STATE OF MICHIGAN

COURT OF APPEALS

In re SEMLA, Minors.

UNPUBLISHED
August 19, 2021

Nos. 356157; 356181
Berrien Circuit Court
Family Division
LC No. 2018-000034-NA

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

PER CURIAM.

Respondents appeal as of right the trial court's order terminating their parental rights to their minor children, BS and LS, under MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions that led to adjudication), and (3)(j) (reasonable likelihood of harm). We affirm.

I. FACTS

On April 19, 2018, the Department of Health and Human Services (DHHS) received information that respondents and their two children were living in a camper where the children were improperly supervised and their hygiene was neglected. Before investigating the complaint, DHHS Supervisor Cindy Wallis spoke to Robin Surber, a LaPorte County, Indiana, Children's Protective Services (CPS) Investigator. Surber reported that she had been working with the family since early April 2018. At that time, LS was hospitalized and the hospital would not release LS to respondents until they confirmed that they had an appropriate home. Respondents agreed that they would stay in Indiana at the home of respondent-father's grandmother. LS was released from the hospital into respondents' care on or about April 5. Indiana CPS initiated a referral for home-based services to address the family's lice and hygiene issues, as well as medical issues. When service providers arrived at the grandmother's home, however, the family was not there. Indiana CPS eventually discovered that the family had returned to their camper in Michigan on April 5.

After receiving the information, Michigan DHHS investigators visited the camper on April 19, 2018, which was located at Judy's Campground in New Buffalo, Michigan. The DHHS investigators reported that the camper did not have running water or a functional toilet; instead, the family used a five-gallon bucket, which was "full of urine and feces," located in the camper next to the kitchen and next to where the children slept. The camper smelled overwhelmingly of raw sewage and marijuana, and was extremely dirty and cluttered with trash, toys, and clothing.

Marijuana and drug paraphernalia were on a table within the reach of the children. The children were extremely dirty, their clothing was extremely dirty, and they smelled of feces. LS, who was three years old, had no shoes or socks, her feet were extremely dirty, and she was coughing and had a runny nose. BS, who was then five years old, was covered in dirt, and his teeth were dark and appeared rotten.

DHHS attempted to interview the children; LS did not speak much, but BS answered questions. BS stated that respondents used marijuana in his and LS's presence, and that respondents kept marijuana in a cupboard. He reported that they had lice, and that his parents told him that the problem would be taken care of because he would be getting a haircut in the summer. BS stated that he only bathed at his grandmother's house, and that his last visit to his grandmother's house had been 15 days earlier.

DHHS investigators also spoke to the owner of Judy's Campground, who confirmed that the family had been living at the campground for the last two or three winters. The owner reported that respondents traveled with a carnival during the rest of the year and were planning to leave the following week for "Carnival Season." He reported that the camper did not have a proper sewer system and that the family used a five-gallon bucket inside the camper for sewage. He stated that during the winter he saw LS playing in the snow without shoes. He also reported that respondent-father used marijuana heavily.

Investigators also spoke with respondents, who were extremely dirty and had a strong odor. Respondents confirmed that they lived in the camper, and respondent-father admitted that the camper "was a bit messy." He also admitted that he smoked marijuana regularly, and complained that Indiana CPS was harassing the family. Respondent-mother told investigators that LS recently had been hospitalized for pneumonia. Respondent-mother stated that LS had an inhaler, but was unable to locate it.

The children were taken into protective custody that evening at approximately 7:00 p.m., and LS was hospitalized. On April 20, 2018, DHHS filed the petition initiating child protective proceedings in the trial court and seeking removal of BS and LS from respondents' care based upon the condition of the children, the condition of the home, and because the children were being exposed to (then) illegal drug use. The petition asserted that the children were covered in lice, had sores on their feet, heads, and faces, and had scabs on their heads. BS had a cut in his ear that contained a large amount of dried blood. LS had severe diaper rash, dried feces in her diaper, and a severe cough. When the children ate, they used their hands rather than utensils. The petition further asserted that the children's primary care physician reported that she had not seen the children in a long time. The petition stated that reasonable efforts were made to prevent the removal of the children, including CPS investigations in Michigan and Indiana, police investigation, observation of the children, interviews with the parents, and contact with the Pokagon Band of the Potawatomi Indians, of which respondent-mother and the children are members.

On April 20, 2018, the trial court issued an ex parte order placing the children in protective custody. The trial court held a preliminary hearing that same day, during which the trial court ascertained that the children and respondent-mother were members of the Pokagon Band. At the request of tribal counsel, the trial court adjourned the preliminary hearing to permit the tribe to

locate a qualified expert witness to testify regarding the cultural child-rearing practices of the tribe. The trial court continued the placement of the children in foster care temporarily pending the completion of the preliminary hearing. The trial court found that reasonable efforts had been made by DHHS to prevent removal of the children, including the investigation by DHHS and by the police, and DHHS's conversations with respondents, the children, and the tribe.

The preliminary hearing continued on May 9, 2018, during which the CPS worker assigned to the case testified that since the previous hearing, efforts had been made to find relatives for possible placement of the children. In addition, DHHS had interviewed respondents regarding housing, and respondents had informed DHHS that they were purchasing a house with the help of relatives. DHHS had ascertained that the tribe would provide medical insurance for the children, had scheduled medical and dental appointments for the children at the tribe, and parenting visits were taking place at the tribe. DHHS had held a family team meeting with respondents, and had scheduled respondents for parenting assessments, psychological assessments, IQ testing, and substance abuse testing. Respondent-father was consistently testing positive for marijuana use.

The foster care caseworker testified that the barriers to returning the children to respondents were housing until respondents obtained possession of their new home and respondents participating in the scheduled assessments to ascertain whether respondents could care for the children. Also testifying at the continued preliminary hearing was a cultural expert for the tribe who testified that the condition of respondents' home at the time the children were removed was not consistent with the child-rearing practices of the Pokagon Band, and that returning the children to respondents' care at that time could result in serious emotional or physical harm.

At the conclusion of the continued preliminary hearing, the trial court noted that both respondents had waived the finding of probable cause, and the trial court therefore authorized filing of the petition. Regarding the children's placement, the trial court found that reasonable efforts as well as active efforts had been made to keep the children in respondents' home. The trial court observed that since the initial emergency removal of the children, DHHS had provided the family with numerous services with the goal of returning the children to respondents' home. However, the trial court found that at that time it was still contrary to the welfare of the children to be placed with respondents until it was determined that the goals of the services had been met. Thereafter, respondents pleaded no contest to the allegations of the petition and the trial court assumed jurisdiction of the children.

Over the next two years, respondents and the children were provided numerous services with the goal of reunification of the family, including medical, dental, and vision care for the children, occupational and physical therapy for LS, individual therapy for both children, trauma assessment for both children, educational services for the children, therapy for both respondents, supervision of parenting time, additional observation of parenting time, transportation for the children to parenting time, Family Team meetings, engagement in the Healthy Families Program, psychiatric evaluation for respondents, assistance with housing for respondents, assistance to respondent-father with Medicaid applications, random drug testing for respondent-father, substance abuse and mental health services for respondent-father, multiple home visits, and relative placement searches.

Despite the efforts of the DHHS and the Pokagon Band, respondents made no sustained progress toward reunification with the children. The children were found to have severe traumas and developmental issues stemming from neglect. Supervised parenting time ultimately was suspended because respondents demonstrated no improvement in their parenting and the children's behaviors before and after visits became increasingly inappropriate. Respondent-father refused to quit smoking marijuana or to find employment. Respondents blamed the children's struggles on caseworkers, fired service providers, and demonstrated no benefit from services.

At the time of the termination hearing, the trial court observed that the barriers to reunification that existed at the time of the initial disposition in July 2018 were respondent-mother's lack of parenting skills and emotional stability, respondent-father's lack of parenting skills, lack of emotional stability, substance abuse, and lack of employment. Additional barriers for both respondents included of lack of adequate housing and the inability to understand the needs of the children. The trial court found that despite numerous services provided by petitioner, the barriers to reunification continued to exist. The trial court further found that despite active efforts made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, the efforts had proved unsuccessful.

The trial court found that the conditions that led to adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages, warranting termination under MCL 712A.19b(3)(c)(*i*). The trial court also found that there was a reasonable likelihood that based upon the conduct or capacity of respondents the children would be harmed if retuned to respondents' home, warranting termination under MCL 712A.19b(3)(j). The trial court also noted the testimony of the tribal expert that the Pokagon Band's tribal values regarding child-rearing were not reflected in respondents' parenting of the children. Having found that the basis for termination of respondents' parental rights had been established by clear and convincing evidence, the trial court also found that termination was in the best interests of the children. Respondents now appeal.[1]

II. DISCUSSION

A. REASONABLE EFFORTS

Respondent-mother contends that the trial court erred by finding that DHHS made reasonable efforts to prevent or eliminate the initial removal of the children from respondents' home. We disagree.

We observe initially that respondent-mother raises this challenge for the first time on appeal, and that the challenge therefore is unpreserved. See *In re Ferranti*, 504 Mich 1, 25; 934 NW2d 610 (2019). Our review of an unpreserved issue arising out of child protective proceedings is limited to plain error affecting substantial rights. *Id*. at 29; *In re Pederson*, 331 Mich App 445, 463; 951 NW2d 704 (2020). An error affects substantial rights if it affects the outcome of the proceedings. *People v Walker*, 504 Mich 267, 276; 934 NW2d 727 (2019). Reversal is warranted

[1] This Court consolidated the parties' appeals. *In re Semla Minors*, unpublished order of the Court of Appeals, entered February 9, 2021 (Docket Nos. 356157 & 356181).

only if the unpreserved plain error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citation omitted).

When a child has been taken into protective custody, a preliminary hearing generally must be held within 24 hours. MCR 3.965(A)(1). During the preliminary hearing, the trial court must determine whether to authorize the filing of the petition. MCR 3.965(B)(12); *In re Ferranti*, 504 Mich at 15. If the trial court authorizes the petition, the trial court must determine whether the child is to be returned home, released to a guardian or legal custodian, or placed in foster care. MCR 3.965(B)(12), (13); *In re Benavides*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No 352581); slip op at 3. The trial court may order placement of the child in foster care if the trial court finds that the criteria of MCR 3.965(C) have been met. MCR 3.965(B)(13)(b). See also MCL 712A.13a(9); *In re Benavides*, ___ Mich App at ___ n 2; slip op at 3 n 2. MCR 3.965(C)(2) provides:

> (2) The court may order placement of the child into foster care if the court finds all of the following:
>
> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.
>
> (d) **Consistent with the circumstances**, **reasonable efforts were made to prevent or eliminate the need for removal of the child**.
>
> (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare. [MCR 3.965(C)(2) (emphasis added).]

The trial court must explicitly find that reasonable efforts were made to prevent or eliminate the need for removal. MCR 3.965(C)(4); *In re Benavides*, ___ Mich App at ___; slip op at 2. That subrule provides, in pertinent part:

> Reasonable efforts findings must be made. **In making the reasonable efforts determination under this subrule, the child's health and safety must be of paramount concern to the court.** When the court has placed the child with someone other than the custodial parent, guardian, or legal custodian, the court must determine whether reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required. . . . [MCR 3.965(C)(4) (emphasis added).]

In certain circumstances, the trial court may adjourn the preliminary hearing. "If the preliminary hearing is adjourned, the court may make temporary orders for the placement of the

child when necessary to assure the immediate safety of the child, pending the completion of the preliminary hearing and subject to subrule (C), and as applicable, MCR 3.967." MCR 3.965(B)(11).

In this case, respondent-mother contends that when the children were initially removed from respondents' care on April 19, 2018, reasonable efforts were not made to prevent or eliminate the need for the removal of the children. Respondent-mother argues that the trial court found that reasonable efforts had been made because there had been DHHS investigations, police investigations, conversations with respondents, and medical services, but that these efforts were directed at removing the children from respondents' care, not preventing removal.

A review of the record, however, demonstrates that "*[c]onsistent with the circumstances*, reasonable efforts were made to prevent or eliminate the need for removal of the child[ren]." MCR 3.965(C)(2)(d) (emphasis added). The children were ages three and five at the time they were removed from respondents' home. In the weeks before the children's removal, respondents had circumvented the efforts of Indiana CPS to assure the safety of the children. LS was discharged from the hospital and returned to respondents' care upon assurances that respondents would move the family to the grandmother's home and work with Indiana CPS while LS recovered. Despite respondents' assurances that they would do so, they instead took the convalescing child back to the unhealthy conditions of the camper. Investigators learned that respondents were planning to leave the following week to spend the summer traveling with a carnival.

When Michigan DHHS and police officers investigated on April 19, 2018, they inspected the condition of respondents' home, and interviewed the children, respondents, the campground owner, and the Indiana CPS worker who worked with the family earlier that month. Although respondent-mother views these actions as efforts to remove the children, the purpose of these actions was to ascertain whether the children could remain in the home safely. Upon discovering the condition of the children and of respondents' home, investigators concluded that the home was unsafe for the children. To safeguard the children, they were removed from the home, and LS was hospitalized. These facts support the trial court's finding that reasonable efforts consistent with the circumstances were made to prevent the initial removal of the children. MCR 3.965(C)(2)(d).

Respondent-mother suggests that the DHHS could have sought an alternative to removal, such as developing a safety plan for LS and assisting respondents with housing. In the weeks following the children's removal, DHHS provided numerous services to respondents and to the children aimed at securing adequate housing for the family and resolving the health, hygiene, and parenting issues that led to the children's removal. However, given the dire circumstances discovered on April 19, 2018, it was not possible for DHHS in one day to provide the services necessary to rectify those circumstances, nor for respondents to demonstrate that they had adequately benefited from the services.[2] When determining whether reasonable efforts have been made under MCR 3.965(C), "the child's health and safety must be of paramount concern to the court." MCR 3.965(C)(4). In light of the circumstances in this case, the trial court did not plainly

[2] In fact, respondents thereafter demonstrated that even numerous services provided for over two years were insufficient to inspire them to rectify the conditions that necessitated the removal of the children.

err by finding that the DHHS made reasonable efforts to prevent or eliminate the need for the children's initial removal.

B. STATUTORY BASIS

Respondent-father contends that the trial court erred by finding that clear and convincing evidence established a statutory basis to terminate his parental rights to the children under MCL 712A.19b(3)(c)(*i*) and (3)(j). We disagree.

To terminate parental rights, the trial court must find that at least one statutory basis for termination under MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Keillor*, 325 Mich App 80, 85; 923 NW2d 617 (2018). We review for clear error the trial court's determination that a statutory basis for termination of parental rights was proven by clear and convincing evidence, as well as the trial court's factual findings supporting its determination. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011). A factual finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made, giving due regard to the trial court's special opportunity to observe the witnesses. *Id*. To be clearly erroneous, a finding must be more than possibly or probably incorrect. *Id*.

In this case, the trial court terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*) and (j). Those statutory sections provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The 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.
>
> * * *
>
> (j) 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.

Termination of parental rights is proper under subsection (c)(*i*) when "the totality of the evidence amply supports" that the parent has not accomplished "any meaningful change in the conditions" that led to the trial court assuming jurisdiction of the child, *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009), and when there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age. MCL 712A.19b(3)(c)(*i*). Failure of a parent to comply with the case service plan is evidence that the parent will not be able to provide proper care and custody for the child, and also evidence that the

child will be harmed if returned to the parent's home. *In re White*, 303 Mich App 701, 710-711; 846 NW2d 61 (2014).

In this case, we conclude that the trial court did not clearly err by determining that clear and convincing evidence supported termination of respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*). At the time the children were removed from respondents' care, the family was living in a camper with no plumbing. The camper was filthy, with raw sewage in a bucket next to the kitchen and the children's beds. Respondent-father smoked marijuana frequently in the presence of the children, and the marijuana and drug paraphernalia were accessible to the children. The younger child, then age three, was ill and recently had been hospitalized, but respondents had failed to follow up with medical care for the child. The older child had rotted teeth. Both children were extremely dirty, covered with sores and scabs, and infested with lice.

The foster care worker testified during the termination hearing that although respondents had been provided numerous services for two years, they had not benefitted from the services. Respondent-father continued to be unemployed, and refused to seek employment. He continued to use marijuana daily, and refused to commit to not using it in front of the children or to not allow his use to affect his parenting. He accepted no responsibility for the children's health or their traumas, and blamed the campground owner for the condition of the camper. He continued to believe that his parenting was adequate, and fired service providers because they were disrespectful or were "quacks."

The trial court found that despite numerous services provided by petitioner, and despite active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, the efforts had proved unsuccessful. The trial court further observed that in June 2018, respondents were provided a house by a relative which at that point was clean. By early 2019, however, the condition of the home was described as "deplorable" with lice and fleas, and an overwhelming bad odor. Respondents were repeatedly advised by service providers about cleaning the home, but respondents denied that the condition of the home was a problem and ultimately evicted the case worker from the home during a home visit.

Respondent-father's psychological examination identified that he was not an adequate parent and had limited insight regarding the children, but that he believed himself to be an average parent and believed that the children were happy. Both respondents rejected the recommendation that they participate in treatment. Throughout the two years, respondent-father repeatedly tested positive for marijuana use and reported that he uses marijuana daily and intends to continue that use.

During the two years that services were offered, respondents occasionally missed parenting time, were late for parenting time, left early from parenting time, and did not engage the children during parenting time. When attending visits, respondents often ignored BS and focused only on LS. Respondents were defensive when given parenting advice and denied that they ignored BS. Respondent-father often used his phone during parenting time. It was reported that neither respondent benefitted from parenting classes. The children expressed to workers that they feared going back to respondent's care, and their behavior dramatically worsened before and after parenting-time visits.

Although respondent-father reported that he previously was employed as a carnival worker, he did not work during the two years the case was pending before the trial court. He stated that he did not need to work because respondent-mother worked at a fast-food restaurant and also had a stipend from the tribe, and that his grandmother was willing to assist them if they needed additional money. Nonetheless, respondents reported that certain repairs could not be made to the house because they lacked money.

The evidence also supports the finding that termination of respondent-father's parental rights was warranted under MCL 712A.19b(3)(j). Termination of parental rights under MCL 712A.19b(3)(j) is proper when "[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." This statutory factor considers not only the harm that may result from the parent's conduct toward the child, but also harm that might reasonably result from the parent's conduct around the child. See *In re White*, 303 Mich App at 712. A parent's "lengthy period of instability" stemming from mental-health issues, combined with a present and "continuing lack of judgment, insight, and empathy" for a child is also relevant to this statutory ground. *In re Utrera*, 281 Mich App 1, 25; 761 NW2d 253 (2008).

In this case, at the time of termination respondents once again lacked adequate housing. Respondent-father continued his excessive marijuana use and refused to commit to not using it around the children. Respondent-father had not benefited from parenting classes or counseling; he had no insight into the needs of the children, continued to believe that his parenting was adequate, and blamed others for the children's health and their traumas. Accordingly, the trial court did not clearly err by determining that clear and convincing evidence established that termination of respondent-father's parental rights was warranted under MCL 712A.19b(3)(j).

C. ICWA

Respondent-father also asserts that the trial court erred by finding that petitioner had satisfied state and federal standards for terminating his parental rights to Indian children. Again, we disagree.

Termination of parental rights to an Indian child requires the trial court to make findings in compliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., before terminating parental rights. *In re Payne/Pumphrey/Fortson*, 311 Mich 49, 58; 874 NW2d 205 (2015). The federal evidentiary standard necessary to terminate parental rights to an Indian child is set forth in 25 USC 1912(f) as follows:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

The Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., similarly provides:

> No termination of parental rights may be ordered in a proceeding described in this section without a determination, supported by evidence beyond a reasonable doubt, including testimony of at least 1 qualified expert witness as described in [MCL 712B.17], that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the Indian child. [MCL 712B.15(4).]

In addition, MCR 3.977(G)(2) provides that a trial court may not terminate parental rights to an Indian child unless "the court find finds evidence beyond a reasonable doubt, including testimony of at least one qualified expert witness," that "continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child." We review de novo issues involving the application and interpretation of the ICWA, *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012), and the MIFPA. *In re Detmer/Beaudry*, 321 Mich App 49, 59; 910 NW2d 318 (2017).

Although respondent-father states on appeal that the trial court erred in ruling that petitioner satisfied state and federal standards for terminating his parental rights to Indian children, he does not support his assertion with facts nor develop his argument. A party may not simply announce a position and leave it to this court to ascertain the basis for his claim or develop an argument to support his assertion. *Mitchell v Mitchell*, 296 Mich App 513, 524; 823 NW2d 153 (2012). Rather, a party abandons an issue when it fails to brief the merits of an allegation. *People v Iannucci*, 314 Mich App 542, 545; 887 NW2d 817 (2016).

Moreover, in this case the witness testifying regarding the Pokagon Band's customs and child-rearing practices testified that returning the children to respondents would result in serious physical or emotional damage to the children, and that respondents' parenting did not reflect the tribe's view of appropriate child-rearing practices. The expert pointed to respondents' unwillingness to address the issues that originally brought the children into care, being substance abuse, physical neglect, lack of parenting skills, lack of safety and hygiene in the home, and issues of self-care. Accordingly, evidence beyond a reasonable doubt was presented allowing the trial court to terminate respondents' respective parental rights under the ICWA and its Michigan counterparts.

Affirmed.

/s/ Jonathan Tukel
/s/ Kirsten Frank Kelly
/s/ Michael F. Gadola