus, respondent mother has failed to establish how the court’s failure to appoint a LGAL at the hearing affected her substantial rights, or deprived the court of jurisdiction over the children.

II. STATUTORY GROUNDS

Respondents argue that the trial court erred in terminating their parenting rights to their children under MCL 712A.19b(3)(c)(i), (g), and (j). We agree the court erred in terminating respondents’ parental rights under MCL 712A.19b(3)(g), but the error was harmless because the court properly terminated their parental rights under the remaining statutory grounds.

In order to terminate parental rights, a trial court must find that a statutory ground has been established by clear and convincing evidence. *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). The trial court’s findings regarding statutory grounds are reviewed for clear error. *Id.* “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.” *Id.* (citation and quotation marks omitted). Any arguments regarding petitioner’s failure to provide reasonable efforts are not preserved, and therefore, are reviewed for plain error. *In re Utrera*, 281 Mich App at 8.

A. MCL 712A.19b(3)(c)(i)

The trial court did not err by terminating respondents’ parental rights to the children under MCL 712A.19b(3)(c)(i). A trial court may terminate parental rights under MCL 712A.19b(3)(c)(i) if 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds that “[t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.”

On July 11, 2017, the court entered the order of disposition. Thus, more than 182 days had passed when the court terminated respondents’ parental rights on September 5, 2019. The conditions that led to the adjudication included the condition of respondents’ home. Specifically, it was alleged that the home was full of clutter, the home smelled of urine, cigarette butts covered the floor, and the floor was covered in debris and food. Moreover, the petition alleged parental

neglect because the children had experienced sun burns, particularly TH, who was diagnosed with second-degree burns. In addition, both parents admitted they had not been employed in at least two years, and both admitted to having a history of mental health issues including suicidal ideations.

The record supports the court's conclusion that respondents had failed to rectify the conditions that led to the adjudication. In regard to both respondents, the court found that their home remained in an unsuitable condition for the children despite two years to remedy the problem. Although respondents cleaned approximately half of the clutter out of their home, the record indicates that the home remained cluttered with dishes and piles of clothes, the children's beds remained covered in clothing and miscellaneous items, and the home continued to smell of smoke, urine, and marijuana. The foster care worker, Heather Diehl, testified that the home was not yet in a condition in which the children could be returned, and respondent mother testified that she would need approximately three to six more months to clean the home. Thus, the evidence supports that respondents had failed to rectify the conditions in the home. Although respondent mother believed that she could clean the home within three to six months, the children had been in placement for two years and needed stability, and respondents had not demonstrated that they could maintain a suitable home, despite having recently started to clean the home.

Moreover, when the court took jurisdiction, respondents both admitted to having been unemployed for at least two years. At the time respondents' parental rights were terminated, respondent father did not have employment and had not received Social Security Income. Although respondent mother had been employed at different times throughout the case, she had also lost her job on more than one occasion, which resulted in the heat and water being turned off. Thus, the lack of employment and income had not been fully rectified as respondents had not displayed the ability to obtain stable employment or provide stable income for the children. Thus, there was evidence to support that the conditions with the home would not be rectified in a reasonable amount of time.

In regard to respondent father specifically, the court concluded that he had not rectified his mental health issues as evidenced by the fact that he had not consistently treated with a psychiatrist, despite how imperative it was considering his severe mental health issues. This finding is supported by the record. In April 2018, respondent father completed a psychological evaluation, which recommended that he increase his psychiatric appointments, attend parenting classes, and attend family and individual therapy. Respondent father attempted to commit suicide during the pendency of the proceedings. At the time his rights were terminated, respondent father had attended one psychiatric visit two months prior, but had chosen to stop seeing his psychiatrist. He had also stopped taking his recommended psychotropic medication, and instead relied solely on marijuana to medicate, despite being advised that marijuana could exacerbate psychotropic issues. The court also took jurisdiction of the children because of neglect. Respondent father was referred to additional parenting classes, but he chose not to attend because the classes were at noon, and he slept until 1:00 p.m. Thus, the evidence supports the court's finding that respondent father had failed to adequately rectify the conditions of the home, his mental health, and parental neglect, which led to the children coming within the court's jurisdiction. Respondent father's failure to treat his psychiatric issues, or make adequate efforts to improve his parenting skills, supports the conclusion that these issues would not be rectified in a reasonable time.

In regard to respondent mother, the court found that she had also failed to rectify her mental health issues. At the time the children came within the court's jurisdiction, respondent mother had an extensive history of mental health issues, including suicidal ideation, depression, and postpartum depression. At the time respondent mother's parental rights were terminated in September 2019, she was not attending individual therapy despite it being a recommendation of her psychological evaluation, and she had not sought out any type of psychological assistance since June 2018.

On appeal, respondent mother contends that, because the evidence indicated that there were no issues with respondent mother's parenting, the only remaining issues involved respondent father, and therefore, the court should have terminated respondent father's parental rights, but given respondent mother more time. This argument is without merit. Respondent mother specifically stated that she chose to stay in a relationship with respondent father, and they would plan for the children together. Thus, any issues regarding respondent father's inability to parent the children affected respondent mother's ability to properly parent the children. Respondent mother's failure to address these issues, and stay in a relationship with respondent father, supports the conclusion that these issues would not be rectified in a reasonable time.

We briefly address respondents' contentions that petitioner failed to make reasonable efforts to reunify them with their children. In general, "the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005), citing MCL 712A.18f(1), (2), and (4). "The adequacy of the petitioner's efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights." *In re Rood*, 483 Mich 73, 89; 763 NW2d 587 (2009).

Respondent mother contends that petitioner failed to provide services to clean her home, and she was provided no assistance setting up therapy sessions. These arguments are without merit. Respondents were given two years to clean their home. In August 2017, Hands Across the Water assisted in cleaning the house. Respondents completed this service in February 2018. Diehl tried to re-refer respondents for the service, but they were not eligible. Furthermore, respondent mother had an individual therapist, but when there were concerns with her therapist, Diehl assisted respondent mother in finding a new therapist. Respondent mother attended four therapy sessions, but had not sought any psychological help since June 2018.

Although respondent father generally contends that petitioner was unable to provide reasonable efforts because of his mental health problems, it is unclear what exactly respondent father argues petitioner failed to do. The record shows that petitioner referred respondent father to a psychological evaluation and individual therapy. Respondent father engaged in individual therapy, had a psychiatrist, and was prescribed psychotropic medications, but chose to stop seeing his psychiatrist and to stop taking his medication. Thus, petitioner made reasonable efforts to reunify respondents with their children.

B. MCL 712A.19b(3)(g)

Respondent father argues that the trial court erred in terminating his rights under MCL 712A.19b(3)(g) because he was financially incapable of providing for the children. MCL

712A.19b(3)(g) was amended, effective June 12, 2018. See 2018 PA 58. Under the previous version, the trial court could terminate parental rights when “[t]he parent, without regard to intent, fails to provide proper care or custody for the child[.]” The current version, and the version in effect when petitioner filed the supplemental petition and when the trial court terminated respondents’ parental rights, allows for termination when “[t]he parent, although, in the court’s discretion, financially able to do so, fails to provide proper care or custody for the child[.]” MCL 712.19b(3)(g). When the trial court terminated respondents’ parental rights, it referenced the prior version, and made no findings as to whether respondents were financially capable of providing for the children.

Because the court relied on the prior version of the statute, and failed to make any findings regarding whether respondents were financially able to provide proper care and custody for the children, the trial court’s termination of respondents’ parental rights under MCL 712A.19b(3)(g) was improper. However, this error was harmless because only one statutory ground is necessary to terminate parental rights. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011) (“Only one statutory ground need be established by clear and convincing evidence to terminate a respondent’s parental rights, even if the court erroneously found sufficient evidence under other statutory grounds.”).

C. MCL 712A.19b(3)(j)

The trial court did not err in finding clear and convincing evidence to terminate respondents’ parental rights under MCL 712A.19b(3)(j). The trial court may terminate parental rights under MCL 712A.19b(3)(j) if the court finds by clear and convincing evidence that “[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.” Under MCL 712A.19b(3)(j), harm can be both physical and emotional harm. *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011).

The children could have been harmed if returned to respondents because of respondents’ failure to address their own mental health issues. The record indicates that respondent father had severe mental health issues, and although he recognized the need for help, he was not undergoing psychiatric treatment. He admitted that it was difficult for him deal with DH’s and TH’s negative behaviors, and parenting time “stressed him out.” As noted earlier, respondent mother chose to stay in a relationship with respondent father despite the fact that his mental health issues affected his ability to parent the children. Moreover, respondent mother had a history of mental health issues, but had not sought psychological assistance in over a year.

Respondents had also not demonstrated that they could consistently provide suitable housing or basic necessities. The court found that respondent mother was the sole provider for the family, but if she lost her job, the water could be shut off, and the family would lack necessities, which could put the children in a dangerous situation where they would not have their basic needs met. The record supports the trial court’s finding. At the time the children came within the court’s jurisdiction, respondents both admitted that they had not worked in two years. Although respondent mother had multiple jobs during the pendency of the case, and actively sought out employment when she lost a job, there were multiple periods during the pendency of the case when

respondent mother was not employed, and on two occasions while she was not employed, the heat and water had been turned off in the home.

In addition, ample evidence indicated that the children had serious behavioral issues and trauma from neglect, abuse, and maltreatment. The evidence indicates that respondents failed to fully understand the severity of their trauma or the source of their trauma. The children require extensive mental and physical treatment, and respondents' lack of understanding as to the severity of these issues illustrated that the children could be harmed if returned to respondents.

III. BEST INTERESTS

Lastly, respondents argue that the trial court erred when it found that it was in the children's best interests to terminate their parental rights.

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90 (footnote omitted). This Court reviews the trial court's ruling that termination is in the child's best interests for clear error. *In re Hudson*, 294 Mich App at 264. "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 Moss*, 301 Mich App at 80 (citation and quotation marks omitted).

"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 deciding whether termination is in the child's best interests, the court may consider the 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*, 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).

The court did not err in concluding that it was in the best interests of the children to terminate respondents' parental rights. Respondents failed to completely comply with or benefit from their case service plans. Respondent father suffered from severe mental health issues and had not adequately addressed those at the time his parental rights were terminated. Respondents failed to demonstrate that they could consistently provide financially for the children or provide a suitable home for the children. Moreover, the children were diagnosed as having suffered severe trauma, and needed stability and permanency. Respondent mother's contention that the grandparents had as much trouble with the children as respondents is without merit. Although the children had numerous physical and mental needs that the grandparents were tasked with handling, the children were doing well in placement with their grandparents, and the grandparents provided the children with necessities, and consistently cared for their medical needs. Thus, the court did not err in determining that it was in the best interests of the children to remain with their grandparents, and for the respondents' parental rights to be terminated.

Affirmed.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Jane E. Markey