STATE OF MICHIGAN

COURT OF APPEALS

In re BEACHAM, WOODWORTH, KOPICKO-LAMROUEX, and RIDDLE, Minors.

UNPUBLISHED
April 22, 2021

No. 352133
Shiawassee Circuit Court
Family Division
LC No. 09-012603-NA

Before: MARKEY, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Respondent appeals by right the trial court's order terminating respondent's parental rights to her five minor children pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continued to exist) and (g) (failure to provide proper care or custody). We affirm.

I. BACKGROUND

Respondent, who has a functioning IQ of 66 and mental health issues, struggled with parenting her five children, two of whom are emotionally impaired. Between 2009 and 2016 the children were removed from her care three times because of improper supervision and physical and medical neglect. Respondent refused to comply with or was unable to benefit from myriad intensive services aimed at improving her parenting skills. From 2016 to 2019 she was unable to manage her children even in a very controlled supervised setting. Ultimately, the trial court concluded that respondent had not sufficiently benefited from services and that it would be in the children's best interests to terminate her parental rights.

II. ADJUDICATIVE PHASE – JURISDICTION

On appeal, respondent first challenges the trial court's assumption of jurisdiction, claiming that it was based on a defective plea. Relying on *In re Ferranti*, 504 Mich 1; 934 NW2d 610 (2019), she contends that her due-process rights were violated because contrary to MCR 3.971(B)(4), she was not expressly advised that a consequence of her no-contest plea was that it could be used against respondent in later proceedings to terminate her parental rights. Respondent also asserts that her plea was induced by the false promise that her two older children would be returned to her care if she entered the plea.

Respondent raised this issue by filing a motion in the trial court to withdraw her plea; therefore, the issue is preserved. See *In re Pederson*, __ Mich App __, __; __ NW2d __ (2020) (Docket No. 349881); slip op at 8. A trial court's denial of a motion to set aside an accepted plea is reviewed for an abuse of discretion. *People v Bailey*, 330 Mich App 41, 49-50; 944 NW2d 370 (2019). Whether a child protective proceeding complied with a parent's right to due process is a question of constitutional law that we review de novo. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). The interpretation and application of statutes and court rules are also reviewed de novo, *id*. at 404, meaning that the issues are reviewed independently with no required deference to the courts below, *In re Ferranti*, 504 Mich at 14.

The Department of Health and Human Services (DHHS), following an investigation, may petition a court to take jurisdiction over a child. *In re Ferranti*, 504 Mich at 15, citing MCR 3.961(A). The petition must contain essential facts that if proven, would permit the court to assume and exercise jurisdiction over the child. MCL 712A.2(b); MCR 3.961(B)(3); *In re Ferranti*, 504 Mich at 15. If a petition is authorized, the adjudicative phase of the proceedings takes place, and the "question at adjudication is whether the court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15.

A court can take and exercise jurisdiction if a respondent "make[s] a plea of admission or of no contest to the original allegations in [a] petition." MCR 3.971(A); see also *In re Ferranti*, 504 Mich at 15. "The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest." MCR 3.971(D)(2). MCR 3.971(B)(3) requires a court to advise a respondent of the numerous rights that the respondent is waiving by entering a plea. And MCR 3.971(B)(4) requires a court to inform a respondent of the "consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent."

In *In re Ferranti*, 504 Mich at 8-13, there was a full termination hearing after the trial court had earlier failed to inform the respondents of their waived rights under MCR 3.971(B) when accepting their pleas during the adjudication. Our Supreme Court stated and ruled:

> The trial court did not advise the respondents that they were waiving any of the important rights identified in MCR 3.971(B)(3). And it failed to advise the respondents of the consequences of entering their pleas. MCR 3.971(B)(4). This failure resulted in the respondents' constitutionally defective pleas and undermined the foundation of the rest of the proceedings. The defective pleas allowed the state to interfere with and then terminate the respondents' fundamental right to parent their child. Due process requires more: either a plea hearing that comports with due process and the court rule or, if respondents choose, a trial. MCR 3.971; MCR 3.972. We thus vacate the trial court's order of adjudication. [*Id.* at 31.]

Here, before the trial court accepted respondent's plea, respondent stated that she understood that a no-contest plea was not "an admission to anything" and that the facts as stated in the petition would be used "for the purpose of establishing jurisdiction." Respondent was advised that she was waiving her rights in exchange for the plea, including the right to a jury trial,

to call witnesses, to cross-examine witnesses and challenge the evidence, to call and subpoena her own witnesses, and to otherwise present evidence. See MCR 3.971(B)(3). Respondent answered in the affirmative when the trial court asked her whether she understood the rights that she was waiving and whether she wished to proceed with a no-contest plea. The trial court did *not* expressly advise respondent that the plea could be used as evidence in a subsequent termination hearing as required by MCR 3.971(B)(4). But, as noted, the court informed respondent that her no-contest plea would be used for adjudication.

Respondent, relying on *In re Ferranti,* contends that the trial court's omission tainted the adjudicative order and subsequent termination proceedings. Therefore, according to respondent, the adjudicative and termination orders have to be vacated or, alternatively, all subsequent hearings must be characterized as having been being adjudicative in nature, requiring reversal because most of the admitted evidence was inadmissible hearsay. In *In re Ferranti*, unlike this case, the Court determined that the respondents' pleas were not knowing, understanding, and voluntary because the trial court had not advised them of *any* of their rights under MCR 3.971(B) before they entered their pleas. *In re Ferranti*, 504 Mich at 9. This case is more akin to *In re Pederson*. In *In re Pederson*, the respondents challenged only the trial court's failure to advise them of the consequences of their plea contrary to MCR 3.971(B)(4). *In re Pederson*, __ Mich App at __; slip op at 8. The *In re Pederson* panel observed:

> MCR 3.971(B)(4) relates to the dispositional phase of the proceedings—as opposed to the adjudicative phase—in that Subrule (B)(4) does not address the rights associated with an adjudication trial. Rather, MCR 3.971(B)(4) concerns how entering a plea at the adjudication stage could later be used against respondents during the dispositional phase. Thus, unlike in *In re Ferranti*, the adjudicative stage was not tainted by the trial court's failure to advise respondents of their rights under MCR 3.971(B)(4). Rather, respondents were aware that they were giving up the right to an adjudication trial before entering pleas. [*In re Pederson*, __ Mich App at __; slip op at 12.]

Notably, this case is distinguishable from *In re Ferranti* and *In re Pederson* in that respondent here was advised that her no-contest plea would be used for the purpose of establishing jurisdiction and providing the court with a basis to order her to participate in services. Accordingly, the adjudication was not tainted because of a failure to comply with MCR 3.971(B)(4); respondent's plea was not rendered unknowing and involuntary. Moreover, whereas in *In re Ferranti* and *In re Pederson* the parents entered pleas admitting certain allegations that they had neglected their children, respondent did not contest such allegations but in no way admitted them. *In re Ferranti*, 504 Mich at 9; *In re Pederson*, __ Mich App at __; slip op at 2. Indeed, when the trial court denied respondent's motion to withdraw the no-contest plea, the court indicated that it accepted the plea solely for purposes of adjudication and that there was nothing from the no-contest plea to use against respondent at the termination hearing because she made no statement under oath. And to the extent that the no-contest plea could have potentially and theoretically been used against respondent by the trial court at the termination hearing, *the court did not do so.* Under these circumstances, respondent's no-contest plea did not constitute a violation of due process. And because any deviation that occurred did not affect respondent's substantial rights, the trial court did not abuse its discretion by denying the motion to withdraw the plea.

Respondent also argues that she was deprived of the ability to make a fully informed decision on whether to tender a plea because it was induced by the false promise to return her eldest two children to her care. This claim is belied by the record, which shows that the trial court clearly went to great pains to ensure that respondent understood that no such promise would be enforceable.

III. DISPOSITIONAL PHASE

A. STATUTORY GROUNDS AND BEST INTERESTS

Respondent argues that the trial court clearly erred by finding that there was clear and convincing evidence to support terminating her parental rights under MCL 712A.19b(3)(c)(*i*) and (g). Respondent also contends that termination of her parental rights was not in the children's best interests.

If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding . . . is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed[.]" *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). When applying the clear error standard in parental termination cases "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); see also MCR 2.613(C).

MCL 712A.19b(3)(c)(*i*) provides that a trial court may terminate a respondent's parental rights if "182 or more days have elapsed since the issuance of an initial dispositional order" and "[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." "This statutory ground exists when the conditions that brought the children into foster care continue to exist despite time to make changes and the opportunity to take advantage of a variety of services[.]" *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014) (quotation marks and citation omitted).

Preliminarily, respondent relies on the alleged jurisdictional flaw to assert that the termination hearing was a combined adjudicative trial and dispositional hearing during which hearsay evidence could not be considered. Because the trial court properly acquired jurisdiction pursuant to the no-contest plea, this assertion is without merit.

Respondent also contends that the trial court improperly considered evidence that was too remote in time from the filing of the petition. Child protective proceedings, however, are a single continuous action, and evidence admitted at any one hearing is to be considered evidence in all subsequent hearings. *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973). Thus,

the trial court properly considered the entire lengthy court record that included prior child protective proceeding orders, periodic case reports, a psychological evaluation, and testimony given during seven review hearings, along with testimony and evidence at the termination hearing.

The condition that led to the court acquiring jurisdiction was respondent's inadequate parenting skills, i.e., her inability to properly supervise and manage the children and provide them with a stable and safe environment. It is undisputed that more than 182 days had elapsed since the first dispositional order was issued. We conclude that the record clearly established that respondent's parenting skills remained inadequate and that there was no reasonable likelihood that the condition leading to adjudication would be rectified within a reasonable time considering the children's ages.

The evidence demonstrated that respondent has a significant cognitive impairment and that for nearly 10 years she was unable to properly parent her children despite numerous interventions and services. Her low range of intellectual functioning had a negative impact on her parenting abilities as she was unable to analyze and integrate information, identify problems, find solutions, benefit from her experiences, or anticipate consequences. She has a short attention span, poor concentration, and deficiencies in her ability to analyze information. The record revealed that respondent is emotionally reactive and oversensitive to being rejected, which negatively affects her ability to parent. She has the ability to be caring and empathetic, but these positive attributes are overshadowed by her limitations. Notably, her three eldest children have special needs.

From October 2016 through June 2019, parenting visits were supervised and chaotic. Several case workers testified that JB and DW were extremely verbally aggressive and physically violent with each other, respondent, and caseworkers, which posed a substantial safety risk to all of the participants. Two or three caseworkers were required during visits because of the high level of aggression. To address this and other concerns, parenting time was arranged with the children individually or in various groupings. Visits were moved to respondent's home to see if it would provide a better environment than the DHHS's offices. But DW ran away, and the house was not baby-proofed, so visitation was moved back to the agency. Various services were provided during the parenting visit to assist respondent with her parenting skills. For example, apart from caseworkers, respondent was given parenting coaches who worked with her one-on-one during visits, along with therapists who worked directly with respondent at some of the visits. Nonetheless, a caseworker once had to intervene because respondent was unaware that one of the girls was choking on a piece of plastic. Shortly after that incident, respondent did not notice that the girls were playing in a garbage can and poking electrical outlets. By July 2019, JB, DW, and KK had become increasingly aggressive. Although respondent had positive interactions with KK, she was unable to protect him from DW. JB and DW had to be hospitalized because they were out of control; they screamed and cried that the visits were too much for them. Given the tumultuous circumstances, the trial court suspended parenting time for the emotional, mental, and physical safety of the children.

The trial court did not clearly err by finding that any progress respondent may have made had not provided a comprehensive picture of her ability to adequately parent the children, let alone five children unsupervised in her own home. The record supports the trial court's conclusion that despite all the services in which respondent had participated, she did not adequately benefit from the services because she remained incapable of parenting her children. Caseworkers testified that

her parenting abilities had not changed since 2016. Although she had put forth effort, it had been very difficult for her to accept guidance from others, and she failed to adequately apply what she was taught in parenting classes to create a safer environment for her children. Moreover, there was ample proof to support the trial court's finding that given the intensive services and extraordinary amount of time that respondent was provided to benefit from services, it was unlikely that she would be able to acquire the necessary parenting skills to properly care for her children so as to meet their basic and special needs within a reasonable time. In this regard, it was noted that a very consistent, predictable, and structured home environment was needed for the boys. For all these reasons, we conclude that the trial court did not clearly err by finding that there was clear and convincing evidence to establish a basis for termination of parental rights under MCL 712A.19b(3)(c)(*i*).[1]

Respondent claims that the findings on the statutory grounds were based on evidence of alleged sexual abuse that did not conform to MCR 3.977(E). Nothing in the record, however, suggests that the trial court gave any consideration to statements regarding alleged sexual abuse, exposure to sexual situations, or failure to protect when terminating parental rights. The allegations were considered only in August of 2017 for placement decisions while an investigation into the allegations was pending.

Also, respondent takes issue with the presence of two witnesses, a case worker and a case supervisor who she claims were biased against her, who remained in the courtroom while other witnesses were sequestered. Sequestering witnesses is within the trial court's discretion. *People v Hayden*, 125 Mich App 650, 659; 337 NW2d 258 (1983). We find no abuse of discretion in exempting the two witnesses from the sequestration order. There is no evidence that the two witnesses modified their testimony because they heard other witnesses testify or that their presence in the courtroom affected the outcome of respondent's case. Reversal is unwarranted.

With respect to the children's best interests, we place our focus on the children rather than the parent. *In re Moss*, 301 Mich App at 87. In assessing a child's best interests, a trial court may consider such factors as a "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 Minors*, 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 at 714.

Preliminarily, contrary to respondent's claim, the trial court properly considered the best interests of each child individually. See *In re Olive/Metts Minors*, 297 Mich App at 42 ("It is . . . incumbent on the trial court to view each child individually when determining whether termination

[1] For many of the same reasons discussed above, there was also ample evidence to establish that respondent failed to provide proper care or custody for the children and that there was no reasonable expectation that respondent would be able to provide proper care and custody within a reasonable time considering the children's ages. MCL 712A.19b(3)(g).

of parental rights is in that child's best interests.").[2] The trial court found that JB and DW "lived a rogue lifestyle" and were completely beyond respondent's ability to provide structure or discipline. The trial court concluded that JB needed permanency and a significant amount of structure to meet his behavioral, cognitive, and mental health needs. Further, the trial court concluded that JB and DW needed caregivers who could foster independence and the ability to make good decisions. The trial court stated that KK, SNR, and SFR needed someone who they could rely on for support, guidance, proper care, and custody, which respondent was unable to provide. The trial court also found that SNR and SFR needed to be able to count on support for housing and nutrition, as well as social, mental, and psychological health and guidance, as they go through life. The court concluded that allowing them to remain with respondent would not fulfill these needs and aspirations. Given the evidence and the court's findings, we conclude that the requirement for individualized considerations was met.

Respondent also argues that it was contrary to the children's best interests to terminate her parental rights because she loves her children and, despite the volatility and complexity of her relationship with her older sons, has a loving bond with all of her children. Respondent's love and affection for all of her children is not in dispute. Caseworkers testified that she clearly loves her children and made multiple attempts to appropriately interact with all of them. But the record also showed that respondent's bond with her children was very tenuous. There was love and affection between respondent and DW but not with JB, who was attached yet ambivalent toward respondent. JB and DW stated multiple times to caseworkers and the lawyer-guardian ad litem that they did not want to be at the visits or preferred to remain with the foster parents who were willing to adopt them. Caseworkers also observed that respondent's bond with KK was strained. His trauma assessment revealed that he liked living with respondent but was also happy living with and was more attached to his foster parents. His behavior had been unaffected after respondent's parenting time was suspended. Finally, although the girls were attached to respondent, it was in a very limited setting for a brief time period each week. They had been in the care of their foster family for almost all of their young lives.

Despite the various degrees of parent-child bonds and respondent's efforts, the trial court did not clearly err by finding that termination was in the children's best interests. Because of her cognitive and mental health limitations, it was beyond respondent's capabilities to meet the children's basic and special needs. Further, the proofs demonstrated that the children's well-being improved while in foster care. Indeed, there was an observable improvement in JB's behavior when he understood that he did not have to visit respondent. Moreover, within months of being hospitalized for failing to thrive, SFR and SNR were interactive, happy, healthy, and thriving while in foster care. Under these circumstances, we find no clear error in the trial court's decision that termination of respondent's parental rights was in the children's best interests.

[2] "[T]his Court's decision in *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.

B. REASONABLE EFFORTS

Respondent finally argues that termination was premature because the DHHS failed to make reasonable efforts at reunification. She asserts that services were not tailored to accommodate respondent's cognitive disabilities contrary to the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*. We disagree.

The DHHS "has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights" and "must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(b), (c), and (d) and MCL 712A.19a(2). These obligations dovetail with those under the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132; *In re Hicks/Brown*, 500 Mich at 86. Thus, the DHHS must make "reasonable modifications to the services or programs offered to a disabled parent" "to reasonably accommodate a disability." *In re Hicks/Brown*, 500 Mich at 86. "[E]fforts at reunification cannot be reasonable under the Probate Code if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA." *Id*.

The record reflected that the DHHS recognized and made reasonable accommodations for respondent's cognitive disabilities when providing family reunification services. Respondent was provided with services beginning in 2009. Several caseworkers testified that they had "brainstormed" creative ways to help respondent in light of her cognitive limitations. She was given multiple and extensive hands-on services for three years before the conclusion of the termination hearing. A caseworker testified that in 2017 she had reviewed respondent's psychological evaluation with her and that respondent did not believe that she had any cognitive delays or needed special services. Nonetheless, the DHHS offered services that included Families First, an intensive hands-on home-based program, maternal infant health services, in-home nursing services, parenting classes, supportive visitation, infant mental health therapy, parent-child interactive therapy, and parent support partners, whose purpose included explaining matters to respondent in terms she could understand given her limitations. Furthermore, respondent received ongoing intensive hands-on parenting skills instruction and support from one to two parent coaches during all supervised visitation time. Additionally, accommodations were made for respondent's poor reading fluency during her psychological evaluation. That respondent could not overcome her limitations does not mean that inadequate services were provided. Regardless of the ADA requirements, which were met, respondent had to sufficiently benefit from the services provided and she did not do so. Three case workers testified that all reunification services had been exhausted without success. We conclude that the reunification efforts made in this case were more than reasonable and consistent with the principles espoused in *In re Hicks/Brown*.

We affirm.

/s/ /Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola