

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 6, 2012

In the Matter of SMITH, Minors.

No. 308819
Wayne Circuit Court
Family Division
LC No. 07-472185-NA

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Respondent-mother F. Lucas-Williams appeals as of right the order terminating her parental rights to her three minor children. The trial court determined that (1) the Department of Human Services (the Department) made reasonable efforts to reunify Lucas-Williams with her children, (2) MCL 712A.19b(3)(c)(i), (g), and (j) provided statutory grounds for terminating her parental rights, and (3) termination would be in the children's best interests. Because we conclude that (1) the trial court clearly erred when it determined that the Department made reasonable efforts to reunify Lucas-Williams with her children and (2) the trial court clearly erred when it determined that the Department had proved the statutory grounds by clear and convincing evidence, we reverse and remand.

I. FACTS

A. BACKGROUND FACTS

In September 2007, the Department petitioned the trial court for temporary custody over the minor children. At the preliminary hearing, Lucas-Williams admitted that her children were without proper care after she passed out in a restaurant. She admitted that she overdosed on Xanax, a narcotic for which she had a prescription. D. Smith, who acted as the children's father and was a respondent in the proceedings, testified that he was aware of Lucas-Williams's substance abuse history. He testified that he meant "Xanax. . . . [T]he doctor kept on prescribing her Xanax to the point they increased the milligrams on it and . . . I was concerned about it."

At the dispositional hearing, the trial court adopted the Department's service plan, and ordered Lucas-Williams to participate in a psychological evaluation and counseling, to participate in a substance abuse assessment and drug screens, and to maintain suitable housing and a legal source of income. In June 2008, the trial court returned the children to Lucas-Williams's care. In November 2008, the trial court dismissed the case.

B. THE CHILDREN'S REMOVAL

The petition here alleged that in May 2009, Lucas-Williams passed out at home. Emergency Medical Services (EMS) reported that one of the children found Lucas-Williams unresponsive. The child alerted an adult, who called EMS. EMS treated Lucas-Williams for an altered mental state with a brief loss of consciousness from an unknown cause. Lucas-Williams was treated with Narcan, a drug commonly used to treat heroin overdose. Lucas-Williams denied overdosing, but indicated to EMS that she might have taken Xanax, or that the adult who called EMS might have "slipped" her something. When the hospital told her that her medical records showed multiple Xanax overdoses, Lucas-Williams denied overdosing, and claimed that someone had stolen her information. In July, the Department petitioned the trial court for protective custody on the basis of substance abuse of Vicodin, Xanax, and Tylenol 3, which is Tylenol with a codeine additive.

At the adjudicatory hearing in November 2009, Lucas-Williams admitted that she was taking Vicodin, Xanax, and Tylenol 3, and that she passed out. She testified that she had prescriptions for the medications, but admitted that they "interfered with [her] ability to parent because they had not been adjusted appropriately." Contrary to repeated comments made by the Department and the trial court in subsequent proceedings, Lucas-Williams did *not* admit that she abused prescription substances.

At the dispositional hearing in Macomb County, Lucas-Williams's counsel challenged the substance abuse portion of her service plan. LaToya Harvey, the children's case worker, admitted that she had not contacted Lucas-Williams's doctor or Henry Ford Medical Center about Lucas-Williams's medications. Without evidence that would counter the opinion of Lucas-Williams's doctors, Harvey stated that she believed a doctor's indication that Lucas-Williams did not abuse substances "would just be the doctor's opinion." Harvey testified that she would recommend drug screens even if a doctor indicated that Lucas-Williams did not abuse substances. The trial court ordered Lucas-Williams to participate in a substance abuse assessment and drug screens. The dispositional court found that "[t]he children come within the provisions of the juvenile code . . . based on evidence of substance abuse." Macomb County subsequently transferred the case to Wayne County.

In December 2009, Lucas-Williams participated in a psychological evaluation and substance abuse assessment at the St. Francis Family Center's Clinic for Child Study. In February 2010, the Clinic indicated that Lucas-Williams's prognosis to be able to care for her children was fair if she took her medications as prescribed, including anticonvulsant medication, and if she received treatment for depression and anxiety. The Clinic recommended monitoring Lucas-Williams to ensure that she took her medication as prescribed. The Clinic referred Lucas-Williams to St. Francis Family Center for individual counseling, but the therapist at St. Francis Family Center reported that Lucas-Williams did not contact her. In March 2010, Lucas-Williams began therapy with Andrea Thomas, a limited license psychologist at Henry Ford Hospital.

In June 2010, St. Francis Family Center reported that Lucas-Williams was not participating in drug screens; Lucas-Williams indicated that she did not have a telephone to call for screens. St. Francis Family Center reported that Lucas-Williams tested positive for opiates

when she did screen, but that Lucas-Williams provided valid prescriptions that would cause positive screens. St. Francis Family Center also reported that Lucas-Williams's "therapist and Neurologist [Dr. Gregory Berkely] do not believe she has a substance abuse issue." Andrea Thomas confirmed that she monitored Lucas-Williams, and that she was taking her medications as directed.

At the June 2010 review hearing, Jessica Girz, the children's foster care worker, testified that Lucas-Williams missed five of eleven visits, but only verified two missed visits. The Department later corrected its documentation to reflect that Lucas-Williams missed only three visits. Girz testified that the children loved Lucas-Williams, were excited to see her, and were disappointed when she did not come to a visit.

Girz acknowledged that all Lucas-Williams's prescriptions were from a single hospital and that Lucas-Williams suffered from a documented seizure disorder, but Girz testified that she was concerned about the quantity of Lucas-Williams's prescriptions. Girz testified that she had difficulty contacting Lucas-Williams's doctors to determine why they prescribed the medications. Girz testified that Lucas-Williams did sign releases to allow the doctors to give her the information, but that the doctors refused to accept the releases. Girz testified that she had referred Lucas-Williams to counseling services and that she had not attended, but that her counseling with Thomas fulfilled her service plan's therapy requirement.

Lucas-Williams expressed concerns that, though she had informed the Department in 2009 that she had a seizure disorder, it took the Department until June 2010 to verify that she had a medical condition. In light of Thomas's and Dr. Berkely's statements that they were monitoring her situation and that she was not abusing substances, she again questioned the purpose of drug screens. The trial court ordered the Department to file a petition for permanent custody of the children because Lucas-Williams had inconsistently complied with her service plan, and ordered a Court Appointed Special Advocate (CASA) assigned to the case.

In October 2010, the CASA reported that Dr. Berkely indicated that the loss of her children caused Lucas-Williams to have increasingly severe headaches and migraines, which in turn caused seizures. The CASA attached a letter in which Dr. Berkely explained that Lucas-Williams's medications might cause her to test positive for opiates and morphine. Through counsel, Lucas-Williams again expressed her concern that she had a seizure disorder and was being improperly "marked with [a substance abuse] reputation[.]"

Sandy Azumi, the children's new foster care worker through St. Francis Family Center, testified that both Lucas-Williams and the children had been late to visits. She admitted that difficulties with bus scheduling was a factor.

In January 2011, Steve Kalbfleisch, the children's new foster care worker through St. Francis Family Center, reported that Lucas-Williams attended nine of twelve visits with her children. She missed one visit because of D. Smith's death on October 25, 2010. Kalbfleisch testified that Lucas-Williams and the children were frequently ten to 20 minutes late to visits. He further testified that Lucas-Williams had completed parenting classes, and that her parenting time reports were positive. Kalbfleisch testified that Thomas informed him that she had no concerns about Lucas-Williams's ability to parent her children.

Kalbfleisch reiterated that the reason the children were in foster care was Lucas-Williams's substance abuse. He testified that Thomas informed him that she believed Lucas-Williams initially "was misdiagnosed as it being . . . drug overdose as opposed to having a seizure disorder . . . but according to the initial petition that I read . . . the EMS worker stated that he administered I believe it's Narcaïn(sic) which is a drug used to reverse the effects in heroin overdose." Kalbfleisch testified that the Department still assumed that Lucas-Williams had abused substances. The Department argued that it could not tell whether Lucas-Williams was abusing her prescription medication because she was not submitting to drug screens. The trial court ordered continued compliance with the drug screens.

In March 2011, Lucas-Williams's counsel asked Argie Lomas, the children's case supervisor through St. Francis Family Center, what the purpose of Lucas-Williams's treatment plan was. Lomas testified "the treatment plan right now is address [sic] the issues with the positive drug screens." Lomas admitted that Lucas-Williams's screens were consistently positive for the same substances, and that Lucas-Williams had prescriptions that accounted for the positive screens. He expressed concern that Lucas-Williams's medication would interfere with her ability to parent, because Kalbfleisch had informed Lomas that during a home visit, Lucas-Williams was unable to follow his conversation.

Lomas testified that he had been unable to determine whether Lucas-Williams's new housing was suitable. However, he admitted that housing had not been an issue in this case.

Lucas-Williams argued that the Department had not made reasonable efforts to reunify her with her children. Lucas-Williams again reiterated that she had a seizure disorder, that she was taking prescribed medication, that her medication was monitored through Henry Ford Hospital, that the Department had not provided any evidence that she abused her medication, and that the service plan only addressed a condition that did not exist. Lucas-Williams submitted documentation from Thomas and Dr. Berkely that she was diagnosed in 2009 with intractable partial epilepsy, post-traumatic stress disorder, insomnia, and migraines. The documents indicated that she had four or five seizures a month, and that stress would increase the frequency of her seizures. The documents indicated that Lucas-Williams would appear disoriented and incoherent during seizures.

The Department argued that Lucas-Williams had admitted in front of the Macomb court that she was abusing prescription medication. But Lucas-Williams contested that characterization of her admissions. The trial court stated that Lucas-Williams admitted in front of the Macomb court that she had abused prescription medication, and that the Department was making reasonable efforts to rectify that condition. The trial court relied on Lucas-Williams's "admission" of substance abuse and ordered continued drug screens.

In June 2011, Kalbfleisch testified that Lucas-Williams attended nine of ten parenting visits. At the visit counted as missed, she arrived five minutes before the visit ended, and the supervising worker reported that her speech was slurred. Kalbfleisch testified that Lucas-Williams and the children were extremely bonded, that she was active with them, and that they drew pictures and wrote letters saying that they missed her.

Kalbfleisch testified that Lucas-Williams's screening agency informed him that, without a specialist, they could not tell whether her medication levels were high or low. Kalbfleisch reported that Lucas-Williams called consistently for screens, but provided only three of 15 screens on the correct days. Kalbfleisch testified that Lucas-Williams tested positive for opiates and morphine after her Tylenol 3 prescription expired, but later admitted that a prescription he was unaware of accounted for the discrepancy.

Kalbfleisch testified that he was aware that Lucas-Williams received all of her prescriptions from the Henry Ford Pharmacy and that her doctors were monitoring her medication use. Stating that Thomas was a critical witness, Lucas-Williams submitted an offer of proof that Thomas could testify that Lucas-Williams's prescriptions, doctors, and files were all through the same centralized group of doctors at Henry Ford Hospital, that Thomas was a part of the group, and that the group monitored Lucas-Williams's medication and prescription use. The trial court ordered a continuance.

Thomas did not appear at the continued dispositional review hearing in July 2011. Lucas-Williams testified that she did not admit that she took multiple medications that *caused* her to pass out. The trial court reviewed the file and stated that

[Lucas-Williams] made admissions to taking multiple medications and passing out. There's no finding in here that says . . . that the medications caused her to pass out. . . . The Court went to immediate disposition as the children come within the provisions of the juvenile code . . . based on evidence of substance abuse There was a finding of substance abuse in this case.

Lucas-Williams continued to challenge that characterization.

Kalbfleisch testified that he believed Lucas-Williams abused her prescription medication. However, he admitted on cross-examination that Thomas and Dr. Berkely had no concerns that Lucas-Williams abused her medication. The following exchange took place:

Q. Did you contact the lab and speak to the toxicologist with respect to the levels?

A. I contacted the lab regarding with [sic] respect to the levels and they said they'd have to hire a separate person to come in . . . and do testing regarding the levels.

Q. Did you require—request that?

A. I did not.

The trial court criticized Lucas-Williams for continuing to deny abusing substances. The trial court again stated that the Macomb court previously found that she abused substances. The trial court ordered the Department to petition for termination of Lucas-Williams's parental rights.

In October 2011, the trial court replaced Lucas-Williams's counsel at her request. The termination petition and hearing were delayed while genetic testing was conducted on one of the

children. Kalbfleisch testified that Lucas-Williams attended three of nine visits with her children, that on one occasion she called and indicated that her ride did not pick her up, and on another occasion the foster parents cancelled the visit because the children were on vacation.

In January 2012, the CASA reported that Thomas told the CASA that Lucas-Williams told Thomas that she had a seizure at a shopping mall on October 27, 2011, and that her purse and medication were stolen. Thomas advised Lucas-Williams to seek new prescriptions at the emergency room. Hospital documentation indicated that Lucas-Williams sought a Tylenol 3 refill on November 7, 2011, that records “show[ed] last fill on 10/10/11[,]” that her request was denied, and that Lucas-Williams was asked to return on November 10. Thomas reported that Lucas-Williams arrived without an appointment on December 7, 2011, was tearful and spoke with slurred speech, explained that she missed two appointments because she was overwhelmed, and asked to have her Tylenol 3 refilled. The nurse reported that Lucas-Williams was seeking her refill two days early. When the nurse came in to observe her, Lucas-Williams became more agitated and tearful, rose to leave, walked into a file cabinet, nearly walked into the door, and accused the nurse of only caring about her license. A third document indicates that Lucas-Williams called on January 9, 2011, and stated “that this request is overdue for a refill . . . script refill is not overdue.”

C. TERMINATION HEARING

Lucas-Williams’s counsel did not subpoena Thomas or Dr. Berkely to appear at the termination hearing. Only Lucas-Williams and Kalbfleisch testified at the termination hearing.

Kalbfleisch testified that Lucas-Williams was diagnosed with intractable partial epilepsy, posttraumatic stress disorder, insomnia, and a seizure disorder. He testified that she completed only 39 of 159 requested drug screens, and only explained that she would not “kill herself” to get to screens. He testified that Lucas-Williams consistently tested positive for codeine, morphine, benzodiazepines, hydrocodone, and hydromorphone, but admitted that Lucas-Williams had prescriptions that accounted for each positive screen. He testified that Thomas told him that Henry Ford monitored Lucas-Williams’s medication. He testified that he was concerned because Lucas-Williams did not always test positive for each substance.

Kalbfleisch testified that even if Lucas-Williams was not abusing her medication, he believed that the trial court should terminate her parental rights because she might pass out while caring for the children, leaving them without supervision. He testified that on some occasions, Lucas-Williams would not remember speaking with him, would not know what day it was, and did not know whether it was day or night. He testified that Lucas-Williams recognized she needed living assistance because she brought the idea up to him. He testified that though Lucas-Williams told him she was working to get an alternate care provider or her brother to live with her, but she did not provide any documentation that either event had happened. When asked if such a living arrangement would provide enough safety for the children, he testified that “if they were there 24/7. I mean, I’m assuming they wouldn’t be there 24/7.”

Kalbfleisch testified that Lucas-Williams attended therapy with Thomas at Henry Ford Hospital, and that her therapy did not include substance abuse treatment. He testified that Lucas-Williams attended parenting classes in September 2010 and participated in and completed the

classes, but was sometimes despondent. Kalbfleisch did not believe that Lucas-Williams benefitted from parenting classes.

Lucas-Williams testified that Dr. Berkely diagnosed her with epilepsy and post-traumatic stress disorder in 2009. She testified that she had started having about one seizure a year in 2004, but that she did not know the occurrences were seizures or that she had a seizure disorder until she was diagnosed in 2009. She testified that Dr. Berkely prescribed her seizure medication, which also helped with anxiety and sleeping, and prescribed pain medication for migraines and back pain from a car accident. She testified that she would not take her medication before going to see her neurologist, therapist, or children, because it would “have [her] dragging.”

Lucas-Williams testified that she was physically and mentally fit to have her children returned to her care. When asked if she felt she needed assistance, Lucas-Williams answered yes, and explained that she would need assistance from family and would accept other assistance from the court. Lucas-Williams testified that she tried to arrange home care in April 2011, but her application had been delayed when she moved after her home was burglarized.

D. THE TRIAL COURT’S FINDINGS AND CONCLUSIONS

The trial court found that the children came into the court’s jurisdiction in 2007 because of substance abuse. The trial court found that the children came back into the court’s care in 2009 because Lucas-Williams admitted that she was taking multiple medications and passed out.

The trial court found that the Department had offered Lucas-Williams adequate services, but she did not comply with or benefit from the service plan. The trial court found that there was clear and convincing evidence that Lucas-Williams abused substances, and that she was not likely to rectify the problem because she would not admit that she had it. The trial court noted that Lucas-Williams asked for medications before the drugs were due to be prescribed in October 2011, November 2011, and December 2011, “days or weeks in advance.” It found that Lucas-Williams’s condition had not improved through counseling with Thomas.

The trial court also found that Lucas-Williams had intractable partial epilepsy, which interfered with her ability to provide safe and appropriate care for her children. The trial court found that “when she has an epileptic seizure. She passes out. She forgets. She doesn’t know what’s happening. You can’t have that type of conduct going on when you have minor children that you may be responsible for.”

The trial court found that the Department provided clear and convincing evidence that Lucas-William’s “numerous medical conditions render her unable to properly parent these children . . . and . . . [a] prescription drug abuse problem,” and therefore statutory grounds supported terminating her parental rights.

II. REASONABLE EFFORTS

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

The Department argues that Lucas-Williams has waived this argument by not challenging the reasonableness of the services offered earlier. We strongly disagree. An issue is preserved when it is raised before the trial court.¹ The time for a parent to challenge a service plan is when the trial court initially adopts it.² This is simply not a case where a person has waited until appeal to argue that the service plan did not comply with their individual needs. From the very beginning of this case—at the dispositional hearing—Lucas-Williams challenged the appropriateness of her substance-abuse-focused service plan, arguing that she had medical conditions, valid prescriptions for her medications, and that those prescriptions were monitored by her doctors. Lucas-Williams challenged the appropriateness of drug screening at almost every hearing, and began arguing in January 2011 that the Department was not making reasonable efforts to reunify her with her children. This issue is preserved.

We review for clear error the trial court’s factual findings.³ A finding 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.”⁴ We review for clear error whether a trial court engaged in reasonable efforts to reunify a child with his or her parent.⁵

B. LEGAL STANDARDS

A parent has a fundamental liberty interest in the care and custody of his or her children under the Fourteenth Amendment of the United States Constitution.⁶ The trial court must make reasonable efforts to reunify a parent with his or her children in every case that lacks aggravating circumstances.⁷ The purpose of a case service plan is to facilitate returning children to their parents.⁸ Accordingly, a parent’s service plan must address the problems that brought the children into care.⁹ The Department must update the plan every 90 days.¹⁰ Because this state

¹ See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008); *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

² *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000).

³ *In re Mason*, 486 Mich 142, 152, 166; 782 NW2d 747 (2010).

⁴ *Id.*, quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

⁵ *In re Mason*, 486 Mich at 152.

⁶ *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

⁷ MCL 712A.19a(2); *In re Mason*, 486 Mich at 152.

⁸ MCL 712A.18f(3); *In re Mason*, 486 Mich at 156.

⁹ MCL 400.115b(2); MCL 712A.18f(2); *In re Rood*, 483 Mich 73, 99; 763 NW2d 587 (2009).

complies with federal standards, the Department's failure to comply with the federal scheme—including providing a parent with services designed to reunite a parent with his or her children—also can result in lost federal funding and financial penalties.¹¹

C. APPLYING THE STANDARDS

We conclude that the trial court clearly erred when it determined that the Department made reasonable efforts to reunify Lucas-Williams with her children.

It is troubling that throughout the proceedings, the trial court frequently stated as determinative that the Macomb court found that Lucas-Williams abused substances. We must correct the trial court when it incorrectly chooses, interprets, or applies the law.¹² We reiterate that the standard to determine whether the children come within the provisions of the juvenile code at the preliminary hearing is probable cause.¹³ The initial finding of probable cause is not determinative, and the Department must still prove the allegations contained in the petition by a preponderance of the evidence at an adjudication.¹⁴ Further, the Department's statutory duties to update a parent's service plan and provide the parent with necessary and relevant reunification services continue throughout the case.¹⁵ The Macomb court found that there was probable cause to assume jurisdiction over the children on its suspicion of substance abuse, because Lucas-Williams allegedly passed out while taking medication. The Macomb court's initial jurisdictional finding *was not* a determinative finding that Lucas-Williams abused her prescription medication.

Further, Lucas-Williams never admitted to substance abuse. Lucas-Williams admitted that she had passed out while taking prescription medications, and that her medications "interfered with [her] ability to parent because they had not been adjusted appropriately." Throughout these proceedings, the trial court repeatedly and improperly chastised Lucas-Williams for refusing to acknowledge her so-called admission that she abused substances, when she made no such admission. There was no admission or proof that Lucas-Williams abused substances in the adjudicatory stage of these proceedings. Any issues of substance abuse remained unproven.

It is clear from the record that Lucas-Williams only attended about 25 percent of her drug screens, at which she consistently tested positive for substances for which she had prescriptions. What is not clear from the record is how these drug screens could address the condition that caused the removal of Lucas-Williams's children.

¹⁰ MCL 712A.18f(5); *In re Rood*, 483 Mich at 99.

¹¹ *Id.* at 103.

¹² *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

¹³ MCR 3.965(B)(11); *In re Hatcher*, 443 Mich 426, 434; 505 NW2d 834 (1993).

¹⁴ See *In re AMB*, 248 Mich App 144, 168; 640 NW2d 262 (2001); MCR 3.972(C)(1).

¹⁵ See *In re Mason*, 486 Mich at 156.

As early as June 2010, Lucas-Williams provided evidence from her neurologist and therapist that she suffered from a seizure disorder, that her disorder mimicked the common symptoms of a drug overdose, that EMS had misdiagnosed her, and that she did not have a substance abuse issue. Also in June 2010, the Department admitted that Lucas-Williams had documented medical conditions. Dr. Berkely submitted documentation supporting that Lucas-Williams's epilepsy would make her appear disoriented and incoherent.

However, the Department vehemently opposed re-evaluating the substance abuse portion of Lucas-Williams' service plan. Even after Lucas-Williams provided letters from her doctors in October 2010 stating that they believed she had been misdiagnosed and that she did not have a substance abuse problem, the Department continued to maintain that the purpose of the service plan was to address "the issues with the positive drug screens." Kalbfleisch admitted that a single group of doctors at Henry Ford Hospital was monitoring Lucas-Williams's medication intake, and that Thomas and Dr. Berkely had no concerns that Lucas-Williams was abusing prescription drugs, yet he continued to ask for drug screens. Kalbfleisch ultimately testified that the Department could test the drug levels of the screens to determine whether Lucas-Williams was abusing her medication. But he also testified that he had not asked the screening agency to do so.

Lucas-Williams submitted *more* documentary evidence from her doctors in October 2011 that she suffered from medical conditions and did not abuse substances. The trial court again continued drug screens and did not change Lucas-Williams's service plan, relying on her "admission" of substance abuse and the "finding" by the Macomb court.

Even on appeal, the Department asserts that Lucas-Williams tested positive for morphine and that morphine was not prescribed by her doctor. The Department makes this assertion despite the June 2010 letter from Dr. Barkely indicating that Lucas-Williams's medications might cause her to test positive for morphine.

We conclude that the Department did not make reasonable efforts to reunify Lucas-Williams with her children because it did not address the problem that brought this case into the court's jurisdiction: that Lucas-Williams passed out while caring for her children.

Lucas-Williams was diagnosed with epilepsy in 2009. The Department does not indicate what services it offered Lucas-Williams that would assist her with the problem she admitted to, that she passed out while caring for her children. Although the Department expressed its concern that Lucas-Williams might again pass out and leave the children unattended, there is no evidence in the record that the Department assisted Lucas-Williams with some way to provide proper care and custody for her children in that event.

Kalbfleisch testified that he was concerned that Lucas-Williams might have a seizure or pass out while parenting, and that it was correct that Lucas-Williams had "brought the idea [of home care] up" to him. Kalbfleisch did not testify that he offered any services to help Lucas-Williams find or acquire home care. Indeed, the record reflects that Kalbfleisch did not refer Lucas-Williams for any services during the fifteen months he was on Lucas-Williams's case. Lucas-Williams testified that she attempted on her own to acquire home care. Most importantly,

Kalbfleisch testified that with home care, Lucas-Williams might be reunified with her children, but that he “assumed” that home care would be inadequate.

The Department explicitly refused to re-evaluate Lucas-Williams’s substance-abuse-focused service plan in light of Lucas-Williams’s evidence and arguments that she suffered from a medical condition. But the Department could not articulate how the purpose of the service plan related to reunifying Lucas-Williams with her children. The Department failed to make any efforts to rectify the effects of Lucas-Williams’s medications and medical condition on her ability to parent and to provide her children with proper care and custody. Thus, we conclude that the trial court clearly erred when it determined that the Department made reasonable efforts to rectify the conditions that caused Lucas-Williams’s children to come into care.

III. STATUTORY GROUNDS

A. STANDARD OF REVIEW

To terminate parental rights, the trial court must find that the Department has proved at least one of the statutory grounds for termination by clear and convincing evidence.¹⁶ This Court reviews for clear error a trial court’s decision to terminate parental rights.¹⁷ A finding is clearly erroneous when there is evidence to support it, but after reviewing the record, we are definitely and firmly convinced that the trial court made a mistake.¹⁸

B. LEGAL STANDARDS

MCL 712A.19b(3)(c)(i) provides that the trial court may terminate a parent’s rights if there is clear and convincing evidence that:

[t]he 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.

MCL 712A.19b(3)(g) provides that the trial court may terminate a parent’s rights if there is clear and convincing evidence that

[t]he 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.

¹⁶ MCL 712A.19b(3); MCR 3.977(H)(3)(a); *In re Sours*, 459 Mich 624, 632; 593 NW2d 520 (1999).

¹⁷ MCR 3.977(K); *In re Trejo*, 462 Mich at 356-357; *In re Sours*, 459 Mich at 633.

¹⁸ *In re Mason*, 486 Mich at 337.

MCL 712A.19b(3)(j) provides that the trial court may terminate a parent's rights if there is clear and convincing evidence that

[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

The burden is on the Department to prove at least one of these statutory grounds by clear and convincing evidence.¹⁹

C. APPLYING THE STANDARDS

The trial court commented on Lucas-Williams's housing, visitation, and angry demeanor. But it found that the Department had proved the statutory grounds by clear and convincing evidence for two reasons: (1) "numerous medical conditions render [Lucas-Williams] unable to properly parent the[] children," and (2) she abused prescription substances and refused to address the problem. We conclude that the trial court clearly erred when it determined that the Department established these findings by clear and convincing evidence.

First, the trial court clearly erred when it found that the Department proved by clear and convincing evidence that Lucas-Williams had a substance abuse problem. Reviewing the record, we are definitely and firmly convinced that the trial court made a significant mistake. And this mistake has permeated this entire case.

There was some evidence that Lucas-Williams might be abusing prescription medication. Kalbfleisch testified that he believed Lucas-Williams was abusing prescription medication because she appeared disoriented and incoherent on two occasions, one during a home visit and on another occasion before attempting to visit her children. Lucas-Williams also attempted to pick up her prescription medication early on three occasions: three days early in November 2011; two days early in December 2011; and one day early in January 2012.

However, as stated above, the trial court's determination that there had been a previous finding of substance abuse in this case was simply and clearly erroneous. . Lucas-Williams's prescriptions accounted for all of her positive drug screens. Kalbfleisch testified that the Department had no idea whether Lucas-Williams was abusing drugs because Lucas-Williams was not showing up for drug screens, but he could not explain what the screens were supposed to show. Kalbfleisch admitted that the Department could, but did not ask to, test any of Lucas-Williams's screens to determine if there was a discrepancy between her prescriptions and the medication levels that would be expected if she were properly taking her medication. Lucas-William's medications were dispensed from a single pharmacy, under the supervision of a single group of doctors. Thomas and Dr. Berkely indicated that Lucas-Williams had been misdiagnosed by EMS as abusing substances. Dr. Berkely indicated that Lucas-Williams's

¹⁹ MCL 712A.19b(3); *In re Trejo*, 462 Mich at 355; see *In re Mason*, 486 Mich at 166.

seizures and migraines increased with stress, and would make her appear disoriented and incoherent. Thomas and Dr. Berkely indicated early in the case that they did not believe Lucas-Williams had a substance abuse problem. The record does not contain any indication that their opinions changed.

On the weight of this record, we are definitely and firmly convinced that the trial court made a mistake when it determined that the Department proved clearly and convincingly that Lucas-Williams was abusing her prescription medication. Given the Department's failure to establish that Lucas-Williams was abusing her prescription medication, substance abuse cannot provide a basis to terminate Lucas-Williams's parental rights under MCL 712A.19b(3)(c)(i), (g), or (j).

We conclude that the trial court's second reason for terminating Lucas-Williams's parental rights was also clearly erroneous. The trial court found that the Department proved that Lucas-Williams's seizures, passing out, forgetfulness, slurred speech, confusion, and unsteady gait made Lucas-Williams an unfit parent. The Department's failure to make reasonable efforts to reunify children with parents has a bearing on whether there was sufficient evidence to terminate a parent's rights.²⁰ Because the Department did not engage in any efforts to assist Lucas-Williams with the effect her epilepsy might have on the care and custody of her children, we conclude that the trial court clearly erred when it determined that she could not rectify the "conduct" resulting from this condition within a reasonable time. Despite Kalbfleisch's assumption, there is no indication that, if given the opportunity, Lucas-Williams could not provide her children with proper care and custody. Nor is there any evidence that she could not minimize the impact of her disease on her ability to parent through home care, a live-in relative, or some other service. Again, the Department provided none of these services. The trial court may not engage in conjecture.²¹ We note that our statutes do not require a parent to personally care for a child.²² For instance, a parent may, because of reasons of illness, entrust the care of her children to others.²³ Lucas-Williams must be given the opportunity to demonstrate that her "conduct" will not endanger her children.²⁴ Therefore, we conclude that the trial court clearly also erred when it found that the Department proved MCL 712A.19b(3)(c)(i), (g) and (j) by clear and convincing evidence for this reason.

²⁰ *In re Rood*, 483 Mich at 89.

²¹ See *Id.* at 89.

²² *In re Mason*, 486 Mich at 161.

²³ See *Id.* at 161 n 11.

²⁴ See *In re Rood*, 483 Mich at 98 ("It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children," quoting the 2009 Children's Foster Care Manual, as "provid[ing] helpful insight[.]" *Id.* at 98 n 31).

IV. CONCLUSION

Because of our resolution of these issues, we do not consider whether termination was in the children's best interests. Nor do we consider whether Lucas-Williams's counsel was ineffective for failing to subpoena her therapist or neurologist to testify at the termination hearing when the case was hotly contested and her previous counsel characterized the therapist as a critical witness. We conclude that the trial court clearly erred when it determined that the Department made reasonable efforts to reunify Lucas-Williams and her children. We further determine that the trial court clearly erred when it determined that the Department proved the statutory grounds by clear and convincing evidence.

On remand, the trial court will retain jurisdiction over the children and engage in further efforts to reunify Lucas-Williams with her children. The trial court should determine whether substance abuse or a medical condition causes Lucas-Williams's disorientation, slurred speech, and other symptoms. If the trial court determines that drugs screens are appropriate to monitor the *levels* of Lucas-Williams's prescription medication to determine whether she is abusing those medications, it shall order Lucas-Williams to participate in drugs screens and order sufficient analysis of those screens to determine whether Lucas-Williams's drug levels exceed her prescribed dosages. Finally, the trial court shall order the Department to engage in reasonable efforts to mitigate these conditions on Lucas-Williams's admitted problem: that her medications and conditions affect her ability to provide her children with proper care.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck