STATE OF MICHIGAN

COURT OF APPEALS

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In re RILEY, Minors.

Nos. 375069; 375070
Bay Circuit Court
Family Division
LC No. 23-013531-NA

Before: RIORDAN, P.J., and REDFORD and PATEL, JJ.

PER CURIAM.

Respondent-mother and respondent-father each appeal as of right an order terminating their parental rights to four children under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (child likely to be harmed if returned to parent). We affirm.

I. FACTUAL OVERVIEW

The youngest child was born prematurely and with methamphetamines and benzodiazepines in her system. She was hospitalized for approximately a month. She has very significant medical needs. In addition, one of the children disclosed domestic violence in respondents' home. The trial court assumed jurisdiction over all four children primarily on the basis of both respondent-mother's and respondent-father's drug use. Respondent-father was facing criminal charges regarding methamphetamine use. At first, the children remained in respondents' home while services were offered to respondents. But respondents did not adequately participate in the services and did not complete drug screens. The children were removed from the home and placed with a paternal relative. After their removal, it became apparent that some of the children had intensive dental needs.

Petitioner, the Department of Health and Human Services (DHHS), repeatedly tried to get respondents to participate in drug treatment. But they left inpatient treatment after a few days and failed to meaningfully participate in outpatient treatment. They remained adamant that their

methamphetamine use[1] had no impact on their parenting. At the time of the termination hearing, respondent-father still had his longstanding problem with substance abuse, and respondent-mother had tested positive for drugs shortly before the hearing. Respondents were repeatedly hostile toward various people involved in the case, and they made inappropriate comments during visitations. The foster family was meeting all the children's needs, and the children were thriving there. The three children who were old enough to express an opinion wanted to stay with the foster family. The trial court terminated respondents' parental rights under the grounds set forth above and concluded that it was in the children's best interests to terminate respondents' parental rights.

II. ANALYSIS

A. REFEREE'S ACTIONS

Respondent-mother contends that the referee erred by failing to read the petition at the preliminary hearing and also failed, at several hearings, to advise the parties that they could seek judicial review of the referee's findings and decision. Respondent-father objects to the referee's failure to give this advice at the removal hearing. These issues are unpreserved. See *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). As stated in *In re MJC*, 349 Mich App 42, 47-48; 27 NW3d 122 (2023):

> [R]eview of unpreserved issues in termination cases is for plain error affecting substantial rights. 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. Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. The party asserting plain error bears the burden of persuasion with respect to prejudice. [Quotation marks and citations omitted.]

MCR 3.965(B)(4), dealing with preliminary hearings, states, "If the respondent is present, the court must assure that the respondent has a copy of the petition. The court must read the allegations in the petition in open court, unless waived."

Respondent-mother contends that she did not waive a reading of the petition at the alleged "preliminary hearings" held on April 27, 2023, and May 30, 2023. Respondent-mother's argument about the hearings held on these dates is without merit because the actual preliminary hearing did not occur on either of these dates. Instead, the proceedings were adjourned, first to investigate possible Indian heritage and then because the relationship between respondent-mother and her counsel had deteriorated and she wanted a new attorney.

Respondent-mother contends that a similar error occurred at the actual preliminary hearing that occurred on June 2, 2023. But no plain error requiring reversal is apparent. Respondent-mother attended the hearing by way of Zoom, and she affirmed that she could hear what was being

[1] There also was some cocaine use.

said in the courtroom. The court asked whether "respondents"[2] had received a copy of the petition. Respondent-father's attorney replied, "Yes, your Honor." Respondent-mother's attorney replied, "I believe so, your Honor." No allegation was ever made in this case that respondents were unable to read. Throughout the case, respondent-mother was zealously represented by counsel, and she later made multiple pleas of admission to allegations read by the court. Under these circumstances, no outcome-determinative plain error is apparent with respect to the failure by the referee to actually read the petition out loud or obtain a waiver of such a reading. *MJC*, 349 Mich App at 48.[3]

Respondent-mother next argues that the referee repeatedly violated the requirement to advise the parties of the right to judicial review. MCR 3.913(C)(1) states that, "[d]uring a hearing held by a referee, the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B)." MCR 3.991(B) provides that a party may request written review by a judge of a referee's recommendation. Respondent-mother contends that the referee failed to give the proper advice at hearings on May 30, 2023; June 2, 2023; July 19, 2023; March 5, 2024; December 3, 2024; and December 11, 2024.

The argument about the May 30, 2023 hearing is without merit because the hearing scheduled to be held on that date was adjourned. The June 2, 2023 hearing was the preliminary hearing. The transcript indicates that the referee stated at that hearing, "I find the motion for rehearing under MCL 712A.21 or the court rule MCR 3.992 or by filing an application for leave to appeal with the Michigan Court of Appeals." Taking the transcript at face value, this was not an understandable statement. Therefore, a plain error did occur. However, respondent-mother has not demonstrated how her substantial rights were affected. *MJC*, 349 Mich App at 48. As noted, "[t]he party asserting plain error bears the burden of persuasion with respect to prejudice." *Id*. Respondent-mother utterly fails to explain what she would have argued in her request for judicial review and why such a request would likely have been successful.[4] The same is true with regard to the hearings held on March 5, 2024 (a brief review hearing after which respondents were ordered to comply with their case-service plans), and December 11, 2024 (a combined review hearing and hearing regarding a motion to reinstate parenting time). As for the hearing on December 3, 2024, no recommendations or actual findings were even made on that date because the court continued the hearing.

Both respondent-mother and respondent-father argue that the referee erred at the removal hearing on July 19, 2023, by failing to set forth the right to judicial review of the referee's decision. No plain error affecting substantial rights occurred in connection with this hearing. First, respondent-mother did, in fact, file a motion for judicial review. The trial court denied the motion, stating, in part, that it was adopting the referee's recommendation and that it had the "identical

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[2] Respondents were a couple and lived together.

[3] To the extent that respondent-mother is arguing about the lack of a proof of service in the record, there is no outcome-determinative plain error, given the delineated circumstances.

[4] Respondent-father's briefing is not entirely clear, but to the extent respondent-father may be arguing about defects at the June 2, 2023 preliminary hearing, the same analysis that applies to respondent-mother applies to his situation as well.

conclusion" that removal was appropriate. And, after respondent-mother appealed the removal decision to this Court, we affirmed. See *In re Riley*, unpublished per curiam opinion of the Court of Appeals, issued April 25, 2024 (Docket No. 367083). Under these circumstances, neither respondent can show outcome-determinative error.[5] *MJC*, 349 Mich App at 48.

Respondent-mother also contends that her attorney rendered ineffective assistance of counsel in connection with the issues discussed above. Reversal on the basis of ineffective assistance of counsel is warranted if "it is shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *Id*. at 59 (quotation marks and citation omitted). For the reasons explained above, respondent-mother has not shown the requisite prejudice.

Respondents contend that this case is analogous to *In re Ferranti*, 504 Mich 1, 30; 934 NW2d 610 (2019), a case in which our Supreme Court found a basis for reversal after applying the plain-error framework. However, the errors in this case were not analogous to the defective pleas at issue in *Ferranti*, *id*. at 31, wherein "the defective pleas [improperly] allowed the state to interfere with and then terminate the respondents' fundamental right to parent their child," as the trial court in that case completely failed to advise the respondents of important rights and the consequences of entering their pleas. The adjudications were proper in this case and, as noted, respondents received full review of the removal decision.

B. PARENTING TIME

Respondent-father contends that his due-process rights were violated when DHHS unilaterally suspended parenting time and that a reversal of the termination decision is, therefore, warranted. Respondent-father did not raise this due-process issue below, so review is under the plain-error doctrine. See *VanDalen*, 293 Mich App at 135.

DHHS stopped respondents' video visits in November 2024 because respondents made comments to the children that they were coming home soon, upsetting one of the children, and also because respondent-mother had told the foster mother by way of Facebook that she was going to come and take the children if they were not returned by the court. A hearing regarding parenting time occurred, and the court ultimately concluded that parenting time should remain suspended, stating, in part, that the guardian ad litem believed that suspension was appropriate and also stating that visitations were negatively impacting the children. However, the court admonished DHHS and stated that if it was going to suspend parenting time, it needed to file an ex parte motion first.

Respondent-father contends that the trial court could not retroactively "correct" the error by DHHS and that the improper suspension was a fundamental due-process error requiring reversal

[5] Respondent-father contends that any error was compounded because he was not served with the petition containing the removal request. But his attorney stated that she had reviewed it with him. Under such circumstances, no plain error requiring reversal is apparent. *MJC*, 349 Mich App at 48.

of the termination decision. As noted above, this argument is not preserved, so the plain-error doctrine applies.

A plain error did occur because DHHS acted unilaterally. See MCL 712A.13a(13) (providing that the *court* may suspend parenting time under certain circumstances).[6] But respondent-father has not demonstrated an impact on his substantial rights such that reversal is required. *MJC*, 349 Mich App at 48. This case took place over almost two years, and the unauthorized suspension of the video visitations lasted a little over a month before the court issued its proper findings. Moreover, and significantly, respondent-father participated minimally even when the video visitations were occurring. This was consistent with his sporadic attendance during the in-person visitations in the beginning stages of the case. Under these circumstances, reversal under the plain-error doctrine is unwarranted.

C. BEST INTERESTS

Respondents contend that the trial court erred by finding that termination was in the children's best interests.[7] This Court reviews for clear error a lower court's decision that termination is in a child's best interests. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). A finding is clearly erroneous if, even if some evidence supports it, the reviewing court is nevertheless left with the firm and definite conviction that the lower court made a mistake. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

"If a trial court finds that a statutory basis for terminating parental rights exists by clear and convincing evidence, it is required to terminate parental rights if it finds from a preponderance of evidence on the whole record that termination is in the children's best interests." *In re Brown/Kindle/Muhammad*, 305 Mich App 623, 637; 853 NW2d 459 (2014) (quotation marks and citation omitted); see also MCL 712A.19b(5).

> The trial court should weigh all the evidence available to determine the children's best interests. To determine whether termination of parental rights is in a child's best interests, the court should consider a wide variety of factors that may include 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. 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

[6] In general, a respondent is entitled to parenting time unless it may be harmful to the child. See *In re Ott*, 344 Mich App 723, 741; 2 NW3d 120 (2022). Respondent-father is not focusing on the substance of the suspension decision but is focusing on DHHS's improper unilateral action.

[7] Respondents do not contest the trial court's finding of statutory grounds for termination but only contend that the court erred by concluding that termination was in the best interests of the children.

> 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, 713-714; 846 NW2d 61 (2014) (quotation marks and citations omitted).]

The trial court did not clearly err in its decision regarding the children's best interests. By the time of the termination hearing, neither respondent had addressed the underlying substance-abuse problems despite being offered assistance in this regard numerous times. They were combative with the foster family and with workers and often inappropriate during visitations. Some of the children came into care with significant dental needs. Also, the youngest child had very substantial medical needs, and the caseworker was concerned about respondents' ability to address them. The children were doing very well in their foster home, and the foster parents wanted to adopt them. The children who were old enough to express an opinion wanted to stay in the foster home. Both the caseworker and the guardian ad litem advocated for termination. Under all these circumstances, no clear error is apparent. It is true that the children were placed with a relative, and relative placement weighs against termination. See *Olive/Metts*, 297 Mich App at 43. Respondent-father contends that the trial court did not acknowledge the relative placement, but the court did so. It seems apparent that the court was implicitly concluding that this single factor did not overcome the other factors weighing for termination. It noted that guardianship was not the best option for the children. This was not clearly erroneous.

III. CONCLUSION

There were no errors warranting relief in either Docket No. 375069 or Docket No. 375070. We affirm.

/s/ Michael J. Riordan
/s/ James Robert Redford
/s/ Sima G. Patel