Order

Michigan Supreme Court
Lansing, Michigan

May 21, 2021

Bridget M. McCormack,
Chief Justice

162710

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

In re A. S-K. SIMONETTA, Minor.

SC: 162710
COA: 354081
St Clair CC Family Division:
19-000333-NA

_____/

On order of the Court, the application for leave to appeal the February 18, 2021 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals opinion holding that the trial court made the requisite judicial determination that the respondent subjected AS to the circumstances provided for in MCL 722.638(1) and (2), and satisfied the requirements of MCR 3.977(E) necessary to terminate the respondent's parental rights without requiring reasonable efforts at reunification. We REVERSE the St. Clair Circuit Court's March 10, 2020 order terminating the respondent's parental rights and we REMAND this case to that court. Reasonable efforts to reunify the child and family must be made in all cases except those involving the circumstances delineated in MCL 712A.19a(2). *In re Mason*, 486 Mich 142, 152 (2010). On remand, the circuit court shall either order that the petitioner provide reasonable services to the respondent, or articulate a factual finding based on clear and convincing evidence that aggravated circumstances exist such that services are not required. The proceedings on remand are limited to these issues. The trial court shall decide the issues on remand within 56 days of this order.

We do not retain jurisdiction.

ZAHRA and VIVIANO, JJ., would deny leave to appeal.

b0518

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 21, 2021

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

In re A. S-K. SIMONETTA, Minor.

UNPUBLISHED
February 18, 2021

No. 354081
St. Clair Circuit Court
Family Division
LC No. 19-000333-NA

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

PER CURIAM.

Respondent appeals as of right the order terminating her parental rights to the minor child, AS, under MCL 712A.19b(3)(g) (parent failed to provide proper care or custody for the child) and MCL 712A.19b(3)(j) (a reasonable likelihood that the child will be harmed if returned to the parent's home). We affirm.

On November 25, 2019, petitioner filed a petition requesting jurisdiction over AS and termination of respondent's parental rights. It was alleged in the petition that respondent had previously been involved with Child Protective Services ("CPS"), she had failed to rectify the conditions that led to the trial court taking jurisdiction over her two older children,[1] and had voluntarily released her parental rights to the older children when she failed to complete foster care services. It was further alleged that at birth, AS's meconium screened positive for opiates and tetrahydrocannabinol ("THC"), that respondent reported that she took an unprescribed hydrocodone bitartrate and acetaminophen tablet ("Norco") for a toothache, and used marijuana during her pregnancy with AS, and that respondent had a history of mental disorders and unstable housing.

The case proceeded to trial before a referee on February 5, 2020, regarding petitioner's request for jurisdiction over AS. The trial court thereafter found the existence of statutory grounds to exercise jurisdiction over AS. On March 4, 2020, a referee held an evidentiary hearing on the petition to terminate respondent's parental rights. The referee took the matter under advisement

[1] Those conditions included that respondent had mental health issues, substance abuse issues, unstable housing, and deplorable home conditions.

and indicated that she was going to prepare a written summary of the testimonies and conclusions of law and recommendations for the trial court. On March 10, 2020, the trial court entered an order adopting the referee's recommendation and terminating respondent's parental rights pursuant to MCL 712A.19b(3)(g) and (j). This appeal followed.

Respondent first argues on appeal that the trial court erred by terminating her parental rights because petitioner failed to make reasonable efforts to reunite respondent with AS, in violation of MCL 712A.19a(2). We disagree.

To preserve an issue regarding reasonable efforts at reunification, a respondent must object or indicate that the services provided to him or her were inadequate in some fashion. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). And an objection to the inadequacy of services must be made when the trial court adopts a case service plan or soon afterward, not at a dispositional hearing to terminate parental rights. *Id.*; *In re Terry*, 240 Mich App 14, 26-27; 610 NW2d 563 (2000). In the instant case, respondent did not object to the reasonableness of the efforts at reunification until the termination hearing. Accordingly, the issue was not preserved by respondent. This Court's "review is therefore limited to plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8-9; 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 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.

"Reasonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances under MCL 712A.19a(2)." *In re Rippy*, 330 Mich App 350, 355; 948 NW2d 131(2019), citing *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). MCL 712A.19a(2)(a) specifically states that reasonable efforts to reunify the child and family are not required if there is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638." *In re Rippy*, 330 Mich App at 355-356.

MCL 722.638 in turn provides, in relevant part:

> (1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> (a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:
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> * * *
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> (*iii*) Battering, torture, or other severe physical abuse.
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> * * *

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life threatening injury.

* * *

(2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b.

Moreover, under MCR 3.977(E):

The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), or (m);

(4) termination of parental rights is in the child's best interests.

In *In re Rippy*, the petitioner sought termination of the respondent's parental rights at the initial dispositional hearing under MCL 722.638 because it believed that the minor had suffered severe physical abuse at the hands of the respondent. The petitioner alleged that the respondent excessively consumed alcohol while pregnant with the minor, causing the minor to be born prematurely with extreme and ongoing medical complications. This Court related the trial court's pertinent factual findings as follows:

Following the initial dispositional hearing, the trial court found that respondent had a severe problem with alcohol that persisted while she was pregnant with [the minor] and that she suffered from multiple mental health issues "that she

> stopped treating upon finding out she was pregnant." The trial court also found that [the minor] was born with many medical issues characteristic of [fetal alcohol syndrome ("FAS")], including "a thin upper lip, a clenched jaw, lower set ears, webbed feet, no testes, an interventricular hemorrhage, a [build-up] of fluid in his brain cavities and a small heart murmur." On the basis of these medical issues, the trial court concluded that [the minor] was a medically fragile child who would require special and lifelong medical care. It was for these reasons that the trial court found grounds to assume jurisdiction over the minor.
>
> And it was for similar reasons that the trial court held that [the petitioner] had established statutory grounds for termination by clear and convincing evidence. The trial court considered respondent's admission that she drank alcohol throughout her pregnancy; [the minor]'s resulting medical symptoms of FAS and need for ongoing, lifelong medical treatment; and respondent's failure to seek treatment for her alcoholism or mental health issues. On these facts, the trial court concluded that statutory grounds for termination were established under MCL 712A.19b(3)(b)(i), (g), and (j)…. [T]he trial court also concluded that termination was in [the minor]'s best interests. [*In re Rippy*, 330 Mich App at 357-358]

These findings, this Court held, "amount to a judicial determination that the respondent subjected [the minor] to aggravated circumstances as provided in MCL 722.638(1) and (2)." *Id.* at 358. This Court further determined that the trial court satisfied the MCR 3.977(E) requirements necessary to terminate the respondent's rights at the initial dispositional hearing because the minor "had suffered severe physical abuse (the respondent's excessive consumption of alcohol while pregnant) that resulted in a life-threatening injury (the minor's FAS symptoms and the accompanying medical issues) and that the respondent was the perpetrator of this abuse." *In re Rippy*, 330 Mich App at 358.

Similarly, in the instant matter, petitioner sought termination at the initial dispositional hearing under MCL 722.638 because it believed that AS had suffered severe physical abuse, loss or serious impairment of an organ, or a life-threatening injury at the hands of respondent. Petitioner alleged that respondent regularly smoked marijuana while pregnant with AS and admitted to using opiates, causing AS to be born positive for two different types of opiates and THC with Neonatal Abstinence Syndrome ("NAS"). AS required placement in McLaren's special care unit and she was not to be discharged before meeting specific goals. In addition, Dr. Pan, a medical doctor and a qualified expert in the field of Pediatrics and Neonatal Abstinence Syndrome, testified that he was the attending pediatrician for AS on her birthdate. Pan testified that infants exposed in utero to opiates could either withdraw like adults, or they could experience difficulty eating, sleeping, and controlling their body temperatures and overall behavior. Pan further indicated that infants could also experience long-term effects of NAS, including mental health and developmental issues.

After the adjudicatory hearing, the trial court found that respondent had a history of substance abuse that persisted while she was pregnant with AS. The trial court also found that respondent suffered from depression, anxiety disorder, and PTSD, which she had ceased treating

and that she was quick to anger and agitated all of the time. It is clear from its findings that the trial court determined that AS had suffered severe physical abuse (respondent's consumption of marijuana and opiates while pregnant) that resulted in a life-threatening injury (AS's NAS diagnosis and the accompanying medical, mental, and developmental issues) and that "respondent was the perpetrator of this abuse." *In re Rippy*, 330 Mich App at 358. These findings[2] amount to a judicial determination that respondent subjected AS to the circumstances identified in the petition for termination and as provided in MCL 722.638(1) and (2), and the trial court satisfied the requirements of MCR 3.977(E) necessary to terminate respondent's rights without requiring petitioner to make reasonable efforts to reunite respondent with AS.

Respondent next argues that the trial court erred by finding statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence under MCL 712A.19b(3)(g) and (j). We disagree.

This Court reviews for clear error the trial court's decision that a ground for termination has been proven by clear and convincing evidence. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

Termination of respondent's parental rights was warranted under MCL 712A.19b(3)(g) because respondent, although financially able to do so, failed to provide proper care or custody for AS and there was no reasonable expectation that she will be able to provide proper care and custody within a reasonable time considering AS's age. When there is severe injury to an infant while in the sole care of the child's parents, the evidence demonstrates that respondent did not provide proper care for the child. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). Respondent's failure to abstain from substance abuse during her pregnancy with AS thus constituted a failure to provide proper care and custody within the meaning of MCL 712A.19b(3)(g). Respondent knowingly and willingly exposed AS to two different types of opiates and THC before AS was born. This exposure required AS to be monitored for withdrawal symptoms for at least five days, and could likely affect AS's development in the long term.

Moreover, respondent's notable lack of resolve throughout this matter since the termination of her parental rights to her older children strongly suggests that she will not be able to provide proper care and custody for AS within a reasonable time. *Id.* Respondent clearly did not benefit from prior services to treat her substance abuse and mental health issues and did not address those issues even after her parental rights to her other children were terminated. This is demonstrated not only by respondent's decision to consume opiates and smoke marijuana while pregnant, but also by respondent's missing a number of visitations with AS throughout the proceedings and appearing at other visitations late and in a tired, disheveled, agitated, and upset state. Respondent had also regularly relied on AS's caregiver to provide appropriate supplies for AS during visitations, had sometimes ended parenting time early, and had even slept during a visit.

[2] The trial court adopted the analysis, findings of fact, and conclusions of law suggested by the referee.

Although respondent had obtained a job the week before trial, respondent was apparently unable to shower or show up on time for a visitation with AS because she had worked for four consecutive days. The trial court interpreted this to mean that respondent had "the ability to be able to provide for herself financially if she were able to address the instability in the rest of her life." At the time of the termination hearing, respondent also continued to lack suitable housing for AS and indicated that she had been living between two homes. Since AS was born, respondent had lived in three different locations, and none of these locations was a viable option for stable or suitable housing. Based on the above, the trial court did not clearly err in finding that MCL 712A.19b(3)(g) was established by clear and convincing evidence.

Although only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), clear and convincing evidence also established grounds for termination under MCL 712A.19b(3)(j). The record reflects that respondent was persistently agitated and clearly unable to control her emotions, which had a direct effect on AS during parenting time. Respondent's behavior during parenting time, and AS's reaction to respondent's behavior, is evidence of emotional harm. Respondent's failure to benefit from her prior service plan during the termination proceedings concerning her older children also shows a likelihood that respondent's behavior will cause a risk of harm to AS.

Despite being provided a treatment plan to address her mental health and substance abuse issues in 2016, and although respondent made some progress, after more than three years respondent had still not regularly participated in mental health and substance abuse counseling. Respondent denied using illegal substances, but she also admitted to regularly using marijuana during pregnancy, and AS's meconium screen was positive for THC, Norco, and hydromorphone. Respondent's failure to complete individual counseling to address both her mental health and substance abuse issues created a risk of harm to AS's safety if returned to respondent. Finally, respondent was physically aggressive at a Family Team Meeting ("FTM"), and had to be physically restrained and escorted out of the meeting and was unable to maintain her composure during any testimony not favorable to her. Acting out in violence when upset presents a concern that the parent will engage in the same behavior with the child. Thus, clear and convincing evidence supports the trial court's finding that MCL 712A.19b(3)(g) and (j) were established by clear and convincing evidence.

Respondent lastly argues that the trial court clearly erred when it concluded that terminating respondent's parental rights was in the best interests of AS. We disagree.

MCL 712A.19b(5) provides, "[i]f 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." "Whether termination of parental rights is in the best interest of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). 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 268. "A finding 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).

When determining whether termination is in the best interests of the child, the trial court should place its "focus on the child rather than the parent." *In re Schadler*, 315 Mich App 406, 411; 890 NW2d 676 (2016). "[T]he 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 at 41-42 (citations omitted). Further, the trial court may consider a respondent's history of substance abuse. *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

The evidence indicated that respondent had a bond with AS, albeit a weak one. However, the foster care worker testified that AS cried every time respondent touched her and would not take a bottle from respondent. And, the trial court properly emphasized that respondent could not care for AS because "[r]espondent's lack of preparedness with supplies, [r]espondent's lack of ability to take care of her own adult needs, and [r]espondent sleeping during visits" was evidence that "[r]espondent [did] not have the ability to appropriately parent her child, and that the minor would be harmed if returned to [r]espondent's care." In addition, respondent's hostile relationship with AS's caregiver, inappropriate and impermanent housing situation, and failure to address longstanding substance abuse and mental health issues rendered her unable to provide the type of stability and permanence that would serve the best interests of AS. Accordingly, the trial court's best interest determination was not clearly erroneous, and the trial court did not clearly err in terminating respondent's parental rights. *In re Terry*, 240 Mich App at 22.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Thomas C. Cameron