

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ROBERT BRINKMAN, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TRACY L. BRINKMAN,

Respondent-Appellant.

UNPUBLISHED
May 12, 2005

No. 259377
Kent Circuit Court
Family Division
LC No. 04-051790-NA

In the Matter of HALEIGH HASTINGS, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TRACY L. BRINKMAN,

Respondent-Appellant.

No. 259378
Kent Circuit Court
Family Division
LC No. 04-051791-NA

In the Matter of PAMELA CARPENTER, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TRACY L. BRINKMAN,

Respondent-Appellant.

No. 259379
Kent Circuit Court
Family Division
LC No. 04-051792-NA

In the Matter of PAMELA CARPENTER, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHAD MICHAEL CARPENTER,

Respondent-Appellant.

No. 259383

Kent Circuit Court

Family Division

LC No. 04-051792-NA

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

In these consolidated appeals, respondent Tracy Brinkman appeals as of right from the trial court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i) (failure to rectify conditions that led to adjudication), (g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm if the child is returned to the parent). Respondent Chad Carpenter appeals as of right from the trial court order terminating his parental rights to the minor child Pamela Carpenter, following his execution and filing of a document indicating his intent not to contest termination of his parental rights. We affirm.

The trial court did not clearly err in determining that the statutory grounds for termination of respondent Brinkman's parental rights were established by clear and convincing evidence. See MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The condition that led to adjudication was Brinkman's medical neglect of the children. Although her neglect of the juvenile diabetes suffered by her minor son, Robert, was of primary concern because of its potentially life-threatening consequences, the evidence showed that both Haleigh and Pamela also suffered from significant medical conditions requiring regular attention. Haleigh was determined to have very poor eyesight and hearing deficits, which required eye exercises, the insertion of drainage tubes in her ears, and possible monitoring of hearing aids in the future. Pamela was shown to suffer from a genetic kidney condition that required daily administration of antibiotics as well as periodic kidney scans.

With respect to Brinkman's ability to monitor these conditions the evidence showed that, even with the assistance of a caseworker, Brinkman, who had been diagnosed during the course of the proceedings with cognitive defects described generally as a learning disability, complied with the requirements of the children's strict medical regimen and numerous appointments only eighty percent of the time during the four months preceding the termination hearing. Although such compliance represented a marked improvement from the time jurisdiction over the children was assumed, it was nonetheless insufficient to constitute proper care or custody, and placed the children at risk of harm in her care. Indeed, the dire consequences associated with less than full

compliance with the regimen designed to treat Robert's juvenile diabetes required nothing less than full compliance. Similarly, although Haleigh's medical condition was not life threatening, and Pamela's was not as serious as that of Robert, Brinkman's delay in filling Haleigh's eyeglass prescription for several months and failure to remember the surgery for insertion of Haleigh's ear tubes and at least one of Pamela's kidney scans, showed that the children's sight and hearing, as well as their basic quality of life, would suffer severely if they were returned to Brinkman's care.

The evidence showed that although Brinkman was able to adequately parent an average child, her difficulty dealing with complex situations rendered her unable to properly care for the special medical needs of her children. The evidence further showed that, even with counseling, it was unlikely that her core level of functioning would improve and that, therefore, there was no reasonable expectation that she would rectify the condition of medical neglect, or otherwise become able to provide proper care or custody for the children, within a reasonable time. The evidence similarly showed that it was reasonably likely that during the course of childhood other complex medical, physical, emotional, and educational challenges would arise, which Brinkman would be unable to adequately address. In light of such evidence, we find no clear error in the trial court's conclusion that grounds for termination of Brinkman's parental rights pursuant to MCL 712A.19b(c)(i), (g), and (j) were established by clear and convincing evidence. *Miller, supra*.

Further, the evidence did not show that termination of Brinkman's parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Although the record makes clear that Brinkman and the children were bonded to and loved one another, the evidence showed that the children would suffer physical harm in her care, and did not show that termination of her parental rights was clearly contrary to their best interests.¹

Respondent Chad Carpenter raises numerous allegations of ineffective assistance of counsel and violation of his constitutional right to due process in the termination of his parental rights. He also asserts that the agency did not provide sufficient reunification efforts. Although Carpenter raised some of these issues in the trial court, thereby preserving them for our review, he did not raise the issue of his appointed counsel's conflict of interest in the trial court. Preserved constitutional issues are reviewed for error that is harmless beyond a reasonable doubt, and unpreserved constitutional issues are reviewed for plain error affecting a party's substantial rights, i.e., error that is outcome determinative. See *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). After review of the record we conclude that, even assuming Carpenter's due process rights to notice, to procedures due an incarcerated individual under MCR 2.004, to appointment of counsel, and to assistance of counsel free from conflict of interest

¹ Brinkman also argues that, given her learning disability, Bethany Christian Services and the Family Independence Agency failed to provide sufficient accommodations or reunification services and thereby discriminated against her in violation of the Rehabilitation Act of 1973, 29 USC 701, *et seq.* However, because Brinkman failed to raise these arguments below, they are not preserved for our review. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Consequently, we decline to address these issues on appeal.

were violated, those errors did not affect the outcome of the proceedings, or were otherwise harmless beyond a reasonable doubt. *Id.*

As previously noted, the trial court's order terminating Carpenter's parental rights was premised on his execution of a document stating that, because he was unable to provide a safe, stable, non-neglectful home for his child and would be unable to do so within a reasonable amount of time, he would not contest termination of his parental rights. The record shows that Carpenter's decision not to contest termination of parental rights did not arise from ineffective assistance of counsel, deprivation of due process rights, or any other procedural or substantive error, but rather was a personal choice knowingly, voluntarily, and intelligently made in light of his incarceration and the best interests of his minor daughter. Although Carpenter has appended to his brief on appeal an affidavit attesting that he executed and filed the document only because he was advised by his appointed counsel that he "would have a better chance of winning [an] appeal for the return of [his] daughter," neither that statement nor the affidavit in which it is contained were presented below and, therefore, are not part of the record for our review. See MCR 7.210(A)(1); see also *Tope v Howe*, 179 Mich App 91, 106; 445 NW2d 452 (1989) ("[m]aterials outside the scope of the record may not be considered on appeal"). Moreover, even were we to consider the affidavit, we note that the facts stated therein are in sharp contrast to Carpenter's testimony under oath at the termination hearing, wherein he assured the trial court that his decision to forgo any contest of the petition to terminate his parental rights was premised solely on what he believed to be in the best interests of his child, and not on any threats or promises of "easier treatment."

Finally, with regard to respondent Carpenter's claim that petitioner did not provide sufficient efforts to reunify him with Pamela, the evidence showed that he made himself unavailable for reunification before his incarceration. Once he was in prison, services were not available. Consequently, we reject Carpenter's claim that petitioner failed to provide services.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra