STATE OF MICHIGAN

COURT OF APPEALS

In re LARD, Minors.

UNPUBLISHED
August 10, 2023

Nos. 364489; 364490
St. Joseph Circuit Court
Family Division
LC No. 2021-000176-NA

Before: YATES, P.J., and BORRELLO and PATEL, JJ.

PER CURIAM.

In these consolidated appeals,[1] respondents appeal of right the termination of their parental rights to two of their children under MCL 712A.19b(3)(c)(*i*) (conditions leading to the adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm). On review, we vacate the termination of respondents' parental rights and remand for further proceedings.

I. FACTUAL BACKGROUND

Respondents have three children, one of whom is an adult, and two others—KL and JL—who are the subjects of the current appeal. At the time this case began, respondents were married, but only because they had not obtained a divorce. They are no longer a couple, although for much of the case respondent-mother allowed respondent-father to live in her home. Respondent-mother has a new partner, RL. While this case was pending, respondent-mother and RL had a child, who was born in March 2022. That child is in the care of RL and respondent-mother, whose parental rights to that child are not at issue on appeal.

Proceedings in this case began in March 2021, when the Department of Health and Human Services (DHHS) filed a petition against both respondents. Respondent-father tendered a plea of admission to allegations in the petition pertaining to him—namely, that he was homeless and that

[1] Respondent-father appeals in Docket No. 364489, and respondent-mother appeals in Docket No. 364490. This Court consolidated the appeals. *In re Lard Minors*, unpublished order of the Court of Appeals, entered January 19, 2023 (Docket Nos. 364489 and 364490).

he used methamphetamine, which he admitted was contrary to the welfare of his children. As to respondent-mother, the petition alleged that she used methamphetamine, that neither respondent was ensuring that the children attended school, and that there were concerns of domestic violence (committed by RL against respondent-mother) in respondent-mother's home. Respondent-mother denied the allegations and requested an adjudication trial. Following a bench trial, the trial court adjudicated respondent-mother unfit, concluding that she used methamphetamine, that she failed to provide for the children's education, and that there were concerns of domestic violence in her home.

During the dispositional phase of proceedings, the trial court denied respondents parenting time—even supervised parenting time—until they submitted three consecutive clean drug screens. In the summer of 2021, respondents both provided three consecutive clean drug screens, and they both began receiving supervised parenting time. Indeed, to their credit, respondents both managed to stop using methamphetamine during this case. RL, who also used methamphetamine when the case began, likewise managed to stop. Although they conquered methamphetamine, respondents and RL continued to test positive for THC. Respondent-father and RL admitted marijuana use, while respondent-mother, whose THC levels were lower, maintained that she was positive merely from being in the presence of RL when he smoked. Regarding their other goals, respondent-father did not obtain independent housing, but for much of the case, respondent-mother permitted him to live in her home—a trailer she shared with RL and others, including RL's nephew. Although there were periods of unemployment during the case, respondent-father obtained employment. RL also found employment, and he was providing financial support for respondent-mother while she stayed home with the new baby. Further, no other incidents of domestic violence were reported between respondent-mother and RL, although they both were convicted of retail fraud, see MCL 750.356d, in June 2022. After a period of supervised visitation with the children, the case progressed to the point that the children spent overnight, unsupervised visits with respondents.

Respondents made significant progress on the conditions that led to adjudication, but new and changed circumstances arose during the case. Although legally admissible evidence was never provided to establish these facts, one of the children, KL, allegedly claimed on two occasions that she was sexually assaulted by individuals in respondent-mother's home during her overnight visits there—specifically, RL's nephew and a friend of the nephew. KL purportedly recanted her claims against the nephew, which she originally made in March 2022. More recently, at the end of August 2022, KL purportedly made the second allegation that the nephew's friend sexually assaulted her. Respondents' parenting time with KL and JL was suspended in September 2022 based upon KL's allegations. As the case progressed, respondent-mother's home—which early in the case had been routinely described as adequate—was deemed inadequate and unclean. JL purportedly stated that he had a cockroach in his cereal. In October 2022, respondent-mother and RL—and the others in the home, including respondent-father—were all evicted from their trailer for nonpayment of rent. Respondent-mother and RL then moved into a hotel, where they lived with their newborn child. Respondent-father slept either at a hotel or in his car.

On September 9, 2022, the DHHS filed a supplemental petition to terminate respondents' parental rights to KL and JL pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). After a one-day hearing on November 30, 2022, the trial court terminated respondents' parental rights under

MCL 712A.19b(3)(c)(*i*), (g), and (j).[2] The trial court also concluded that termination was in the children's best interests, so the trial court entered an order terminating respondents' parental rights to KL and JL. Respondents now appeal.

II. LEGAL ANALYSIS

On appeal, respondents challenge, on several grounds, the trial court's decision to terminate their parental rights. Respondent-father insists he should be allowed to withdraw his plea because the trial court failed to advise him of his appellate rights as required by MCR 3.971(B)(6). He also argues that the trial court failed to hold an initial dispositional hearing and that he was not properly informed of case services. Respondent-mother faults the trial court for admitting hearsay evidence to prove new or different circumstances as a basis for termination. Also, she contends that the trial court erred when it relied on marijuana use as a basis for termination without any evidence that it put the children at risk of harm. Additionally, respondent-mother challenges the trial court's order conditioning parenting time on three consecutive clean drug screens. We will address each of the arguments from the parents in turn.

A. ADVICE OF RIGHTS IN CONNECTION WITH RESPONDENT-FATHER'S PLEA

We will first address respondent-father's assertion that the trial court did not advise him of his appellate rights after the adjudication proceedings as required by MCR 3.971(B)(6). According to respondent-father, he should be permitted to withdraw his plea because the factual basis for that plea was defective insofar as his admitted methamphetamine use and homelessness did not affect the children, who were living with respondent-mother at the time of his plea. We disagree.

An objection to the plea-taking process may be preserved by moving to withdraw a plea in the trial court or by "otherwise" objecting to the advice of rights that was provided. *In re Pederson*, 331 Mich App 445, 462; 951 NW2d 704 (2020). Because respondent-father did not object to the advice of rights provided or seek to withdraw his plea in the trial court, this issue was not preserved. *Id*. "[A]djudication errors raised after the trial court has terminated parental rights are reviewed for plain error." *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019).

"Due process and our court rules require a trial court to advise respondents-parents of the rights that they will waive by their plea and the consequences that may flow from it." *Id*. at 30. Specifically, in child-protective proceedings, the advice that must be provided to a parent entering a plea is set forth in MCR 3.971(B), which states:

> (B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

[2] The trial court ostensibly rejected petitioner's reliance upon MCL 712A.19b(3)(c)(*ii*). But as we will discuss, the trial court in fact relied upon other conditions, aside from those leading to the adjudication, when terminating respondents' parental rights.

* * *

> (6) that appellate review is available to challenge any errors in the adjudicatory process, which may be challenged in an appeal from the court's initial order of disposition;
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> (7) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of transcripts; and
>
> (8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from an order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR 7.204 or a delayed appeal under MCR 3.993(C).

If the trial court fails to advise a parent of these appellate rights, the court rules provide a remedy for the parent on appeal following termination of the parent's rights. Specifically, MCR 3.971(C) states: "The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to subrule (B)(6)-(8)."

Here, the transcript of respondent-father's plea establishes that the trial court did not inform respondent-father of appellate rights on the record before entry of his plea. But respondent-father is not entitled to relief on appeal. At most, under MCR 3.971(C), if he was not properly advised of his appellate rights, he would be able to "challenge the assumption of jurisdiction" in his current appeal following termination. In this respect, respondent-father does briefly assert that there was not an adequate factual basis for his plea, but his jurisdictional argument lacks merit. "In order to find that a child comes within the court's jurisdiction, at least one statutory ground for jurisdiction contained in MCL 712A.2(b) must be proven, either at trial or by plea." *In re SLH*, 277 Mich App 662, 669; 747 NW2d 547 (2008). Jurisdiction must be demonstrated by a preponderance of the evidence. *In re Hockett*, 339 Mich App 250, 254; 981 NW2d 534 (2021).

In this case, the trial court adjudicated respondent-father under MCL 712A.2(b)(2). The trial court's assumption of jurisdiction under that provision was supported by a preponderance of the evidence because respondent-father's admissions at the plea hearing established that he was unable to provide adequate housing for his children, and by his own admission, he was engaged in using methamphetamine, which was negatively affecting his children's welfare. In other words, this was not an instance of drug use or illegal activity without proof of any connection to abuse or neglect. See *In re LaFrance Minors*, 306 Mich App 713, 731; 858 NW2d 143 (2014). Moreover, although it would be improper to exercise jurisdiction when a child lives separately from the parent in a home that is not "unfit," see *In re Long*, 326 Mich App 455, 462; 927 NW2d 724 (2018), that was not the situation when this case started. At the time that the trial court assumed jurisdiction, the children were going back and forth between their parents; they were not placed exclusively in respondent-mother's care. Beyond that, respondent-mother's home was likewise unfit as a result of domestic violence and methamphetamine use in her home. Therefore, the trial court did not err by exercising jurisdiction under MCL 712A.2(b)(2).

B. DISPOSITIONAL HEARING AND ADOPTION OF CASE-SERVICE PLAN

Respondent-father argues that the trial court erred by failing to hold an initial dispositional hearing as required by MCR 3.973(C). Respondent-father also contends that he was not informed of the schedule of services and that no one reviewed the case-service plan with him. Respondent-father therefore insists that reasonable efforts towards reunification were not made. Respondent-father failed to raise these issues in the trial court, meaning that these issues are unpreserved. See *In re Atchley*, 341 Mich App 332, 336; 990 NW2d 685 (2022). Our review, therefore, is for plain error affecting substantial rights. *In re Sanborn*, 337 Mich App 252, 258; 976 NW2d 44 (2021). Respondent-father has not shown plain error.

When the children are in placement, a dispositional hearing must be held within 28 days of the trial court's assumption of jurisdiction unless "good cause" for a delay exists. MCR 3.973(C). A dispositional hearing may be conducted "immediately following" the adjudicatory proceedings. *In re Thompson*, 318 Mich App 375, 379; 897 NW2d 758 (2016) (quotation marks and citation omitted). Nevertheless, adjudication and disposition are distinct proceedings—each with its own procedural requirements—and the two cannot "be converged such that there was no distinction." *Id*. (quotation marks and citation omitted).

Here, the plea transcript reveals that the trial court in fact conducted the initial dispositional hearing immediately after respondent-father's plea. See *id*. Promptly after accepting respondent-father's plea, the trial court told him that "we're going to enter some orders about what you need to do to get started on the case." The trial court then asked the caseworker for recommendations for services for respondent-father, and then the trial court ordered respondent-father to engage in a variety of services and comply with a case-service plan. After that hearing, in addition to entering an order of adjudication, the trial court entered a written order of disposition memorializing those service requirements for respondent-father and setting the initial review hearing for June 10, 2021. Thus, contrary to respondent-father's assertion, the trial court held an initial dispositional hearing, which took place immediately after respondent-father entered his plea. See *id*.

With respect to whether respondent-father received a case-service plan or reviewed it with anybody, we note that under the probate code, absent certain aggravated circumstances not at issue here, the DHHS also "has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017). See also MCL 712A.19a(2). As part of its reasonable efforts, the DHHS 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 at 85-86. See also MCL 712A.18f(3)(b) and (c). The case-service plan must list a schedule of services to be provided to the parent, the child, and—if the child is placed in foster care—the foster parent, to facilitate the child's return home or to facilitate the child's permanent placement. MCL 712A.18f(3)(d).

Here, to the extent that respondent-father contends he was not provided with an explanation of services, the initial case-service plan, dated April 9, 2021, does not appear to have been signed by respondent-father, which is concerning. See *In re Mason*, 486 Mich 142, 156-157; 782 NW2d 747 (2010) (discussing procedures in the Michigan Foster Care Manual regarding the need for a parent's participation in development of the case-service plan and noting the conspicuous absence of the respondent's signature from the case-service plan). Similarly, there are also updated case-

service plans that lack respondent-father's signature. Beginning with the preliminary hearing in March 2021, however, the services required of respondent-father were consistently identified on the record at each of the numerous hearings. Respondent-father was to participate in random drug screens, refrain from the use of alcohol and drugs (including marijuana), obtain and maintain suitable housing and employment, participate in psychological and substance-abuse assessments, follow any recommendations made in those assessments, and participate in the children's services as recommended. Additionally, although respondent-father's signature does not appear on all the case-services plans, he signed the plan dated July 9, 2021, acknowledging that he participated in development of the plan and that he had received a copy to review. Moreover, he participated in services during the course of this case, indicating that he understood which services were expected of him. In sum, despite unsigned case-service plans in the record, respondent-father was informed of his obligations under the case-service plans and he participated in some of the services required by those plans. Therefore, on this record, respondent-father has not shown plain error. See *In re Sanborn*, 337 Mich App at 258.

C. ADMISSION OF HEARSAY STATEMENTS

Respondent-mother faults the trial court for admitting hearsay statements to establish new or different circumstances as a basis for the termination of respondents' parental rights. According to respondent-mother, DHHS special investigator Alisha Flotte was permitted to testify about KL's statements that she was a victim of a sexual assault. Because the statements were admitted through the testimony of Flotte, respondent-mother was not able to test the credibility of the statements via cross-examination. Respondent-mother also argues that the testimony of foster-care worker Emily Bartzen included statements from KL about KL's distrust of respondent-mother and her belief that respondent-mother would revert to drinking, smoking marijuana, and hanging out with the wrong people. We agree that the trial court erred by admitting hearsay at the termination hearing.

Respondent-mother failed to preserve her evidentiary issue in the trial court, so our review of this issue is, therefore, limited to plain error affecting substantial rights. See *In re Sanborn*, 337 Mich App at 258. Generally speaking, the rules of evidence apply during an adjudicative trial, but they do not apply during the dispositional phase of the proceedings. *In re Sanders*, 495 Mich 394, 405-406; 852 NW2d 524 (2014). If termination did not occur at the initial disposition hearing and the case later proceeds to termination on grounds that formed the basis for adjudication, the rules of evidence—except those for privilege—typically do not apply at the termination hearing. See MCR 3.977(H); MCR 3.977(H)(2). Instead, "[a]t the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value." MCR 3.977(H)(2). Under MCR 3.977(F)(1)(b), at a termination hearing on "a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the grounds that led the court to take jurisdiction," the trial court's findings must be based on "legally admissible evidence."

Here, with regard to respondent-mother, the circumstances leading to the adjudication were substance abuse (especially the use of methamphetamine), domestic violence, and the fact that the children were not going to school. At the termination hearing, however, petitioner cited new and different circumstances, including, most notably, respondents' alleged failure to protect KL from sexual assault by others. The new and different circumstances also included respondent-mother's

lack of housing,[3] employment issues, and criminality. Because all those circumstances were "new and different" from the circumstances proved at the adjudication, legally admissible evidence was required. See MCR 3.997(F)(1)(b); *In re Snyder*, 223 Mich App 85, 90; 566 NW2d 18 (1997).

Notably, the only proof offered to support the claim that KL was sexually assaulted—and respondents failed to protect her from those assaults—was inadmissible hearsay. See MRE 801(c); MRE 802; *In re Gilliam*, 241 Mich App 133, 137; 613 NW2d 748 (2000). During the termination hearing, two caseworkers recounted KL's allegations of sexual abuse and her statements about not feeling safe in respondents' homes. That hearsay evidence was not admissible, and because it was inadmissible, it could not be used to support the finding that respondents failed to protect KL. See MCR 3.997(F)(1)(b). Under the plain-error standard, this error was clear or obvious, and it also affected the outcome of the proceedings.

The trial court cited the failure-to-protect allegation at length in its findings, even going so far as to conclude that KL was afraid to return to her parents' homes because KL did not think that they would keep her safe and there was a risk she would again be sexually assaulted in their homes. The trial court also noted this alleged lack of safety in respondents' homes—and the comparative safety of the foster homes—when addressing the children's best interests. This evidentiary error affected the outcome of the proceedings. Thus, in our view, this serious error was prejudicial, and relief is warranted on plain-error review, particularly when coupled with the numerous other errors, including, as discussed later in this opinion, the unwarranted suspension of parenting time and the inappropriate consideration of marijuana without a showing of harm to the children as a reason to terminate parental rights. Based upon this outcome-determinative evidentiary error, we vacate the termination of respondents' parental rights, and we remand with instructions that "any allegations of new or different circumstances from those that justified the original assumption of jurisdiction must be established with legally admissible evidence." *In re Gilliam*, 241 Mich App at 137-138.

Admission of hearsay to prove that respondents failed to protect KL from sexual assault is the most glaring and obviously prejudicial error under MCR 3.997(F)(1)(b). Respondent-mother also asserts that legally inadmissible evidence was introduced on other topics, including housing, employment, and criminality. But contrary to respondent-mother's concern, much of that evidence would be admissible because respondent-mother made admissions to the caseworkers about, for example, her employment and housing. Her statements would be admissible against her as party-opponent admissions under MRE 801(d)(2). Respondent-mother also testified about some of those issues at the termination hearing, and her testimony on matters within her own personal knowledge was clearly admissible. See MRE 602. Nevertheless, inadmissible hearsay was admitted on those topics, including JL's hearsay report that he had a cockroach in his cereal. See MRE 801(c); MRE 802. Likewise, KL's hearsay statement that, at one time, she personally had a stash of marijuana at respondents' house was hearsay unrelated to the circumstances that led to the adjudication. The

[3] At times, both the trial court and petitioner blurred respondents' respective issues leading to the adjudication. Respondent-*father* lacked adequate housing when the case started, but respondent-mother did not. Early in the case, her trailer was deemed adequate, although there were notes that she was in the process of renovating or that it was "cluttered." It was not until later in the case that allegations of cockroaches and inappropriate housing arose.

petition and adjudication involved no assertion whatsoever that *KL* used drugs. See MRE 801(c); MRE 802. On remand, the trial court must assess any new or different circumstances on the basis of legally admissible evidence. See *In re Gilliam*, 241 Mich App at 137-138.

Finally, although respondent-father failed to raise this evidentiary issue on appeal, we find it appropriate to exercise our discretion under MCR 7.216(A)(7) to also grant relief to him on that basis. The requirements of MCR 3.997(F)(1)(b) apply with equal force to respondent-father, and the plain error in admitting inadmissible evidence to prove new or different circumstances applies equally to him. When entering a plea, he admitted to methamphetamine use and homelessness; he did not admit to failing to protect KL from sexual assault or any of the other new issues identified by petitioner. Thus, we find it just to afford relief to respondent-father on the basis of respondent-mother's evidentiary argument, despite his attorney's failure to raise the issue for him on appeal. See MCR 7.216(A)(7).

D. STATUTORY GROUNDS FOR TERMINATION

Next, we take up respondent-mother's argument that the trial court erred when it relied on marijuana use as a basis for terminating respondents' parental rights because no evidence showed that the marijuana use put the children at risk of harm. In challenging the trial court's analysis of statutory grounds for termination, respondent-mother also argues that the trial court clearly erred by finding statutory grounds to terminate her rights to KL and JL when her infant was in her care. We review for clear error the trial court's decision that statutory grounds for termination have been proven by clear and convincing evidence. *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "A trial court's decision is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Id*. at 41 (quotation marks, citation, and brackets omitted). "This Court gives deference to a trial court's special opportunity to judge the weight of the evidence and the credibility of the witnesses who appear before it." *In re TK*, 306 Mich App 698, 710; 859 NW2d 208 (2014).

"To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). Here, the trial court terminated respondents' parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j). Those provisions state:

> (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:
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> * * *
>
> (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:
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> (*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.

* * *

> (g) The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody 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.

In the case of respondent-mother, the conditions leading to adjudication included drug use (specifically methamphetamine), domestic violence, failure to send the children to school, and her act of allowing the children to run the streets unsupervised. By the time of the termination hearing, additional issues had surfaced, including failure to protect KL from sexual assault, housing, and employment. The trial court relied on the same reasons for terminating respondents' rights under all three subsections. But, as discussed, the failure-to-protect allegation was not proved by legally admissible evidence, see MCR 3.997(F)(1)(b), so it could not be cited to support the termination of respondents' parental rights. The only issues, therefore, were drug use, domestic violence, lack of schooling, and housing.

Of those issues, there was one single allegation of domestic violence before the case began. There was no other evidence of domestic violence, the caseworker did not think domestic violence constituted a barrier at the time of the termination hearing, and it was not a factor in the trial court's termination ruling. Similarly, there was no indication that the children were not attending school, and that did not seem to enter into the trial court's analysis. Although RL's employment was not entirely consistent throughout the case, he obtained employment and supported respondent-mother financially while she stayed at home with their baby. Respondent-mother and her partner, RL, to their credit, addressed their methamphetamine problem. Indeed, no one in this case tested positive for methamphetamine for over a year before the termination hearing.

The trial court, however, concluded that respondent-mother failed to address her substance-abuse problem because she continued to test positive for low levels of THC and RL, her partner, admitted that he used marijuana. RL's THC levels on his drug tests were quite high. In addressing marijuana as a basis for terminating parental rights, the trial court stated:

> One of the things that this Court has said is no use of drugs or alcohol including marijuana. Yes, marijuana is now legal. There was a time when people went to prison for marijuana. That's not the case. It's legal. But this Court doesn't want parents using mind altering substances in order to and—and be parenting.
>
> In an example of why that is goes back to the BRISSA [sic] report where [KL] says she was drinking alcohol and using marijuana when she was living in her mother's house. And the father's home. And on page 11. Is that appropriate? It's

> legal. It's legal for 21-year-olds using. Again, it's not legal for this Court. This Court doesn't accept it and has ordered and specifically mentioned time after time after time this case and many other cases, use of marijuana is not allowed here. It's not allowed on probation in our criminal cases either and I make a point of that.
>
> Mom's live together boyfriend, [RL] who is part of this whole situation, that's who Mom lives with, that's her significant other. That's her testimony today. This drug testing, it would appear here that the cutoff point where they don't measure any higher is 1000 on THC, THC marijuana, specifically here. When I'm looking at Exhibit 4 which is [RL's] test results you got a few of these that fall less than a 1000 but the vast majority of them appear to me, now you've got some that are a low here of 209 and 105 it looks like perhaps is the lowest, yeah, that's the lowest, on one occasion.
>
> So many other ones he's at a thousand which means they stopped counting at a thousand. That's like way up here. Mom thinks it's okay that he goes to IAC and smokes dope on the way to work. She sees nothing wrong with that. Her testimony is it's legal. It must be okay to do it. It's 1egal to drink alcohol too. You think drinking a pint of vodka on the way to work at IAC is acceptable? No. It's not acceptable. It's not acceptable to use marijuana at these kind of levels specifically when I've ordered there cannot be marijuana use and he's part of family. He and Mother are tied together. They were all tied together in the trailer, still tied together. He completely ignores getting the children back, stopping the use of marijuana.
>
> Mom sees nothing wrong with it. Once again, it's okay to smoke dope on the way to work. There's nothing wrong with that. It's legal. She's choosing [RL] over and above the return of her children. Actions speak louder than words. Anybody can say anything but it's what you do that's counted.

The trial court's reasoning is flawed, and it does not support the termination of respondents' parental rights on the basis of marijuana use. Use of drugs—even *illegal* drugs—cannot just be assumed to cause harm to children or to warrant the termination of parental rights. *In re LaFrance Minors*, 306 Mich App at 731. There are certainly cases that "dramatically illustrate that substance abuse can cause, or exacerbate, serious parenting deficiencies," *id*., but there must be evidence that the drug use is linked to abuse or neglect. That cannot be assumed. *Id*.; see also *In re Richardson*, 329 Mich App 232, 255; 961 NW2d 499 (2019) (holding that substance abuse must be viewed in the context of the effect on parenting ability and the substance abuse's actual harm or articulable risk of harm cannot be presumed, but must be supported by facts in the record).

Indeed, with respect to marijuana in particular, under MCL 333.27955(3) of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*., "[a] person shall not be denied custody of or visitation with a minor for conduct that is permitted by this act, unless the person's behavior is such that it creates *an unreasonable danger* to the minor that can be clearly articulated and substantiated." (Emphasis added). That provision of the MRTMA applies to child-protective proceedings in particular. *In re Ott*, ___ Mich App ___, ___; ___ NW2d ___ (2022)

(Docket No. 362073); slip op at 10. See also *In re Richardson*, 329 Mich App at 255 (applying a comparable statutory provision in the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., in the context of a statutory-grounds analysis to conclude that termination could not be based upon marijuana use alone without a showing that it affected parenting ability). Here, the trial court quite significantly disapproved of the use of marijuana by respondents and RL and respondent-mother's tolerance of RL's marijuana use. But missing from the trial court's analysis is an explanation of how that marijuana use affected respondents' ability to parent. The trial court emphasized KL's hearsay statement that she had marijuana while she was living in respondents' home. But the claim that KL used drugs was a new or different circumstance, meaning that hearsay statements should not have been admitted to prove that point, see MCR 3.977(F)(1)(b); MRE 802, and the trial court erred by relying on KL's purported drug use as a basis to terminate parental rights.

Even if KL's hearsay statement is considered, no evidence even suggests that respondents provided her with marijuana, that they knew she had marijuana, or that they failed to secure their marijuana so that she could have taken it from them. To the contrary, the testimony on this matter was that respondents kept their marijuana under lock and key. Even the caseworker conceded that there was no smell of smoke in the home and no indication that respondents used marijuana around the children. Beyond that, during the case, the children spent overnight visits in the home, yet the only major concern arising from those visits was KL's allegation of sexual assault by teenagers in the home. But, as discussed, the allegation that respondents failed to protect KL constituted a new or different circumstance that could only be established by legally admissible evidence, see MCR 3.997(F)(1)(b), which was not presented at the termination hearing. Nothing in the findings of the trial court or the evidence presented indicates that respondents' use of marijuana—or respondent-mother's tolerance of RL's marijuana use before going to work—posed any danger to the children or otherwise affected respondents' ability to parent. The trial court may personally disapprove of marijuana use, but, without more, that is not a valid basis for terminating parental rights. See *In re Richardson*, 329 Mich App at 255.

The only remaining concern is respondent-mother's housing, which was not identified as a barrier until late in the case. Indeed, respondents were evicted from the trailer where they lived on October 24, 2022, approximately five weeks before the termination hearing on November 30, 2022. When new issues arise—and housing was a new issue for respondent-mother that was not a basis for her adjudication[4]—respondents must be afforded notice and a reasonable opportunity to rectify the conditions. See MCL 712A.19b(3)(c)(*ii*). For most of the case, respondent-mother lived with RL in a trailer, where she also permitted respondent-father to live. Although sometimes described as cluttered or messy, the trailer was, for most of the case, deemed stable housing even if it was not perfect. See *In re Kaczkowski*, 325 Mich App 69, 75; 924 NW2d 1 (2018) (finding that housing posed no threat to the child when the housing was "stable, even if it is not perfect"). Respondent-mother was evicted from the trailer on October 24, 2022, when she moved into a hotel. The DHHS apparently considered the hotel to be inadequate housing. But, rather than providing

[4] The trial court and petitioner blurred respondents' respective issues leading to the adjudication. Respondent-*father* lacked proper housing when the case began. Respondent-mother did not. Early in the case, her trailer was deemed adequate, although there were notes that she was in the process of renovating. Much later in the case, allegations of cockroaches and inappropriate housing arose.

respondent-mother with services or making any effort to assist her in obtaining new, low-income housing, the DHHS sought termination of her parental rights and identified housing as a basis for termination. If housing was an issue, respondent-mother should have been afforded an opportunity to rectify this new condition. See MCL 712A.19b(3)(c)(*ii*).

Moreover, the record does not indicate, by clear and convincing evidence, that respondent-mother's housing was inadequate. Respondent-mother was not homeless after eviction. Instead, while she saved money for new housing, respondent-mother moved into a hotel, where she had a bedroom and a living room. Living in a hotel might seem less than ideal, but there is no indication that the hotel was unsafe, unclean, or otherwise unfit for the children. Housing need not be perfect to be suitable for children. See *In re Kaczkowski*, 325 Mich App at 75. Indeed, we note that, while seeking termination of respondents' parental rights to KL and JL and contending that respondent-mother's trailer and her new hotel room constituted inappropriate housing, the DHHS nonetheless permitted respondent-mother's baby to remain in respondent-mother's care. In a similar situation involving multiple children, this Court once concluded that it was "significant" that the department claimed a house was unacceptable for children, but had no concern about allowing the respondents' young baby to remain in that home. *In re Newman*, 189 Mich App 61, 67; 472 NW2d 38 (1991). The same is true here. If respondent-mother's housing was so unacceptable, and if the marijuana use by respondent-mother and RL presented such an obstacle to parenting as to warrant termination of parental rights, an infant would be the child most imperiled by respondent-mother's purported failings. Yet, the infant—who was born in March 2022—remains in respondent-mother's care and custody. Despite numerous home visits, the DHHS made no attempt to file a petition to bring her under the trial court's jurisdiction. Although certainly not dispositive, when considered with the other circumstances here, the infant's continued placement with respondent-mother is significant in assessing whether the trial court's termination of respondents' parental rights was supported by clear and convincing evidence. See *id*.

As our discussion presages, we conclude that the trial court's finding of statutory grounds to terminate respondent-mother's parental rights is unsupported by clear and convincing evidence. The two most significant issues in the trial court's analysis were ongoing marijuana use and the lack of safety in respondents' home stemming from their failure to protect KL from sexual assault. For the reasons we have discussed, the failure-to-protect allegation had to be established by legally admissible evidence, not the hearsay presented at the termination hearing. Further, the trial court erred by injecting its personal views of marijuana and using its disapproval of respondents' use of marijuana—without linking that use of marijuana to abuse or neglect—as a basis for termination. Other issues—including use of methamphetamine and domestic violence—were resolved.[5] Even though there was evidence that respondent-mother's hotel housing was not ideal, the evidence does not clearly and convincingly support termination, particularly given the short timeframe between respondent-mother's eviction and the termination of her rights. If better housing is needed, she should be given time and assistance to obtain it.

[5] The only other issue mentioned was respondent-mother's criminality, which comprised a single retail-fraud conviction. Criminal history alone—even a violent criminal history—does not justify termination. See *In re Mason*, 486 Mich at 165.

Respondent-father does not expressly address statutory grounds, but he does argue that he was not provided reasonable services, which "ultimately relates to the issue of sufficiency." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). We note that, as compared to respondent-mother, the case for termination of respondent-father's rights under MCL 712A.19b(3)(c)(*i*), (g), and (j) is somewhat stronger because housing has been a consistent concern for him since the very beginning of the case, and despite time to rectify that problem, his housing was still unstable at the time of the termination hearing in November 2022. Although he made considerable progress by abstaining from methamphetamine use and securing employment, his failure to address his housing concerns, despite ample time, tends to support termination. But, just as with respondent-mother, two of the trial court's principal reasons for termination—marijuana use and lack of safety flowing from KL's allegations of sexual assault—do not support the trial court's ruling in this case. Setting aside these issues, clear and convincing evidence does not support the trial court's conclusions that respondent-father will be unable to provide proper care in a reasonable time, particularly if some housing assistance is provided by the DHHS, or that the children face a reasonable likelihood of harm in his care. See MCL 712A.19b(3)(c)(*i*), (g), and (j). Having determined that respondent-mother's parental rights should not be terminated, on the facts of this case, we also conclude that termination of respondent-father's parental rights would be premature without a showing that he will not be able to care for the children in a reasonable period of time either personally or through *relatives*, e.g., respondent-mother. Because there remains a reasonable likelihood that respondent-father will be able to provide proper care (either personally or through respondent-mother) for KL and JL within a reasonable time, termination is inappropriate. *In re Mason*, 486 Mich at 164-165.

E. PARENTING TIME

Respondents both challenge the trial court's decision to condition parenting time on three consecutive clean drug screens. In addition, respondent-mother insists that the trial court erred by suspending parenting time in the wake of KL's allegations of sexual abuse. Respondents contend those parenting-time decisions were improper absent any finding of harm to the children. Without a finding of harm to the children, the suspension of parenting time, including supervised parenting time, at the beginning of the case—and the threat that it would be suspended again if respondents tested positive in the future—was "patently invalid." See *In re Ott*, ___ Mich App at ___; slip op at 11. Under MCL 712A.13a(13), "[i]f a juvenile is removed from the parent's custody at any time, the court shall permit the juvenile's parent to have regular and frequent parenting time with the juvenile." See also MCL 712A.18(1)(p). But "[i]f the court determines that parenting time, even if supervised, may be harmful to the juvenile's life, physical health, or mental well-being, the court may suspend parenting time until the risk of harm no longer exists." MCL 712A.13a(13). See also MCL 712A.18(1)(p). Applying these provisions in the context of drug use, we recently explained that a respondent's use of marijuana did not justify denial of her parenting time unless the trial court concluded that such parenting time may be harmful to the child. *In re Ott*, ___ Mich App at ___; slip op at 11. Because no such determination was made, this Court decided that "the orders suspending respondent's parenting time for THC-positive drug screens and requiring three consecutive negative drug screens before parenting time could resume were patently invalid. *Id*. That conclusion applies "to the suspension of parenting time for positive drug screens regardless of whether marijuana is involved or some other drug." *Id*. at ___; slip at 11 n 11.

Here, the trial court erred in March 2021—when respondents were still engaged in the use of methamphetamine—by conditioning parenting time on three clean drug screens without making

the required determination that parenting time, even if supervised, would have been harmful to the children's lives, physical health, or mental well-being. See *id*. at ___; slip at 11. Similarly, in September 2022, the trial court erred by completely suspending parenting time following KL's allegations of sexual assault by someone in respondent-mother's home. Even if KL's allegations warranted suspension of in-home, unsupervised visits, the trial court should have considered the availability of supervised parenting time and decided whether parenting time, even if supervised, could have been harmful to the children's lives, physical health, or mental well-being. See *id*. We also note that this inquiry should have been conducted individually for KL and JL. Parenting time should only be suspended when it "may be harmful to the juvenile's life, physical health, or mental well-being . . . ." MCL 712A.13a(13). This language indicates that the impact of parenting time upon a child must be analyzed for each child. Even if suspension of parenting time with KL was warranted, it does not follow that JL also should have been deprived of parenting time. In short, the trial court failed to make the appropriate findings to warrant suspension of parenting time in March 2021 or in September 2022. On remand, the trial court shall adhere to MCL 712A.13a(13) and MCL 712A.18(1)(p) before denying respondents parenting time.

F. REASONABLE EFFORTS

Finally, we briefly note that respondents both challenge the reasonable efforts made by the DHHS, contending that they were denied appropriate services—or that services were improperly delayed—and that the termination of their parental rights was premature absent reasonable efforts. Respondent-father emphatically asserts that he was denied housing services and that substance-abuse services were not provided to him until late in the case. Respondent-mother, in comparison, emphasizes that after the BRISA assessment, a recommendation was made that she and KL engage in therapy together, but that therapy was not implemented. Because of our decision to vacate the termination of respondents' parental rights, we find it unnecessary to address whether termination was premature in light of respondents' complaints about the reasonable efforts made. We leave it to the trial court on remand to ensure that reasonable efforts were, or are, provided for respondents.

Vacated and remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher P. Yates
/s/ Stephen L. Borrello
/s/ Sima G. Patel