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STATE OF MICHIGAN
COURT OF APPEALS

In re L. KERSEY, Minor.

UNPUBLISHED
June 20, 2019

No. 344827
Eaton Circuit Court
Family Division
LC No. 16-019588-NA

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Respondent-mother, D. Kersey, appeals as of right the trial court’s order terminating her parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). We affirm.¹

Respondent’s argues that petitioner failed to make reasonable efforts at reunification because its reunification services did not accommodate her mental health disability. Because respondent did not object below to the adequacy of the reunification services provided to respondent, this issue is unpreserved. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Therefore, we review this issue for plain error affecting respondent’s substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

Generally, the petitioner, the Department of Health and Human Services (DHHS), “has an affirmative duty to make reasonable efforts to reunify a family.” *In re Hicks*, 500 Mich 79, 85; 893 NW2d 637 (2017), citing MCL 712.18f(3)(b) and (c); MCL 712.19a(2). “As part of these 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.” *Id.* at 85-86. Additionally, the DHHS is obligated by the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, to reasonably accommodate a parent’s disability before terminating his or her parental rights. *Id.* at 86.

¹ The court also terminated the parental rights of the child’s father, who has not appealed that decision and is not a party to this appeal.

Respondent's argument is premised on a discussion at a hearing regarding services that had been provided to her. She maintains that the responses from the caseworker at that services hearing supports her argument that petitioner failed to accommodate her mental health disability.

At the termination hearing, which was held more than seven months later, respondent's counsel asked the caseworker whether she recalled the discussion at the services hearing regarding ADA compliance to accommodate respondent's mental health issues. The caseworker recalled the discussion and agreed that respondent required case-specific services. She also agreed with counsel's statement that case-specific services were provided, and she and counsel discussed the specific referrals to various mental health and substance abuse providers. Respondent's counsel emphasized all the positive interactions respondent had with these providers to support his suggestion that respondent had been making substantial progress with her case-service plan.

This record refutes respondent's argument that petitioner did not make reasonable efforts to reunify her with the child, and more specifically, refutes any suggestion that petitioner did not endeavor to reasonably accommodate her mental health issues as required by the ADA. Indeed, respondent's counsel acknowledged that the necessary referrals had been made. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) (quotation marks and citation omitted).

In addition, the record demonstrates that petitioner provided myriad mental health and other services, and the opportunity for many more, throughout the case. The court provided a detailed summary of these efforts. Respondent entered inpatient treatment shortly after the services hearing, but was discharged after a physical altercation with another resident. Although petitioner has an obligation to make reasonable efforts for reunification, a respondent has a commensurate responsibility to participate in the offered services, *In re Frey*, 297 Mich App at 248, and benefit from those services, *In re TK*, 306 Mich App 698, 711; 859 NW2d 208 (2014). Respondent has not shown, or even argued, that alternative services were available that would have given her a greater opportunity to address her mental health issues and reunify with the child. Rather, she claims that her success in the services that were offered would soon allow her to be successful in addressing her barriers to reunification. The trial court did not err when it found that petitioner made reasonable efforts at reunification, and respondent has not demonstrated any plain error with the adequacy of the services to accommodate her mental health needs. Respondent decided not to cooperate with and failed to benefit from other services provided to her.

Next, respondent argues that the trial court erred when it found that the statutory grounds for termination were established by clear and convincing evidence. We disagree.

We review for clear error a trial court's finding that a statutory ground for termination has been proved by clear and convincing evidence. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

“In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met.” *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). The trial court found that grounds for termination were established under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j), which, at the time the trial court entered its order, authorized termination of parental rights 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.

(ii) Other conditions exist that cause the child to come within the court’s jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, 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.^[2]

* * *

(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.

² This subsection was recently amended by 2018 PA 58, effective June 12, 2018. Before the amendment, Subsection (g) provided:

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.

With respect to § 19b(3)(c)(i), the two principal conditions that led to the child's adjudication were respondent's substance abuse and anger management problems, possibly associated with her bipolar condition or other mental health issues. At birth, the child tested positive for hydromorphone, hydrocodone, and amphetamines, and exhibited withdrawal symptoms, including tremors. There was a history of domestic violence between respondent and the child's father, and a history of violent conduct by respondent against her mother and others. At the time the trial court exercised jurisdiction over the child, the barriers to reunification were listed as substance abuse, emotional or mental health, housing and employment, parenting skills, communication skills, and anger management, including domestic violence.

The trial court found that respondent had made some progress, but characterized her progress as a "roller coaster ride" whereby she would address some barriers to reunification, but then her progress would "go downhill." The court discussed respondent's substance abuse history at length, including her most recent positive drug screen in February 2018. The court noted that a substance abuse counselor at Eaton Behavioral Health (EBH), had successfully discharged respondent from the EBH program and found that her substance abuse issue had "diminished greatly," but found that it continued to "go on." The court's finding concerning this barrier is not clearly erroneous. Respondent failed to address this issue during most of the child's placement in care. She missed drug screens, tested positive for alcohol, cocaine, and amphetamines, and her psychiatrist discontinued treating her because he believed she was abusing her prescription medications. She also often refused to attend Alcohol Anonymous (AA), which was a condition of her probation, because she felt that she did not need to attend.

With respect to respondent's successful completion of the EBH program, the counselor testified that she and respondent agreed that respondent was ready to be done with active substance abuse treatment, in part because she would be engaged in other mental health services, obviating her continued need for the substance abuse counselor's case management services. At the time of the termination hearing, however, respondent was not participating in other services; she remained on a waiting list for a new therapist. Moreover, respondent's caseworker testified that, although respondent had generally been compliant with drug screens, she refused to take one on June 11, 2018, and both lied to the caseworker about her work schedule and refused to take the test at home. According to the caseworker, respondent continued to deny that she had a substance abuse problem.

In sum, the evidence showed that respondent had made progress with her substance abuse issue, and her history of substance abuse may have been linked to her mental health issues. However, the trial court's finding that this barrier continued to exist is supported by the evidence, particularly because respondent had not completely addressed her mental health barriers to reunification.

The trial court also did not clearly err by finding that respondent had not adequately addressed her domestic violence, anger management, and mental health issues. The trial court discussed the various domestic violence incidents between respondent and the child's father, the fact that some of respondent's housing instability involved her mother's decision to obtain a personal protection order (PPO) against respondent, and the incidents where respondent reacted aggressively, with hostility, or was emotionally unstable during parenting sessions or with clinicians. The court also noted respondent's continued failure to complete anger management

classes. The evidence supports the trial court's finding that, despite some improvement, these related issues remained as barriers to reunification.

Testimony was presented that respondent's acts of domestic violence toward the child's father, her violence toward others, and her mental health instability remained barriers to reunification. Respondent's caseworker testified that respondent was supposed to see a new psychiatrist at Cherry Health, who apparently intended to test her for attention deficit hyperactivity disorder (ADHD), but she refused to sign a release for this information. The caseworker reported that respondent attended most of her sessions with her former therapist who reported that respondent had benefited from the sessions, but respondent did not finish her therapy with that therapist, who had moved. Respondent supposedly had been assigned a different therapist at Community Mental Health, but respondent's caseworker never received verification that she had done so and respondent told her substance abuse counselor that she did not yet have a new therapist. To the caseworker's knowledge, respondent never completed a psychotherapy counseling program. Part of the reason the substance abuse counselor decided to discontinue respondent's substance abuse counseling was her belief that respondent could continue to address this issue in therapy, but respondent had not followed through with any therapy.

Respondent was involved in serious physical attacks against the child's father during the initial months after the child was placed in care. The evidence showed that respondent continued to engage in threatening and abusive behavior toward others and was unable to control her anger. She was discharged from inpatient treatment after a physical altercation with another resident. The caseworker reported that respondent had been kicked out of an AA Fellowship Hall because she threatened one of the other AA members. Respondent's mother obtained a PPO against respondent. Despite some recent indications of stability, the caseworker continued to have concerns about respondent's mental health issues affecting her parenting skills because of her history and her outbursts in front of the child. The caseworker noted respondent's anger when she refused to submit to a drug screen that respondent had threatened to "possibly cut her hand off at work" if she did not continue to receive ADHD medications. Although respondent had expressed a need for help, she was not cooperating in the process to obtain it. Given this testimony, the trial court did not clearly err by finding that respondent's mental health issues and inability to control her anger were conditions that continued to exist.

Similarly, the trial court did not clearly err when it found that a lack of stable housing and employment continued to be barriers to reunification. Respondent had recently become employed, but her history of employment was inconsistent throughout the entirety of the case. While this case was pending, she resided at five different locations and, according to the caseworker, respondent's housing was inappropriate for the child because of concerns identified in background checks of others living in her apartment.

The trial court also did not clearly err by finding that there was no reasonable likelihood that respondent would be able to rectify these conditions within a reasonable time considering the child's age. Although respondent had made substantial progress with her substance abuse issues, she did not make significant progress in addressing all of the other barriers to reunification during the 22 months that the child was removed from her care. The trial court's finding focused on the evidence that respondent maintained a relationship with the child's father,

despite the ongoing domestic violence between them. Respondent disputes this, but evidence was presented that the child's father's car was seen at the same motel where respondent was staying, and respondent remained uncommitted about whether to remain married to him. For these reasons, the trial court did not clearly err by finding that clear and convincing evidence supported termination of respondent's parental rights under § 19b(3)(c)(i).

With respect to § 19b(3)(c)(ii), the trial court relied on the same conditions and findings it discussed in connection with § 19b(3)(c)(i). Respondent does not separately challenge this ground for termination. Given that respondent's lack of suitable housing could be considered a "new" condition that had not been rectified despite an opportunity to do so, the trial court's reliance on this ground is not clearly erroneous.

With respect to § 19b(3)(j), "a parent's failure to comply with the terms and conditions of his or her service plan is evidence that the child will be harmed if returned to the parent's home." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). The trial court's reliance on this ground is also supported by the testimony concerning respondent's history of hostile and aggressive behavior in front of the child, and the evidence that her hostile conduct and inability to control her anger were conditions that continued to exist. The trial court did not clearly err by finding that the child was reasonably likely to be harmed if returned to respondent's home.

With respect to § 19b(3)(g), respondent correctly notes that the trial court relied on the former version of Subsection (g), before it was amended by 2018 PA 58, effective June 12, 2018. Thus, the court did not consider respondent's financial ability to care for the child. However, because the trial court's decision is supported by other statutory grounds for termination, and it only was required to find one statutory ground for termination, any error in either relying on or applying § 19b(3)(g) is harmless.

Respondent also argues that the trial court erred by finding that termination of her parental rights was in the child's best interests. We disagree.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). Whether termination of parental rights is in a child's best interests is determined by a preponderance of the evidence. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). We review for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Payne/Pumphrey/Fortson*, 311 Mich App 49, 63; 874 NW2d 205 (2015).

In considering the best interests of a child, factors to consider include "the 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 Olive/Metts*, 297 Mich App at 41-42 (citations omitted). A court may also consider whether it is likely "that the child could be returned to her parents' home within the foreseeable future, if at all." *In re Frey*, 297 Mich App at 248-249.

The trial court found that respondent's bond with the child was affected by missed parenting time during the early stages of the case. Although respondent's visitation had improved and there was some evidence that the child was bonded with respondent, the court found any bond was not, in the trial court's words, "super strong." This finding is supported by the testimony of the child's therapist who stated that while the child had fun with respondent and seemed to have a bond with her, he did not exhibit what the therapist would consider a special attachment to her.

The trial court also considered respondent's parenting abilities. The court expressed concern that the child would continue to be exposed to domestic violence between respondent and the minor child's father, and expressed concern that respondent had missed earlier parenting times, and was in "denial" of some of the services offered to her. These findings are not clearly erroneous. Given the evidence presented, the court could reasonably find that respondent would continue to remain in contact with the father and that, given their history, the child would again be exposed to domestic violence. Contrary to respondent's contention on appeal, she had not made significant progress with her anger management issues. Respondent had also been released from at least one parenting class for failure to attend.

The trial court found that the most significant factor in its analysis of the child's best interests was the child's need for permanency, and the fact that the child was doing well in his current foster home. Respondent argues that the trial court clearly erred by relying on the child's therapist's testimony in support of this finding. Respondent takes one portion of the therapist's testimony out of context to argue that the child would be harmed if he remained in foster care. During questioning, the therapist testified that the child would be negatively affected if he were returned to respondent because of the harm he had experienced every time a bond with a caregiver was broken. She testified that the child's need for stability and permanence was an overriding factor in an analysis of his best interests. Given his age and numerous past placements, he was at a critical period where the window was closing for him to form a secure attachment with a caregiver, so she could not predict what would happen if respondent were given more time. In fact, in response to the direct question whether the child would be harmed if he remained in his foster home, the therapist testified that there would be a lesser likelihood of harm, but also restated that he had already been harmed by the past instability. The thrust of the therapist's testimony was that the child needed immediate stability, perhaps more so than other children, due to his age and his five previous placements since coming into care. This testimony does not support respondent's position that the child should have remained in care while respondent continued to work on the barriers to reunification. Given the length of time the child had already been in care and respondent's lack of substantial progress with her mental health and anger barriers, the trial court did not clearly err by finding that the child's best interests would be served if respondent's parental rights were terminated.

Affirmed.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Michael J. Riordan