

STATE OF MICHIGAN
COURT OF APPEALS

In re ALI-MALIKI/ALEXANDER/AL-DHEFERY Minors.

UNPUBLISHED
February 19, 2015

No. 321420
Wayne Circuit Court
Family Division
LC No. 01-402578-NA

Before: MURRAY, P.J., and HOEKSTRA and WILDER, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to five of her minor children pursuant to MCL 712A.19b(3)(c)(i) and (g). Because the trial court did not clearly err in terminating respondent's parental rights, we affirm.

I. FACTS AND PROCEEDINGS

Respondent has a lengthy history with Children's Protective Services (CPS). She received services before this case began to address issues of medical neglect, improper supervision of the children, and unfit home conditions. After the four older children were adjudicated temporary court wards in March 2010, respondent participated in services that included individual therapy, parenting classes, and other requirements. Respondent's reunification efforts fell short of enabling her to provide proper care for the children. ASA and BSA both suffered from serious mental health issues that led to severe behavioral problems. Both of these children were aggressive and rebellious against authority and, although they had a close fraternal relationship, they evinced an adverse influence on each other. ASA developed juvenile diabetes while in foster care and rebelled against his dietary restrictions. MAA and KBA did not suffer from mental health issues to the same degree, and the trial court returned these children to respondent's care in January 2012. Respondent was then living with her mother and stepfather so they could assist with the children's care. Unfortunately, MAA's and KBA's mental health issues worsened while in respondent's care, and respondent failed to consistently keep their medical and therapy appointments. Respondent hoarded clutter in the children's bedrooms, which may have contributed to a recurring head lice problem. Meanwhile ASA's and BSA's problems worsened. Respondent failed to benefit from her parenting classes and a parenting coach service. She was unable to manage the children's behavior during visits, or to demonstrate that she could implement methods learned from her services. A fifth child, HJA, was born to respondent in November 2012 and placed with his father. On one occasion, respondent went to the father's home, verbally abused him, cut his satellite, and broke a window.

MAA and KBA were eventually removed from respondent's care, and petitioner filed a supplemental petition to terminate her parental rights. Following a termination hearing, the trial court found that although respondent had good intentions, she was not capable of caring for her children, especially in view of their extreme problems. The court found that statutory grounds for termination were established pursuant to §§ 19b(3)(c)(i) and (g), and that termination of respondent's parental rights was in the children's best interests.

II. STANDARD OF REVIEW

In an action to terminate parental rights, the petitioner must prove a statutory ground for termination in § 712A.19b(3) by clear and convincing evidence. MCR 3.977(A)(3) and (H)(3); *In re Trejo*, 462 Mich 341, 355-357; 612 NW2d 407 (2000). Once a statutory ground for termination is established, the trial court shall order termination of parental rights if it finds by a preponderance of the evidence that termination is in the child's best interests. MCL 712A.19b(5); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). The trial court's factual findings, including its best-interest determination, are reviewed for clear error. MCR 3.977(K); *In re Trejo*, 462 Mich at 356-357. A finding is clearly erroneous when the reviewing court is left with the firm and definite conviction that a mistake was made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). "[T]his Court accords deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005); MCR 2.613(C).

III. REASONABLE SERVICES

Respondent first argues that petitioner failed to provide reasonable services to reunify her with her children, including specialized services under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* In particular, respondent maintains that petitioner failed to provide specialized services to accommodate her cognitive and intellectual limitations.

In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights. *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). Termination of parental rights may be considered premature when a parent is not provided with an opportunity to participate in a service plan. *In re Mason*, 486 Mich 142, 152, 159; 782 NW2d 747 (2010). In turn, however, "there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

The reunification services provided by a petitioner must comply with the ADA, meaning that the Department of Human Services (DHS) is required "to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services." *In re Terry*, 240 Mich App 14, 25; 610 NW2d 563 (2000). "[I]f the [DHS] 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.* at 26.

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.* (emphasis added).]

In other words, “[a]ny claim that the parent's rights under the ADA were violated must be raised well before a dispositional hearing regarding whether to terminate her parental rights, and the failure to timely raise the issue constitutes a waiver.” *Id.* at 26 n 5. Moreover, a disabled parent may not raise a violation of the ADA as a defense to termination of parental rights because proceedings to terminate parental rights “do not constitute ‘services, programs or activities’ within the meaning of 42 USC 12132.” *In re Terry*, 240 Mich App at 25.

In this case, petitioner provided respondent with numerous and continuous services over a period of more than four years. Respondent was provided with individual therapy, parenting classes, two evaluations at the Clinic for Child Studies, two psychological evaluations, a psychiatric evaluation, supervised visitations, family therapy, Wraparound services, a parenting coach, and a parent partner. She also received services from an infant mental health specialist when MAA and KBA were returned to her home. The children were also provided with a multitude of services designed to address their many physical, behavioral, and mental health issues. There is no merit to respondent's argument that petitioner failed to comply with its statutory obligation to provide reasonable services.

There is also no merit to respondent's assertion that petitioner violated the ADA by failing to provide specialized services to accommodate her cognitive and intellectual limitations. To begin with, respondent did not challenge the adequacy of services until the termination hearing. Although on at least one occasion the trial court ordered petitioner to provide services to accommodate respondent's intellectual disability, respondent did not timely raise any claim that petitioner's efforts were inadequate to comply with the ADA. In fact, at one point during the course of proceedings, petitioner sought to have respondent tested to diagnose a possible developmental disability, but respondent's attorney opposed the request. Moreover, on numerous occasions throughout these proceedings petitioner's witnesses testified that respondent was complying with services, but not benefitting from them. These instances provided respondent with opportunities to explain that she was not benefitting because the services were not adequate to accommodate her disability. Respondent did not advance any such claim based on the ADA and, accordingly, respondent may not now claim that petitioner violated the ADA. See *id.* at 25-26 & n 5.

Moreover, even if the issue had been timely raised, the record does not support respondent's claim that petitioner failed to reasonably accommodate her disability. Respondent received extensive services over the course of more than four years. Cf. *id.* at 27. There is no

evidence that respondent was denied any services because of her intellectual and cognitive abilities. Cf. *id.* Instead, what the evidence demonstrates is that petitioner provided numerous services for respondent, but that respondent was nonetheless unable to succeed. “[A] parent, whether disabled or not, must demonstrate that she can meet [her children’s] basic needs before they will be returned to her care,” and respondent’s contention that she needed even more assistance from petitioner “merely provides additional support” for the trial court’s decision to terminate her parental rights. *Id.* at 28. That is, the evidence amply demonstrates that respondent’s limited cognitive abilities could not be accommodated to the degree necessary to enable her to parent the five children, four of whom have severe special needs. Cf. *id.* at 27-28. On the facts of the present case, the trial court did not err in finding that reunification could not have been achieved by providing respondent with services other than those offered.

IV. STATUTORY GROUNDS FOR TERMINATION

Respondent next argues that the evidence was insufficient to support termination of her parental rights under §§ 19b(3)(c)(i) and (g). Termination is authorized under §§ 19b(3)(c)(i) and (g) under the following circumstances:

(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:

(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, 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.^[1]

In challenging the trial court’s findings under these provisions, respondent’s argument focuses primarily on the trial court’s conclusion that she would not be able to rectify the

¹ The parties also discuss §§ 19b(3)(j), which allows for termination when there is a reasonable likelihood a child will be harmed if returned to a parent’s home. We do not consider this provision because it is not clear from the record that the trial court relied on §§ 19b(3)(j) when terminating respondent’s parental rights. Moreover the propriety of termination under this provision will not impact the outcome of this case because termination was appropriate under §§ 19b(3)(c)(i) and (g), and only one statutory ground need be proven by clear and convincing evidence in order to terminate a respondent’s parental rights. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

conditions leading to adjudication and provide proper care for her children at some point in the future. She emphasizes that she consistently complied with services and, given this compliance, she argues that the evidence did not show that she would not be able to rectify the harmful conditions or that she would not be able to provide proper care and custody for her children in the future.

Although the trial court acknowledged that respondent made earnest efforts toward reunification and petitioner acknowledges that respondent made the best efforts she could, the fact remains that despite more than four years of services respondent had not resolved the issues leading to the adjudication and she remained unable to provide proper care and custody for her children. In these circumstances, it was not clear error to determine that she would not be able to do so in a reasonable time given the children's ages. Indeed, this Court has repeatedly recognized that it is not enough to participate in services; a parent must also benefit from the services provided in order to address the problems leading to adjudication. *In re Frey*, 297 Mich App at 248.

“Compliance” could be interpreted as merely going through the motions physically; showing up for and sitting through counseling sessions, for example. However, it is not enough to merely go through the motions; a parent must benefit from the services offered so that he or she can improve parenting skills to the point where the children would no longer be at risk in the parent's custody. In other words, it is necessary, but not sufficient, to physically comply with the terms of a parent/agency agreement or case service plan. For example, attending parenting classes, but learning nothing from them and, therefore, not changing one's harmful parenting behaviors, is of no benefit to the parent or child. [*In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded by statute on other grounds MCL 712A.19b(5).]

Thus, in this case, respondent's efforts at compliance do not render the trial court's findings clearly erroneous. Rather, despite respondent's apparent efforts, there was ample evidence that respondent failed to benefit from services. Despite attending parenting classes and receiving the assistance of a parenting coach or educator, she failed to follow through with providing structure, setting rules, and appropriately disciplining the children. She could not respond appropriately when the children were disobedient or disrespectful in supervised visitation. Further, although the Wraparound facilitator and the infant mental health specialist provided favorable reports, her caseworkers and their supervisor testified that respondent was not able to control the visitation sessions. When MAA and KBA were returned to respondent's care, after respondent had received services for more than two years, respondent was unable to provide for the children's medical and mental health needs, failed to provide suitable bedrooms, and failed to manage their behavior when they were the only children in her custody. Describing the return of MAA and KBA to respondent's care, the trial court commented that this “experiment failed and it failed spectacularly.”

Given that respondent had been the recipient of services for more than four years and yet she remained unable to provide proper care for her children, the trial court did not clearly err in finding that the conditions that led to the adjudication were not reasonably likely to be rectified within a reasonable time, and that there was no reasonable expectation that respondent would be

able to provide proper care and custody within a reasonable period of time considering the ages of the children. Thus, statutory grounds for termination were met under §§ 19b(3)(c)(i) and (g).

V. BEST INTERESTS

Finally, respondent argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. Specifically, respondent argues that the trial court failed to adequately consider the importance of the bond between respondent and her children as well as respondent's compliance with her treatment plan. Respondent also notes that the trial court was required to consider the children's best interests individually and she argues that the trial court failed to address significant differences between the children, including distinctions in the degree of their special needs as well as HJA's placement with his father.

When evaluating a child's best interests, the trial court should weigh all evidence available and "consider a wide variety of facts that may include child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014) (quotation marks and citation omitted). A child's placement with relatives weighs against termination and is a factor which the trial court must consider when assessing a child's best interests. *In re Olive/Metts Minors*, 297 Mich App 35, 43-44; 823 NW2d 144 (2012). Moreover, when there are multiple children involved, the trial court has a duty to decide the best interests of each child individually. *Id.* at 42. The rule that the children's best interests must be considered individually does not, however, require the trial court to "explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *In re White*, 303 Mich App at 716. Rather, the trial court need only address differences between the children where their best interests "significantly differ." *Id.* at 715.

In this case, the trial court found that termination was in the children's best interests because they had already waited years for respondent to enable herself to care for them. The trial court emphasized that *all* the children needed permanency and stability, which respondent was not able to provide. Contrary to respondent's arguments on appeal, the trial court did consider respondent's bond with her children, but this bond simply did not justify a continuation of services in lieu of termination when it was apparent from the evidence that, despite her efforts, respondent was not benefiting from services. The trial court specifically noted that respondent had made "very little change that is positive" over the course of the last 14 months and that, in these circumstances, "the children should no longer have to wait" The trial court also discussed individual differences between the various children, noting, for example, which children had placements with a possibility of adoption. Further, there was overwhelming evidence that the four older children all had significant special needs and that respondent was unable to adequately address those needs and manage their care. The four oldest children in particular were similarly situated due to their special needs, and the trial court did not clearly err in determining termination of respondent's parental rights was in their best interests.

The youngest child, HJA, had some differences from his elder half-siblings insofar as there was no indication that he had special needs and, unlike his siblings, he was in placement with his father. As required by *In re Olive/Metts Minors*, 297 Mich App at 43-44, the trial court expressly addressed HJA's placement with a relative while conducting its best interest analysis,

noting that the child “is where he should be with his father.” Having acknowledged this placement with a relative, the trial court nonetheless determined that termination was in HJA’s best interests given HJA’s need for permanency, and this decision was not clearly erroneous, particularly given that there was evidence of a contentious relationship between respondent and HJA’s father. Moreover, although the trial court did not expressly address HJA’s lack of special needs, we see no error in this given that the trial court did make certain individual distinctions among the children and in fact expressly determined that *all* the children, including HJA, were in much need of permanency and stability which respondent could simply not supply, despite more than four years of services. Cf. *In re White*, 303 Mich App at 716 (concluding that there was no error in the trial court’s failure to address particular distinctions between the children when the trial court made findings that clearly pertained to “all the children”). In short, the trial court did not clearly err in determining that HJA’s best interests, like those of his siblings, were best served by termination of respondent’s parental rights.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder