STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of S. BONDS, Minor.	UNPUBLISHED October 28, 2010 No. 296291 Genesee Circuit Court Family Division LC No. 08-123996-NA
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Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals, respondent father appeals as of right the termination of his parental rights to his child under MCL 712A.19b(3)(a)(*ii*), (b)(*ii*), (c)(*i*), (g), and (j). Respondent mother appeals the termination of her parental rights to that child and another child under the same statutory grounds. We affirm.

Respondent father first argues that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. In termination proceedings, this Court must defer to the trial court's factual findings if those findings do not constitute clear error. MCR 3.977(K). Both the trial court's decision that a statutory basis for termination has been proven by clear and convincing evidence and the best-interests determination are reviewed for clear error. *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (2009). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal citations and quotation marks omitted).

The trial court clearly stated that abandonment, MCL 712A.19b(3)(a)(*ii*), was established with regard to respondent father, but the court was not explicit in setting forth the additional specific grounds it found were established with regard to him. The other grounds on which petitioner sought termination were MCL 712A.19b(3)(b)(*ii*), (c)(*i*), (g), and (j), and we assume the court found that all had been established. Although the trial court clearly erred in finding that

sections (b)(*ii*) and (j) were established, the error was harmless where other statutory grounds for termination were established by clear and convincing evidence. MCL 712A.19b(3).

The trial court did not clearly err in finding that sections (a)(*ii*), (c)(*i*), and (g) were established. The foster care worker testified that she was assigned to the case in May 2008 and did not meet or hear from respondent father until December 2008, a period well over 91 days. During that time, no services were provided and no visitation occurred because the foster care worker did not have contact with respondent father. Therefore, the trial court did not clearly err in finding that petitioner established section (a)(*ii*) by clear and convincing evidence.

The conditions leading to adjudication were that (1) many people lived in the child's home, (2) those people and respondent father used crack cocaine, (3) the child was physically and sexually abused in the home, (4) the child missed a lot of school, (5) respondent father was on parole and had an extensive criminal history, (6) respondent father threatened to kill protective services workers and police who came to the home to remove the child, and (7) respondent father moved a lot. At the time of trial, respondent father had not completed required drug tests to show that he was drug free, he had not completed a required psychiatric evaluation, and he had moved numerous times while the case was pending. Respondent father made little progress in the year and a half the case was pending and missed visits and family therapy sessions with his daughter. He excused his daughter's many absences from school by explaining that, when she was late, the school counted it as if she had missed the whole day. Although respondent father's psychological evaluation gave him a good prognosis for parenting, he did not follow through with the evaluation's recommendations. Therefore, the court did not err in finding that section (c)(*i*) was established.

The court also did not clearly err in finding that petitioner established that respondent father did not provide proper care and custody for his daughter and would not provide proper care and custody within a reasonable time considering his daughter's age. MCL 712A.19b(3)(g). At the time the child was removed from her grandmother's home, respondent father was on parole and threatened to kill police officers and protective service workers, and there was evidence that the child was not being properly cared for. Respondent father testified that he had an alcohol problem and used crack cocaine. Although he was ordered to complete random drug screens, he did not do so. He testified that he took drug screens while in residential treatment and that it was his foster care worker's fault that she did not request records containing the results of these screens. However, respondent father was not in treatment for the whole period that he was required to submit screens. Respondent father also did not attend visitation and family therapy on a consistent basis when it was offered to him. Over a period of 20 months, respondent father did very little to demonstrate his ability to provide proper care and custody for his child, and this small amount of progress was indicative of respondent father's ability to provide proper care and custody in the future.

Finally, respondent father argues that the trial court clearly erred in its best-interests determination. However, this issue is not properly presented for review because it was not included in the statement of issues presented for appeal. MCR 7.212(C)(5); *Grand Rapids v Grand Rapids Employees Independent Union*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). Moreover, we note that respondent father's child did not know he was her father and instead believed someone else was her father. Respondent father took months to contact the foster care worker and get a psychological evaluation so that visitation could begin, and he

missed many of the visits and family therapy sessions with the child until they were suspended because of his nonattendance and failure to complete drug screens. The trial court did not clearly err in finding that termination of respondent father's parental rights was in his child's best interests.

Respondent mother first argues that the trial court clearly erred in finding that petitioner made reasonable efforts at reunification in light of her cognitive impairment. When a child is removed from a parent's custody, petitioner is generally required to make reasonable efforts at reunification. MCL 712A.18f(1), (2), and (4). A failure to make reasonable efforts at reunification may prevent petitioner from establishing statutory grounds for termination. *In re Newman*, 189 Mich App 61, 67-68, 70; 472 NW2d 38 (1991). The Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., requires the state to provide equal access to services to those with disabilities, as defined by the ADA. It appears that respondent mother's cognitive impairment qualifies as a disability under the ADA.

This Court, in *In re Terry*, 240 Mich App 14, 25-27; 610 NW2d 563 (2000), decided that a respondent parent may not raise violations of the ADA as a defense to termination of parental rights proceedings and that, if a parent intends to rely on the ADA, the parent must raise the issue in a timely manner, i.e., at an early disposition hearing. However, the *Terry* Court also stated that if petitioner fails to take into account the parent's limitations or disabilities and make reasonable accommodations, then petitioner has not made reasonable efforts at reunification. *Id*. at 25-26.

Here, petitioner was aware of respondent mother's limitations and alleged in its April 25, 2008, petition for temporary custody that respondent mother was cognitively impaired. The foster care worker testified that, in July 2008, respondent mother entered an institution in an effort to make her competent to attend to criminal charges. The foster care worker was not sure when respondent mother was released from the institution, but she was there in September 2008, and the foster care worker first had contact with her in December 2008, when respondent mother was in court for proceedings involving her newborn son, who is not involved in the present case. The foster care worker gave respondent mother a business card and asked her to call her service worker to set up a psychological evaluation. The foster care worker also sent respondent mother a letter in December 2008. That was the extent of the contact the foster care worker had with respondent mother. In April 2009, respondent mother called the case manager assigned to the case and was told to get a psychological evaluation. Respondent mother completed the evaluation in September 2009 and had one meeting with the case manager in September 2009; respondent father did most of the talking at this meeting. Respondent mother completed in-home parenting classes for her newborn son's case, in which no termination petition had been filed. According to the case manager, no other services were offered to respondent mother because she was not in contact with her case manager.

In *Terry*, petitioner's efforts were deemed reasonable, even disregarding the absence of a request for ADA compliance, because petitioner had provided numerous services to the respondent parents. *Terry*, 240 Mich App at 27. Here, respondent mother did not receive the plethora of services offered in *Terry*. However, respondent mother was not in contact with the foster care worker or case manager assigned to the case. For many months, her non-contact was likely because of her institutionalization, but upon her release she still did not contact anyone. While petitioner was aware of respondent mother's cognitive impairment, petitioner could not

provide specialized services to a parent whom they were unable to communicate with or locate. Further, the file contains progress reports for respondent mother's case with her son, for which more services were offered and respondent mother participated minimally. In these progress reports, respondent mother failed to make contact with her worker for long periods, moved without updating her address with her worker, and did not adequately participate in the services ordered.

Petitioner could have done more and attempted more contact with respondent mother. However, petitioner can only do so much for a parent that does not provide contact information. Because of this, the trial court did not clearly err in finding that petitioner's efforts at reunification were reasonable, even considering respondent mother's cognitive impairment.

Respondent mother next argues that her trial counsel was ineffective in failing to make a timely demand for reasonable accommodations for respondent mother in light of her cognitive impairment. Effective assistance of counsel claims in parental rights termination cases are analogous to effective assistance of counsel claims in criminal cases. *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). To establish ineffective assistance of counsel, a respondent must show that (1) counsel's actions fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the result of the proceedings was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Trial counsel's performance fell below an objective standard of reasonableness. As respondent mother contends, although counsel argued at trial that more should have been done for respondent in light of her mental deficits, counsel failed to request compliance with the ADA at an early stage, as required by *Terry*, even though it was clear from the beginning that respondent mother's cognitive impairment required accommodation. Also, it appears that a guardian ad litem should have been requested, see MCR 3.916(A), because there were competency issues raised during the pendency of the case.

However, respondent mother has not established that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Respondent mother's psychological evaluation report indicated a poor prognosis, concluded that it would be highly unlikely for respondent mother to succeed with traditional services and problematic for her to succeed even with specialized services, and recommended that respondent mother be appointed a guardian to care for her children and that respondent mother be supervised at all times in her care of her children. Further, respondent mother's argument that she did well when provided specialized services for her newborn son was not supported by the record. In the report prepared for a December 10, 2009, review hearing in her son's case, respondent mother was non-compliant in all areas of her case service plan, including housing and communication, and visitation had been suspended. For these reasons, respondent mother has not established that there is a reasonable probability that, but for counsel's error, the result of these proceedings would have been different. Respondent mother did not establish ineffective assistance of counsel on the record before the trial court.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio