

STATE OF MICHIGAN
COURT OF APPEALS

In re FLOWERS, Minors.

UNPUBLISHED
June 25, 2019

Nos. 345433; 345445
Oakland Circuit Court
Family Division
LC No. 2017-852368-NA

Before: GADOLA, P.J., and BOONSTRA and SWARTZLE, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right the order of the trial court terminating their parental rights to their three children under MCL 712A.19b(3)(c)(i) (adjudication conditions continue to exist), (g) (failure to provide proper care and custody), and (j) (risk of harm to children if returned to parents). We affirm.

I. FACTS

The family in this case first came to the attention of the Department of Health and Human Services (DHHS) in 2013, when the oldest child tested positive at birth for marijuana. In February 2017, the family again came to the attention of DHHS when the agency received an abuse and neglect complaint alleging a history of domestic violence between respondents. An investigation by DHHS revealed a significant history of domestic violence between the parents, with respondent-mother being hospitalized after one incident in October 2016. During a second incident on February 10, 2017, respondent-father pushed respondent-mother’s head into a door, punched her in the back of the head, bit her leg, and attempted to suffocate her while yelling “die b**ch.” He also smashed holes in the wall of their home and threw a television down the stairs. The children were in the home during this incident. Respondent-father was arrested after the February 2017 attack, and pleaded guilty to criminal assault charges. He was thereafter incarcerated in the Macomb County jail, during which time he also faced unrelated charges of fraud and aggravated assault of another inmate.

DHHS filed a petition regarding both respondents on March 31, 2017, alleging domestic violence by respondent-father, and alleging that respondent-mother had failed to protect the children from exposure to domestic violence because she had permitted respondent-father to remain in the home. The petition further alleged that respondents were medically neglecting the

oldest child, who had been diagnosed with hydrocephalus and epilepsy. Although respondent-mother assured the caseworker that the child was taking his prescribed medication daily, the child's neurologist informed the caseworker that the child's prescription had not been renewed since 2015. The petition also alleged that respondent-mother was using illegal substances. Both respondents pleaded no contest to the allegations of the petition.

The children were initially placed in respondent-mother's care. The agency provided her with a case service plan that required her to complete substance abuse assessment, engage in domestic violence counseling, participate in parenting skills classes, refrain from criminal activity, maintain income, and maintain suitable housing. The family also was provided services through Families First, but respondent-mother was often asleep when the Families First worker arrived and as a result could not let the worker into the home. On May 11, 2017, the children were removed from the home after an emergency hearing because respondent-mother continued her pattern of substance abuse and failure to supervise the children. Respondent-mother continued to use marijuana, failed to participate in most drug screens, and failed to attend the scheduled psychological examination. As a result, the trial court suspended her parenting visits until she could provide three consecutive negative drug screens. She was not able to do so until shortly before the termination petition was filed, and when she regained her visitation privileges, she cancelled the visits. During this time, respondent-mother was also involved in another relationship that involved domestic violence.

At a pretrial for respondent-father on May 22, 2017, the trial court referee cautioned him, stating "the Department of Health and Human Services has an obligation to outline a plan for you to regain custody of your children. If you follow that plan, you will regain custody of your children. If you do not follow that plan, this plea will later be used as a basis for starting proceedings to terminate your parental rights." Respondent-father indicated that he understood. The trial court ordered that respondent-father undergo a psychological examination, but did not order that a case service plan be adopted at that time because the foster care worker was not present at the hearing.

A dispositional hearing was held before the trial court referee on June 19, 2017. Respondent-father attended the hearing, as did his attorney. Respondent-father had completed the court-ordered psychological evaluation, and anticipated being released from incarceration within two months. The trial court adopted the case service plan outlined by DHHS, which required respondent-father to participate in mental health treatment, parenting classes, individual counseling to address domestic violence and anger management, and psychiatric evaluation and any recommendations of that evaluation, including taking any prescribed medication. He was also ordered to participate in random drug screens, maintain housing, provide a financial plan for caring for the children, refrain from any criminal activity, and to cooperate with his probation upon release.

Respondent-father was released from jail in July 2017, and shortly thereafter met with the foster care worker, and made an appointment to meet with her the next day to establish a parenting time schedule and to pick up bus tickets to facilitate visitation. He indicated that he did not have housing and was staying with various family and friends, and the foster care worker later testified that respondent-father appeared to be slightly disoriented. He then missed the scheduled appointment the next day and failed to return the worker's phone calls. Respondent-

father was arrested for home invasion on August 14, 2017, and was incarcerated at the Wayne County jail. The foster care worker testified that after their meeting in July 2017, respondent-father did not contact DHHS to discuss the status of the case service plan or to advise the agency of his re-incarceration.

At a review hearing held before the trial court's referee on March 5, 2018, respondent-father's attorney informed the trial court that DHHS had failed to contact respondent-father after his re-incarceration. The trial court was informed that DHHS had assigned a new foster care worker to the case two weeks earlier, and that she had attempted unsuccessfully to contact the probation officer for respondent-father. Thereafter, the new foster care worker contacted respondent-father by telephone March 23, 2018 to discuss whether he wanted to plan to care for the children. The foster care worker later testified that although respondent-father explained that he had not had enough money to call the agency, she learned that he had made calls to other people while incarcerated.

On July 9, 2018, the hearing on the termination petition was held before the trial court. At the conclusion of the evidence, respondent-father's attorney argued in closing that the agency had made "questionable reasonable efforts." His attorney argued that although respondent-father had been advised by the trial court of the terms of the case service plan, DHHS had not given respondent-father a copy of the plan, had not contacted respondent-father after his re-incarceration until March 2018, and that the foster care worker was not aware of what services were available to respondent-father while incarcerated.

The trial court concluded that the statutory grounds for termination had been proven as to both respondents. The trial court found that DHHS had provided a case service plan to respondent-father that required him to participate in certain services, and that, apart from completing a psychological evaluation, he had not otherwise complied with the case service plan, the most important aspect of which was refraining from criminal activity. The court also found that respondent-father did not meet with DHHS when released from incarceration. Because respondent-father had not complied with services, particularly anger management or domestic violence counseling, he posed a risk of harm to the children if they were returned to his care. Thus, the trial court found that termination of respondent-father's parental rights was warranted under MCL 712A.19b(3)(c)(i), (g), and (j).

Regarding respondent-mother, the trial court noted that the children came into care because of domestic violence, medical neglect, and respondent-mother's substance abuse. The case service plan provided her the opportunity to reunite with the children, but she failed to comply with the terms of the plan. Respondent-mother continued to be involved in domestic violence, continued to use illegal substances, failed to participate in required drug screening, failed to participate in counseling, failed to visit regularly with the children, and had no proof of income. Although she completed a psychological evaluation and a parenting class, the trial court found that she "utterly failed" to engage in any other requirement of the case service plan, and that termination of respondent-mother's parental rights was warranted under MCL 712A.19b(3)(c)(i), (g), and (j).

The trial court thereafter conducted a separate hearing regarding the best interests of the children, at the conclusion of which the trial court determined that termination of both respondents' parental rights was in the best interests of the children. Respondents now appeal to this Court, challenging the order of the trial court terminating their parental rights.

II. DISCUSSION

A. STATUTORY BASIS

Respondents contend that the trial court clearly erred in finding that a statutory basis to terminate their parental rights was proven by clear and convincing evidence. We disagree.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. MCL 712A.19b(3); *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review the trial court's determination for clear error. *Id.* A finding is clearly erroneous when, though some evidence may support the finding, we are left with a definite and firm conviction that a mistake has been made. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

In this case, the trial court terminated both respondents' parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). Those statutory sections provide:

(3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

* * *

(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, 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.

* * *

(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.

Regarding subsection 19b(c)(i), the issues that led to adjudication in this case were domestic violence between respondents, medical neglect of the oldest child, and respondent-mother's substance abuse. After adjudication, neither respondent engaged in domestic violence counseling, and respondent-mother became involved in a second relationship that included

domestic violence. Neither respondent participated in the oldest child's medical care after his removal from their custody. Respondent-mother participated in only 14 of 116 drug screens, five of which were positive for marijuana. Respondent-mother's substance abuse evaluation recommended intensive outpatient rehabilitation services, but she never engaged in those services. Upon release from jail, respondent-father failed to participate in the case service plan, failed to meet with the agency, and engaged in criminal activity, which resulted in his again being incarcerated. During his re-incarceration, he failed to contact the agency. Thus, the evidence established that the conditions that initially led to adjudication continued to exist, supporting the trial court's termination of respondents' parental rights under subsection 19b(3)(c)(i).

The trial court also terminated respondents' parental rights under MCL 712A.19b(3)(g). Subsection (g) was amended by 2018 PA 58, effective June 12, 2018. The pre-amendment language stated: "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." (Emphasis added). The statute now requires the trial court to consider the parents' financial ability to provide care and custody. The pre-amendment language of MCL 712A.19b(3)(g) was in effect at the time this case was initiated and when the supplemental petition seeking termination was filed on May 10, 2018. When the trial court issued its opinion from the bench at the conclusion of the hearing on the supplemental petition for termination on July 9, 2018, and when the trial court issued its order on August 24, 2018 terminating respondents' parental rights, the amended language of the statute was in effect. On the record, the trial court stated that the parties, without regard to intent, failed to provide proper care and custody for the children, suggesting application of the pre-amendment language of the statute.

We conclude that a review of the record in this case supports termination of respondents' parental rights under either version of the statute, given that there was no evidence or argument presented before the trial court that respondents lacked financial ability to provide proper care and custody for the children. When examining the pre-amendment language of MCL 712A.19b(3)(g), this Court has found that "[a] parent's failure to participate in and benefit from a service plan is evidence that the parent will not be able to provide a child proper care and custody." *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). That reasoning is equally relevant when examining the post-amendment language regarding whether the parent, in the court's discretion, although financially able to do so, has failed to provide proper care or custody of the child. Because respondents in this case failed to participate in, benefit from, or comply with their service plans, the trial court did not err by terminating respondents' parental rights under MCL 712A.19b(3)(g).

Similarly, when examining MCL 712A.19b(3)(j), this Court also has held that "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 at 711. Thus, respondents' failure to comply with their case service plans supports termination under subsection 19b(j) as well. Accordingly, the trial court did not err in determining that the

statutory grounds for termination of respondents' parental rights were established by clear and convincing evidence.¹

B. BEST INTERESTS

Respondents also contend that the trial court clearly erred in finding that termination of their parental rights was in the children's best interests. We disagree.

After a statutory ground for termination has been established under MCL 712A.19b(3), a trial court may terminate a parent's parental rights if the trial court finds by a preponderance of the evidence that termination is in the best interests of the child. MCL 712A.19b(5); *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). We review for clear error the trial court's decision that termination is in the best interests of a child. *In re Schadler*, 315 Mich App 406, 408; 890 NW2d 676 (2016).

In determining a child's best interests, the trial court may consider a number of factors, including the child's bond with the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the suitability of alternative homes. *In re White*, 303 Mich App at 713. The trial court may also consider the parent's history of domestic violence, whether the parent complied with the parent agency agreement, the parent's visitation history with the child, the child's well-being while in care, and the possibility of adoption. *Id.* at 714. The trial court may also consider the opinion testimony of experts, see *In re Conley*, 216 Mich App 41, 44; 549 NW2d 353 (1996), a parent's unwillingness to participate in counseling, see *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001), a parent's inability to control his temper, and lack of income, see *In re Olive/Metts* 297 Mich App 35, 43; 823 NW2d 144 (2012).

In this case, a review of the evidence presented at the best-interests hearing demonstrates that the trial court did not clearly err in concluding that termination was in the best interests of the children. The trial court considered both respondents' lack of compliance with their case service plans. Respondent-father's plan required him to refrain from engaging in criminal activity, but upon his release from jail, he again engaged in criminal activity and was again incarcerated. Respondent-father admitted during his psychological evaluation that he still had problems controlling his emotions and that he would still be violent with a woman if she had a "smart mouth." He admitted that he had never had appropriate income; he sold drugs for money. Respondent-father did not visit his children during the period when he was released from jail.

Respondent-mother continued to be involved in domestic violence, and continued to use illegal drugs. Respondent-mother's visitation privileges with the children were suspended because of her inability to provide negative drug screens. Moreover, the children were being properly cared for in their foster homes, and the oldest child was receiving appropriate medical care. The evidence demonstrated that the children were bonded to their foster families, and they all had the potential for adoption. In addition, the psychologist evaluating the children opined

¹ We also note that only one statutory ground must be established to terminate a parent's parental rights to a child. *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

that termination would benefit the children. The trial court therefore did not err in determining that termination was in the best interests of the children.

C. REASONABLE EFFORTS BY AGENCY

Lastly, respondent-father argues that DHHS failed to make reasonable efforts to reunify him with his children. We disagree.

DHHS has an affirmative duty to make reasonable efforts to reunify a family before seeking to terminate a parent's parental rights. MCL 712A.19a(2); *In re Hicks/Brown*, 500 Mich 79, 85; 893 NW2d 637 (2017). To do so, the agency is required to adopt a case service plan aimed at rectifying the conditions that caused the child to be removed from the parents' custody. See *In re Mason*, 486 Mich 142, 156; 782 NW2d 747 (2010). The case service plan must include a "[s]chedule of services to be provided to the parent, child, and if the child is to be placed in foster care, the foster parent, to facilitate the child's return to his or her home or to facilitate the child's permanent placement." MCL 712A.18f(3)(d); see also *In re Mason*, 486 Mich at 156. The parent should then be given reasonable time to make necessary changes and benefit from the service plan. See *id.* at 159.

When a parent is incarcerated, the state is not relieved of its duties to engage the parent. *In re Mason*, 486 Mich at 152. Although DHHS cannot refer an incarcerated parent to agencies in the community for services, it is required to provide a case service plan, inform the parent of the need to engage in particular services, and contact the appropriate person at the prison regarding the parent's need for services. See *id.* at 156-157. A challenge to the reasonableness of the reunification efforts made by the DHHS ultimately relates to the sufficiency of the evidence underlying the trial court's decision that a ground for termination in MCL 712A.19b(3) has been proven by clear and convincing evidence. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). We review for clear error the issue of whether DHHS made reasonable efforts to preserve and reunify the family. See *id.* at 542-543.

To preserve a challenge to the reasonableness of the agency's efforts toward reunification, the parent must object to the services offered at the time they are offered. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Our Supreme Court has expressed some skepticism about this rule, but has not overturned it. See *In re Hicks/Brown*, 500 Mich at 88-89. In this case, respondent-father did not challenge the reasonableness of the agency's efforts until shortly before termination. At the March 5, 2018 review hearing, one year after the agency petitioned the trial court regarding the children, and several months after his re-incarceration, respondent-father's attorney informed the trial court that DHHS had failed to contact respondent-father in jail after his re-incarceration. During closing argument at the termination hearing, respondent-father's attorney for the first time argued that the agency had not made reasonable efforts to reunify the children with respondent-father. Respondent-father thus failed to preserve this challenge by timely raising it.

Moreover, respondent-father failed to participate in the reasonable efforts made by the agency. At the time the children were removed from respondents' home in May 2017, respondent-father was incarcerated but was anticipating release within approximately two months. DHHS adopted a case service plan for respondent-father that required him to participate

in certain services. The trial court advised respondent-father during a hearing that he must comply with the service plan to regain custody of the children. One of the requirements of the plan was that respondent-father refrain from criminal activity. He was thereafter released from jail, but after an initial contact with the agency, he failed to make further contact and approximately one month later was re-incarcerated on new criminal charges. He did not contact the agency to advise them of his re-incarceration.

There is no dispute in this case that the agency provided respondent-father with a case service plan and met with him upon his release from jail to implement the plan. There is also no dispute that when respondent-father was released from incarceration and services were available to him, he failed to participate in the service plan, the most important element of which was to refrain from criminal activity so that he could remain available to parent the children. After being re-incarcerated, respondent-father did not make any effort to comply with the service plan. He did not contact the agency, though the record suggests that he did make phone calls to other people, and his attorney, no doubt, had the ability to contact the agency. He did not take his medication to assist with his mental illness as required by the case service plan; he testified that though he was given the option of taking his prescription medication while incarcerated, he chose not to take it.

Thus, even though respondent-father could have complied with some aspects of the case service plan after becoming re-incarcerated, he failed to do so. Although DHHS “has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered.” *In re Frey*, 297 Mich App at 248. Respondent-father was present at a disposition hearing when the requirements of his service plan were discussed on the record, and he stated that he understood that failure to comply with the plan would lead to termination of his parental rights. Upon release from jail, respondent-father failed to comply with the case service plan, engaged in criminal activity, became re-incarcerated, and thus rendered himself unavailable to parent the children. We conclude that under the circumstances, the agency’s efforts were sufficient to afford respondent-father a meaningful opportunity to participate in services.

Affirmed.

/s/ Michael F. Gadola
/s/ Mark T. Boonstra
/s/ Brock A. Swartzle