

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 16, 2010

In the Matter of KLEMKOW, Minors.

No. 295488
Genesee Circuit Court
Family Division
LC No. 07-123083-NA

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Respondent Pomeroy (hereinafter “respondent”) appeals as of right from the trial court’s order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(ii) and (j). We affirm.

I. REASONABLE EFFORTS TO PREVENT THE CHILDREN’S REMOVAL

Respondent first argues that when petitioner filed its initial petition in September 2007, requesting that the children be removed from the home and that the trial court exercise jurisdiction over the children, petitioner failed to comply with MCL 712A.18f(1), which requires an agency to report in writing to the court what efforts were made to prevent a child’s removal or the efforts to rectify the conditions that caused the child’s removal. We conclude that this issue is not properly before this Court. Respondent could have directly appealed the September 2007 order removing the child. MCR 3.993(A)(1). She did not do so and cannot now collaterally challenge that decision in this appeal from the October 2009 termination order. *In re Hatcher*, 443 Mich 426, 439-444; 505 NW2d 834 (1993); *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005); *In re Powers*, 208 Mich App 582, 587-588; 528 NW2d 799 (1995).

II. REASONABLE EFFORTS TOWARD REUNIFICATION

Respondent next argues that reversal is required because petitioner failed to refer her for a psychopharmacological review to determine whether medication should be prescribed to address her depression. Respondent contends that her depression was a disability and that, by failing to refer her for a psychopharmacological review as recommended by a psychologist, petitioner violated its statutory duty under the Americans with Disabilities Act (“ADA”), 42 USC 12101 *et seq.*, to provide services to reasonably accommodate a parent’s disability, see *In re Terry*, 240 Mich App 14, 24-28; 610 NW2d 563 (2000), and also violated its statutory duty under state law to make reasonable efforts to rectify the conditions that caused a child’s removal from a parent’s home and to provide necessary services to facilitate the return of the child. See

MCL 712A.18f(4), *In re Terry*, 240 Mich App at 25-26, and *In re Rood*, 483 Mich 73, 104-106; 763 NW2d 587 (2009). We disagree.

Dr. Walter Drwal conducted a psychological evaluation of respondent in November 2007. He concluded in part that respondent suffered from depression and he made several recommendations, one being that respondent be referred for a psychopharmacological review to determine if medication should be prescribed to help treat her depression. Although that recommendation was never implemented, respondent was referred for counseling and her depression was addressed in therapy. Respondent's therapist was also aware that respondent had been referred for substance abuse treatment, which would have included an evaluation of the need for medication to treat depression. However, respondent denied using drugs and, therefore, she did not participate in substance abuse treatment.

We agree with the trial court that respondent never timely asserted a violation of the ADA. As explained in *In re Terry*, 240 Mich App at 26:

Any claim that the [DHS] 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 [DHS] 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 this case, the recommendation for a psychopharmacological review was made in a psychological evaluation in November 2007. Respondent never raised a claim before the August 2009 termination hearing that petitioner unreasonably refused to accommodate her alleged disability by refusing to refer her for a psychopharmacological review. Respondent's failure to timely raise the issue constitutes a waiver of any claim based on the ADA. *In re Terry*, 240 Mich App at 26 n 5.

We also disagree with respondent's argument that, by failing to make the referral for a psychopharmacological review, petitioner violated its statutory duty to make reasonable efforts to rectify the conditions that caused a child's removal from a parent's home and to provide necessary services to facilitate the return of the child. Respondent was offered other services to address her depression. As previously indicated, respondent's depression was an issue that was addressed in counseling. In addition, respondent was twice referred for substance abuse treatment, which would have included an evaluation by a psychiatrist to determine whether medication might be advisable to address respondent's depression, but both times respondent failed to cooperate in that process. Thus, the record discloses that petitioner made reasonable efforts to provide services to respondent, and that it was respondent's lack of cooperation with those services that thwarted the reunification efforts. Further, respondent completed another psychological evaluation with Dr. Allen Bellamy in March 2009. Although he agreed that respondent showed some signs of depression, he concluded that it was not clinically significant, that it did not constitute a disability, and that medication was not required to enable respondent

to benefit from services. Thus, the record fails to show that a psychopharmacological review was critical to the reunification efforts.

We also disagree with respondent's argument that, apart from the failure to make a referral for a psychopharmacological review, petitioner failed to make other reasonable efforts to help reunite her with her children. Although respondent complains that she was not referred for counseling until June 2008, more than seven months after Dr. Drwal completed his psychological evaluation in November 2007, the record discloses that respondent was offered domestic violence and parenting courses during this interim period. The caseworker explained that services are sometimes staggered to avoid overwhelming a parent. Further, respondent was eventually offered counseling, and she had ample opportunity to participate in counseling before proceedings were initiated to terminate her parental rights.

Respondent also claims that she was not provided with services to assist in finding housing and employment. The record does not support this claim. On the contrary, the record discloses that these services were offered to respondent and that she either declined them or refused to follow through. The facts that respondent rejected petitioner's offers for assistance and decided to pursue these matters on her own does not establish that petitioner's efforts were deficient or unreasonable. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

III. STATUTORY GROUNDS FOR TERMINATION

Respondent next argues that the statutory grounds for termination were not established by clear and convincing evidence. We disagree.

The burden was on petitioner to prove a statutory ground for termination by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). We review the trial court's factual findings, as well as its ultimate decision that a statutory ground for termination was proven by clear and convincing evidence, for clear error. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* Deference is given to the trial court's assessment of the credibility of the witnesses before it. *In re Newman*, 189 Mich App 61, 65; 472 NW2d 38 (1991).

The trial court terminated respondent's parental rights under §§ 19b(3)(c)(ii) and (j), which provide:

(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:

* * *

(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.

* * *

(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.

The trial court found that termination was justified under § 19b(3)(c)(ii) because, despite being afforded services and having ample time to address the conditions identified in her parent-agency agreement, respondent (1) continued to use marijuana, (2) failed to complete substance abuse treatment and denied having a substance abuse problem, (3) failed to maintain stable housing, and (4) failed to benefit from counseling. We find no clear error with the trial court's findings. *In re Mason*, 486 Mich at 152.

Despite denying that she had a drug problem, respondent repeatedly tested positive for marijuana use, leading to frequent suspensions of her visitations rights, and she refused to participate in substance abuse treatment. In June 2009, the trial court adjourned a scheduled termination hearing to provide respondent with another chance to show that she could make progress with her treatment plan, but she again tested positive for marijuana use later that month and again in July 2009. The evidence also showed that respondent failed to benefit from counseling that was intended to address the psychological barriers that prevented her from safely parenting her children. She believed that her marijuana use did not affect her children because she did not use it in their presence, but she failed to recognize that it was symptomatic of her failure to deal with other issues and that it prevented her from understanding and addressing her children's needs. Respondent had an older child who committed suicide in 2004 after respondent failed to monitor him following his release from a hospital, and another daughter who was sexually assaulted. Respondent tended to blame her daughter for the assault and showed little concern for her daughter's mental health and suicidal status after that offense. Respondent's lack of empathy for her children was addressed in counseling, but respondent made little progress.

According to Dr. Drwal's psychological evaluation in 2007, respondent had rigidity in her thinking about how to raise her children and was not willing to be told what to do because she did not feel that she had done anything wrong, and her narcissistic tendencies affected her ability to accept advice from others. He concluded that her prognosis for change was poor. Dr. Bellamy reached similar conclusions when he evaluated respondent again in March 2009. He stated that she continued to lack insight into her children's needs and the effects of her behaviors on her children, and that, despite participating in services over the previous 18 months, she still lacked the ability to parent her children.

The trial court did not clearly err in finding that respondent failed to rectify the conditions that supported the court's continued jurisdiction over the children, despite having a reasonable opportunity to do so. Further, given respondent's poor prognosis for change and her demonstrated lack of progress throughout the history of case, there was no reasonable likelihood that the conditions would be rectified within a reasonable time considering the children's ages.

Accordingly, the trial court did not clearly err in terminating respondent's parental rights under § 19b(3)(c)(ii). *In re Mason*, 486 Mich at 152.

The evidence also supports the trial court's decision to terminate respondent's parental rights under § 19b(3)(j). The evidence showed that respondent's parenting deficiencies contributed to an older child's suicide in 2004, and that respondent showed little concern for the mental health of another daughter, who had suicidal thoughts following a sexual assault offense, which respondent tended to blame on the daughter. Considering respondent's lack of progress with therapy and poor prognosis for change, there is a reasonable likelihood her children would be harmed if returned to respondent's home.

IV. DUE PROCESS

Relying on *In re B & J*, 279 Mich App 12; 756 NW2d 234 (2008), respondent argues that petitioner violated her constitutional right to due process by creating the circumstances that led to the termination of her parental rights. We find no merit to this argument. This case is clearly distinguishable from *In re B & J*, in which this Court found that the respondents' due process rights were violated when the petitioner initiated action that led to the respondents' deportation, and then relied on that circumstance to argue that the respondents were not able to provide proper care and custody for their children. *Id.* at 19-20.

Respondent here contends that petitioner's initiation of this child protective proceeding led to her placement on the Central Registry, which resulted in her loss of employment as a care provider, and in turn caused her to lose her housing, conditions that ultimately led to the termination of her parental rights. Respondent likens this situation to that in *In re B & J*. We reject respondent's argument for several reasons. First, as the trial court found, the evidence indicated that respondent was placed on the Central Registry in 2004, after complaints involving two other children were substantiated. The evidence also indicated that respondent failed to renew her license as a certified nurse's aide before this proceeding began. Thus, petitioner did not create those situations. Second, even if respondent had not been placed on the Central Registry until this proceeding began in 2007, the circumstances that led to the placement involved respondent's neglect of her children. Third, even if respondent's placement on the Central Registry prevented her from seeking work as a care provider, it did not prevent her from pursuing other types of employment. Fourth, as previously indicated, petitioner offered respondent assistance in finding employment and housing, but respondent refused to accept those offers. Thus, there is no merit to respondent's argument that petitioner violated her due process rights by "virtually assur[ing] the creation of a ground for termination of parental rights." *Id.* at 19 (citation omitted).

Respondent also argues that petitioner's failure to provide her with necessary services to reunify the family violated her right to due process. As discussed previously, however, the record shows that petitioner made reasonable efforts to rectify the conditions that caused the children's removal and to facilitate the return of the children. The delivery of services was also timely. Indeed, the trial court even agreed to adjourn the original termination hearing to provide respondent with more time to benefit from services. This more than satisfied respondent's right to due process.

Respondent also argues that the trial court's policy of suspending visitation following a positive drug test violated her right to due process. Respondent relies on MCL 712A.18f(3)(e), which provides that a case service plan must include weekly visitation unless the court determines that visits would be harmful to the child. As respondent observes, the trial court never specifically found that it was necessary to suspend visits because continued visitation would be harmful to the children. Nonetheless, we cannot conclude that respondent's right to due process was violated. Ultimately, respondent's visitation record was not the reason that her parental rights were terminated. Moreover, the court later allowed visits to continue despite respondent's continued positive drug tests.

For these reasons, we find no merit to respondent's due process argument.

V. THE CHILDREN'S BEST INTERESTS

Respondent lastly argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. MCL 712A.19b(5). We disagree. The children had been in foster care for more than two years and were in need of stability, permanence, and a consistent home environment. Respondent had resisted efforts to improve her situation, her prognosis for change was poor, and there was little likelihood that she would be able to provide the stability and permanence that the children required in the foreseeable future. The trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood