

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of Q. L. MACKIN, Minor.

UNPUBLISHED
June 21, 2012

No. 305951
Manistee Circuit Court
Family Division
LC No. 09-000075-NA

In the Matter of Q. L. MACKIN, Minor.

No. 305952
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In the Matter of I. N. VANCE, Minor.

No. 305954
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Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

In these consolidated appeals, respondents D. Vance, M. Mackin, and E. Baczewski appeal as of right the trial court's orders terminating their parental rights to QLM (the child of respondents Vance and Mackin) and INV (the child of respondents Vance and Baczewski). The court terminated Vance's parental rights to QLM pursuant to MCL 712A.19b(3)(c)(i) (the conditions that led to the adjudication continue to exist), (g) (failure to provide proper care and custody), (i) (parental rights to another child previously terminated), and (j) reasonable

likelihood of harm if child is returned to the parent's home), and terminated her parental rights to INV under §§ 19b(3)(g), (i), and (j). The court terminated Mackin's parental rights to QLM pursuant to §§ 19b(3)(g) and (j), and terminated Baczewski's parental rights to INV under §§ 19b(3)(c)(i), (g) and (j). Because Vance and Baczewski were not denied the effective assistance of counsel and petitioner made reasonable efforts to accommodate their disabilities, Baczewski was provided a meaningful opportunity to participate in services, clear and convincing evidence supported the termination of Mackin's parental rights and termination was in the child's best interests, and Mackin was provided reasonable reunification services, we affirm.

The evidence established that INV, the older child, has significant medical needs. Although some of his medical conditions have resolved, he continues to experience other conditions that will require special attention, treatment, and education for the foreseeable future. The younger child, QLM, also has health problems, but they are not as severe as INV's. Baczewski was incarcerated for several months during the pendency of these proceedings. He participated in services while in prison, but did not benefit from the services, in part because of his cognitive limitations. He was also provided with supervised parenting time and parental instruction both before and after his incarceration. Vance is also cognitively impaired and was subject to a full guardianship throughout these proceedings. Mackin is not cognitively impaired, but the evidence showed that he had no interest or motivation in participating in services or establishing a meaningful relationship with his son.

I. DOCKET NOS. 305951 AND 305954 (RESPONDENT VANCE)

Vance argues that her attorney rendered ineffective assistance of counsel by failing to assert her right to accommodations for her mental disability under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* Because Vance did not raise this issue in the trial court, our review is limited to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). “[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.” *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). To establish an ineffective assistance of counsel claim, a respondent must show that counsel's performance fell below an objective standard of reasonableness and that she was so prejudiced by the representation that she was denied a fair hearing. *Id.* at 198. To establish prejudice, a respondent must demonstrate a reasonable probability that the result of the proceeding would have been different absent counsel's error. *Id.*

The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 USC 12132. A “qualified individual with a disability” is

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. [42 USC 12131(2).]

“Mental retardation” is a disability within the meaning of the ADA. 28 CFR 35.104.

In *In re Terry*, 240 Mich App 14, 25; 610 NW2d 563 (2000), this Court held that a disabled parent may not raise violations of the ADA as a defense to termination of parental rights proceedings because the proceedings “do not constitute ‘services, programs or activities’ within the meaning of 42 USC 12132.” This Court explained, however, that the ADA requires the DHS, formerly the Family Independence Agency (FIA), “to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services.” *Id.* Accordingly, petitioner’s reunification services and programs must comply with the ADA. *Id.* This Court observed that “the state legislative requirement that the FIA make reasonable efforts to reunite a family is consistent with the ADA’s directive that disabilities be reasonably accommodated.” *Id.* at 26. “In other words, if the FIA fails to take into account the parents’ limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family.” *Id.* This Court further stated:

Any claim that the FIA is violating the ADA must be raised in a timely manner, however, so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward. The court may then address the parent’s claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate her parental rights. In such a case, her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court’s task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA. [*Id.*]

Although Vance argues that her attorney was ineffective for failing to raise an ADA challenge, the record establishes that, throughout the proceedings, her counsel questioned petitioner’s witnesses regarding the need to accommodate Vance’s disability. The record also establishes that petitioner made reasonable accommodations by involving Vance’s guardians in the proceedings and by providing one-on-one parenting education sessions for her. The sessions were structured so that Vance received instruction immediately before her parenting time, giving her the opportunity to implement the lessons while they were fresh in her mind. As petitioner’s witnesses testified, however, Vance had difficulty retaining even the most basic information about her children’s ordinary needs and was unable to manage information regarding their special needs. For example, she could not remember that QLM could be fed only nondairy foods and did not understand why INV needed physical therapy. Vance fails to indicate what other accommodations could have closed, or even narrowed, the gap between her limited cognitive functioning and the complex, substantial demands of caring for her special-needs children. In light of the evidence that petitioner attempted to structure services in a manner to accommodate Vance’s cognitive limitations, and her failure to identify any accommodation that could have made a meaningful difference in her potential to benefit from services, her ineffective assistance of counsel claim fails.

We also reject Vance's related argument that petitioner failed to make reasonable efforts to accommodate her disability. As previously discussed, violations of the ADA cannot be asserted as a defense to a petition to terminate parental rights, or to establish grounds to reverse an order terminating parental rights. Moreover, the record shows that petitioner made reasonable accommodations by involving Vance's guardians in the proceedings and providing one-on-one parenting sessions immediately before her parenting time. Other than generally arguing that she should have been afforded more parenting time, Vance fails to identify what accommodations should have been made, or how any accommodations could have helped her overcome her significant barriers to reunification given her severe cognitive limitations and her children's demanding medical needs. Accordingly, Vance has failed to establish a basis for relief.

II. DOCKET NO. 305952 (RESPONDENT MACKIN)

Mackin first argues that the trial court erred by finding that petitioner established the statutory grounds for termination by clear and convincing evidence. We review the trial court's decision for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). A finding is clearly erroneous when the reviewing court is left with the firm and definite conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

The trial court terminated Mackin's parental rights under MCL 712A.19b(3)(g) and (j), which allow termination under the following circumstances:

(g) The parent, without regard to intent, 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.

Petitioner presented ample evidence in support of these grounds. The evidence showed that Mackin never established housing, that his conduct resulted in his and Vance's eviction from Vance's apartment, and that he spent parenting time sessions either sleeping or reading. Although he contends that his medication caused him to fall asleep during visits, the record shows that Mackin did not interact with his child even when he was awake and, instead, spent the time reading to himself. Mackin failed to demonstrate any commitment or desire to fulfill his parental responsibilities.

Mackin's reliance on *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), is misplaced. In that case, the Court held that a father's temporary incarceration did not warrant termination where family members cared for the children, and the father was not allowed the opportunity to demonstrate that he would be able to provide care after his release. *Id.* at 164-165. Unlike the incarcerated father in *In re Mason*, Mackin was not temporarily prevented from caring for his son. Rather, he was provided services, he failed to benefit from those services, and he showed

little interest in making the effort necessary to establish a parental relationship with QLM. The evidence clearly supports the trial court's finding that there was no reasonable expectation that Mackin would be able to provide proper care and custody for QLM within a reasonable time and that QLM was reasonably likely to be harmed if placed in Mackin's care.

We also reject Mackin's argument that petitioner failed to comply with its statutory duty to provide reasonable reunification services. In general, when a child is removed from his parents' custody, the DHS is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan. MCL 712A.18f(1)-(4); *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). The reasonableness of the services offered to a respondent may affect the sufficiency of the evidence in support of a statutory ground for termination. *Id.* at 541.

The record fails to support Mackin's claim that petitioner failed to provide reasonable reunification services. Mackin's principal complaint is that he was not offered sufficient parenting time to bond with QLM and demonstrate his parenting abilities. The record shows, however, that Mackin was offered three-hour and two-hour parenting time sessions, and that he wasted those opportunities by sleeping or reading to himself. The visits were shortened from three hours to two hours because Mackin and Vance did not make beneficial use of the time, and they were later shortened to one hour because Mackin and Vance started preparing to leave before the visits were over. Although Mackin also complains that petitioner did not offer him housing assistance, the evidence indicates that petitioner offered him information regarding affordable housing, but Mackin failed to follow up on the information. In sum, the record shows that petitioner provided reasonable reunification services, but Mackin squandered the opportunities that were offered to him and made little effort to improve his situation.

Mackin further argues that termination of his parental rights was not in QLM's best interests. Once a statutory ground for termination is established, the trial court shall order termination of parental rights if it finds that termination is in the child's best interests. MCL 712A.19b(5). We review for clear error the trial court's best interests determination. *In re JK*, 468 Mich at 209. In light of the overwhelming evidence showing that Mackin made no effort to engage QLM during visits and showed no interest in establishing a nurturing and meaningful relationship with the child, the trial court did not clearly err by finding that termination of Mackin's parental rights was in QLM's best interests.

III. DOCKET NO. 305955 (RESPONDENT BACZEWSKI)

Baczewski first argues that his attorney was ineffective for failing to assert his right to reasonable accommodations under the ADA. Similar to Vance, Baczewski does not indicate specifically what accommodations should have been made that might have made a difference in the proceedings. Rather, he leaves this Court to speculate regarding what counsel might have done to assert his ADA rights, and how the unspecified accommodations might have affected the outcome of the proceedings. Consequently, Baczewski has failed to establish that counsel's performance prejudiced him. *In re CR*, 250 Mich App at 198.

Further, the record fails to support Baczewski's claim that petitioner failed to provide reasonable reunification services tailored to his cognitive limitations. Petitioner provided

Baczewski with one-on-one parenting education sessions, but even with individualized instruction he could not retain basic information such as how to change a diaper. Baczewski was also provided anger management classes and reading classes while in prison, but he failed to benefit from them. Thus, the record shows that petitioner made reasonable efforts toward reunification.

Baczewski also argues that counsel was ineffective for failing to move for the appointment of a guardian for himself. Because Baczewski did not raise this argument in the trial court, our review is limited to errors apparent on the record. *Sabin*, 242 Mich App at 658-659. Under MCL 700.5306(1), the trial court may appoint a guardian if it “finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual[.]” An “[i]ncapacitated individual” is “an individual who is impaired by reason of mental illness, mental deficiency . . . to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions.” MCL 700.1105(a). Although the evidence showed that Baczewski was cognitively limited and functioned at the level of a 12-year-old, his cognitive limitations do not necessarily establish that he lacked the capacity to make or communicate informed decisions. Because it is not apparent from the record that Baczewski required a guardian, his ineffective assistance of counsel claim fails.

Finally, Baczewski argues that petitioner did not provide him an opportunity to participate in services while he was incarcerated and wrongfully determined that his incarceration prevented him from caring for INV. Baczewski relies on *In re Mason*, 486 Mich at 155, previously discussed. In that case, our Supreme Court reversed an order terminating an incarcerated father’s parental rights where he was not given the opportunity to participate in services over a 16-month period. The Court noted that the father “missed the crucial, year-long review period during which the court was called upon to evaluate the parents’ efforts and decide whether reunification of the children with their parents could be achieved.” *Id.* Accordingly, the Court found that termination was premature and opined that the mere present inability to personally care for a child as a result of incarceration is not a basis for termination. *Id.* at 159-160.

Here, the trial court did not terminate Baczewski’s parental rights because he was incarcerated and temporarily unavailable to care for INV. Rather, Baczewski had been released from prison before the termination hearing began, but he failed to establish housing. He was also offered services while in prison, including parenting classes, counseling, and anger management classes. He failed to benefit from those services, as well as the services that petitioner offered to him before and after his incarceration. Thus, Baczewski’s failure to achieve reunification is not attributable to petitioner’s failure to offer him reunification services, but rather to the wide gap

between his limited benefit from the services provided and INV's significant medical needs.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens