STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of TERRY POOLE, MARCUS POOLE, DAVOHN POOLE, DAVIOHN POOLE, and TRACY POOLE, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

NATHANIEL POOLE,

Respondent-Appellant,

and

TRACY FLEMING,

Respondent.

UNPUBLISHED
October 6, 2009

No. 290750
Jackson Circuit Court
Family Division
LC No. 07-005580-NA

In the Matter of TERRY POOLE, MARCUS POOLE, DAVOHN POOLE, DAVIOHN POOLE, and TRACY POOLE, Minors.

DEPARTMENT OF HUMAN SERVICES,

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v

TRACY FLEMING,

Respondent-Appellant,

and

NATHANIEL POOLE,

No. 290894
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Family Division
LC No. 07-005580-NA

Respondent.

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

Respondent-appellant Nathaniel Poole (hereinafter "respondent father") and respondent-appellant Tracy Fleming (hereinafter "respondent mother") are the biological parents of the five involved minor children. In these consolidated cases, respondents appeal as of right challenging a circuit court order terminating their parental rights to the children under MCL 712A.19b(3)(c)(i) [the conditions leading to the adjudication continue to exist with no reasonable likelihood of rectification within a reasonable time given the child's age], (c)(ii) [the parent has failed to rectify other conditions causing the child to come within court jurisdiction, and there is no reasonable likelihood of rectification within a reasonable time], (g) [irrespective of intent, the parent fails to provide proper care and custody and no reasonable likelihood exists that she might do so within a reasonable time given the child's age], and (j) [a reasonable likelihood exists, based on the parent's conduct or capacity, that the child will suffer harm if returned to the parent's home]. We affirm.

Respondent mother has borne a total of eight children, and respondent father has parented seven of the children. Although the initial petition named all eight children in these proceedings, the circuit court ultimately terminated respondents' parental rights to the five youngest children, many of whom have special needs. The circuit court conducted a termination hearing in August 2008, but did not terminate respondents' parental rights after this hearing, primarily because the service plan petitioner offered respondents was not fashioned to take into account their intellectual limitations. The court ordered that petitioner afford respondents additional services more tailored to their learning difficulties. By the time of the second termination hearing in March 2009, the circuit court found that petitioner had made reasonable efforts to reunite the family, and that the circumstances warranted termination of respondents' parental rights to the five youngest children.

I. Docket No. 290750

Respondent father challenges both the circuit court's findings on the statutory grounds warranting termination of his parental rights and the court's findings concerning the children's best interests. The petitioner has the burden of proving a statutory ground for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once a statutory ground for termination is established by clear and convincing evidence, the trial court must order termination if "termination of parental rights is in the child's best interests." MCL 712A.19b(5). We review for clear error a trial court's findings of fact. MCR 3.977(J); *In re Trejo*, 462 Mich 356-357. Clear error exists when the reviewing court has a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Respondent father does not challenge the circuit court's findings with regard to any of the individual statutory grounds, but insists that petitioner did not make reasonable efforts to reunite him with his children. He contends that petitioner failed to offer services that took into account

his cognitive limitations. Respondent father invokes *In re Terry*, 240 Mich App 14, 25-28; 610 NW2d 563 (2000), in which this Court explained a child protective proceeding petitioner's responsibilities to accommodate a parent's disabilities when offering services:

> Nevertheless, the ADA does require a public agency, such as the Family Independence Agency (FIA), to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the FIA must comply with the ADA. However, in the context of the present case, we discern no conflict between the ADA and Michigan's Juvenile Code. Under MCL 712A.18f(4) . . . , before entering an order of disposition, the court must determine whether the FIA has made "reasonable efforts" to rectify the conditions that led to its involvement in the case. Thus, the state legislative requirement that the FIA make reasonable efforts to reunite a family is consistent with the ADA's directive that disabilities be reasonably accommodated. In other words, if the FIA 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.
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> 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.[5]

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[5] Any 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. The focus at the dispositional hearing must be on the parent's rights to the child and the best interests of the child under the Juvenile Code, and the parties and the court should not allow themselves to be distracted by arguments regarding the parent's rights under the ADA. Given that the court must consider whether reasonable efforts were made to reunite the family, precluding specific reference to the ADA at the dispositional hearing is not likely to make any difference in terms of the outcome.

> In the present case, respondent did not raise a challenge to the nature of the services or accommodations offered until her closing argument at the hearing regarding the petition to terminate her parental rights. This was too late in the proceedings to raise the issue. The time for asserting the need for accommodation in services is when the court adopts a service plan, not at the time of a dispositional hearing to terminate parental rights.
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> Even if respondent had timely raised this issue, the record does not support her claim that petitioner did not reasonably accommodate her disability. It is undisputed that respondent was provided with extensive services, and there is no evidence that she was denied any services that are available to parents with greater cognitive abilities. The caseworkers were aware of respondent's intellectual limitations and would repeat instructions multiple times and remind her when tasks had to be completed. Respondent received assistance . . . to address both personal and parenting problems in a program that was tailored to developmentally disabled persons. An arrangement under which respondent lived in the children's foster home was attempted but proved unsuccessful. Petitioner had no other services available that would address respondent's deficiencies while allowing her to keep her children. The ADA does not require petitioner to provide respondent with full-time, live-in assistance with her children.
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> Respondent's contention that she needed even more assistance from petitioner to properly care for her children merely provides additional support for the family court's decision to terminate her parental rights. After her children have come within the jurisdiction of the family court, a parent, whether disabled or not, must demonstrate that she can meet their basic needs before they will be returned to her care. "If a parent cannot or will not meet her irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent." *In re AP*, [1999] Pa Super [78]; 728 A2d 375, 379 (1999). [Footnote and some citations omitted.]

At no point in these proceedings did respondent father specifically object that the services he received did not reasonably accommodate his cognitive limitations. Instead, at the close of the first termination hearing the circuit court raised its concern that the services offered to respondents had not been geared to take into account their limitations. The court refused to terminate respondents' parental rights, directing petitioner to give respondents other services aimed at more "concrete" learners. The court also requested that a therapist participate in respondents' parenting times with the children to both model appropriate behavior for them and assess respondents' capacities to parent. Because respondent-father did receive "hands on" assistance and training during both the parenting classes and parenting times, we reject that the services offered failed to take into account his limitations.

Respondent father also criticizes petitioner's handling of family parenting times. The parties do not dispute that visits often occurred in a room too small to accommodate respondents and the eight children at once. However, testimony showed that petitioner tried to make changes to accommodate the large family by holding some visits in a bigger room and alternating some of the children present for visits. And the record reflects that the size of the room was not an impediment to successful or meaningful parenting times, but that the problems stemmed from

respondent father's consistent failure to interact with the children. He ritually spent a majority of the visits preparing sandwiches and cleaning, and spent little time interacting and playing with the children.

Respondent father suggests that he could not conceivably provide snacks for the children and interact with them in the brief period of an hour. However, the testimony reveals no reason why he had to spend the major part of every visit preparing sandwiches, and that the most significant problem consistently apparent during parenting times involved respondent father's limited interactions with the children. Although petitioner attempted to model appropriate conduct for respondent father during parenting times, he repeatedly seemed oblivious to the need to communicate with the children or understand their problems and needs. Furthermore, the younger children did not receive the necessary care and stimulation critical to their development when in respondent father's custody. The parenting times demonstrated that respondent father simply did not possess the ability to care for the children on a regular basis and address their ever changing needs.

Although some testimony referenced the possibility that respondent father might receive housing, employment and other assistance from the VFW National Home for Children over the course of a limited, three-year period, the evidence did not substantiate that this program would have helped him in any significant respect to parent the younger children. The evidence rendered unlikely the probability that respondent father could ever care for the five youngest children on his own even if he had three years of additional services, especially in light of the children's special needs. And as documented in the record, respondents already had received multiple in-home services in the years before the children's instant removal, none of which services proved beneficial.

In conclusion, the circuit court did not clearly err in finding that petitioner had proven at least one statutory ground, i.e., MCL 712A.19b(3)(g), by clear and convincing evidence, or that petitioner made reasonable reunification efforts before the termination of respondent father's parental rights.

Respondent father next maintains that in deciding what served the children's best interests, the circuit court improperly considered the children's potential for adoption. A court cannot consider alternative homes when determining whether statutory grounds for termination of parental rights exist. *In re Mathers*, 371 Mich 516, 530; 124 NW2d 878 (1963); *In re Hamlet (After Remand)*, 225 Mich App 505, 520; 571 NW2d 750 (1997), overruled in part on other grounds in *In re Trejo*, 462 Mich 353 n 10. However, once a statutory ground for termination is clearly and convincingly established, a court may consider alternative homes when weighing what arrangement would enhance a child's best interests. *In re Shawboose*, 175 Mich App 637, 640-641; 438 NW2d 272 (1989).

The circuit court here considered the children's ages and their likelihoods of adoption because the parties presented testimony on the subject. Given that the younger children had resided in foster care for a good portion of their young lives, they exhibited more bonding with their foster parents than with respondents. The circuit court plainly took these factors into account only when ruling with respect to the children's best interests. Respondents could not give all the children the attention they needed, or control and protect all of the children. There was simply no reasonable likelihood that respondent father, as a single parent, could properly

care for all seven of his children when he could not successfully care for only three or four of the older children after they returned to his custody. Notwithstanding that respondent father did participate in appropriately tailored services to address his parenting deficiencies, abundant evidence showed that his problems were simply too much to overcome, especially in light of the younger children's ages and special needs. The circuit court thus did not clearly err in finding that termination of respondent father's parental rights served the children's best interests.

II. Docket No. 290894

Respondent mother raises only one appellate issue, which does not challenge any of the specific statutory grounds on which the circuit court premised termination of her parental rights. Respondent mother claims that the circuit court "legally erred where it terminated . . . [her] parental rights . . . , holding that the best interest [sic] of the children would be served by termination."

As we already have observed, a court cannot consider alternative homes when ascertaining the existence of statutory grounds for termination of parental rights. *In re Mathers*, 371 Mich 516; *In re Hamlet*, 225 Mich App 520. However, once a petitioner has established a statutory ground supporting termination, the court may consider alternative homes when weighing what outcome would serve the child's best interests. *In re Shawboose*, 175 Mich App 640-641. The record plainly reflects that the circuit court properly considered potential adoption issues or the children's progress in their foster care placements only in the context of its best interest findings.

The record established that the younger children had improved since their placements in foster care, primarily because they were receiving the care and attention they did not receive when residing in respondent mother's custody, and that in light of respondent mother's difficulties in caring for just three or four of her older children, no reasonable likelihood existed that she could care for all eight children. Throughout these proceedings, respondent mother displayed an inability to place the children's needs first; for example, she refused to accept help offered to assist her in caring for Davohn's medical needs.

In conclusion, the circuit court did not clearly err in finding that clear and convincing evidence of several statutory grounds warranted termination of respondent mother's parental rights, and the circuit court did not clearly err in its determination that termination of her parental rights would enhance the children's best interests.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher