

STATE OF MICHIGAN
COURT OF APPEALS

In re PENNINGTON, Minors.

UNPUBLISHED
October 18, 2016

Nos. 331727; 331728
Wayne Circuit Court
Family Division
LC No. 14-515657-NA

Before: MURRAY, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Respondent mother, T. Pennington, and respondent father, J. Torres, each appeal as of right the circuit court’s order terminating respondent mother’s parental rights to AJP and ZLP, and terminating respondent father’s parental rights to AJP, pursuant to MCL 712A.19b(3)(a)(i), (c)(i), (g), and (j).¹ We affirm.

I. ISSUES ON APPEAL

Both respondents challenge the circuit court’s determination that clear and convincing evidence supported the cited statutory grounds for termination. Respondent mother further challenges the circuit court’s determination that termination of her parental rights was in her children’s best interests. Because the circuit court addressed and decided each of these matters, these issues are preserved. Both respondents further argue that petitioner failed to comply with its statutory duty to provide reasonable services designed to reunify the parent and the child. Because neither respondent objected on this basis in the trial court, or otherwise argued that the services provided were inadequate, this issue is unpreserved. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012).

¹ The trial court also cited MCL 712A.19b(3)(a)(i), which authorizes termination of parental rights when a “child’s parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period.” That section clearly does not apply to either respondent, and instead applies only to the unidentified father of ZLP, whose parental rights were also terminated.

II. APPLICABLE STANDARDS OF REVIEW

The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). Once the petitioner has proven a statutory ground, the circuit 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 circuit court’s decision to terminate parental rights. MCR 3.977(K). The clear error standard controls this Court’s review of “both the court’s decision that a ground for termination has been proven by clear and convincing evidence and . . . the court’s decision regarding the child’s best interest.” *In re Trejo*, 462 Mich at 356-357. A decision qualifies as clearly erroneous when, “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 JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). Clear error signifies a decision that strikes this Court as more than just maybe or probably wrong. *In re Trejo*, 462 Mich at 356. This Court does “give deference to the trial court’s special opportunity to judge the credibility of the witnesses.” *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

Respondents’ unpreserved arguments regarding the reasonableness of petitioner’s reunification efforts are reviewed for plain error affecting respondents’ substantial rights. *In re Frey*, 297 Mich App at 247; *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008).

III. STATUTORY GROUNDS FOR TERMINATION

We conclude that clear and convincing evidence supports the circuit court’s termination of respondent mother’s parental rights to the children under MCL 712A.19b(3)(c)(i), (g), and (j), and termination of respondent father’s parental rights to his child pursuant to MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j).

A. MCL 712A.19b(3)(a)(ii)

Parental rights may be terminated pursuant to MCL 712A.19b(3)(a)(ii) if “[t]he child’s parent has deserted the child for 91 or more days and has not sought custody of the child during that period.” The parties on appeal agree that § 19b(3)(a)(ii) was not intended to apply to respondent mother. Respondent mother provided custodial care for the children when they arrived in foster care, and she at least minimally participated in the offered services. Clear and convincing evidence does not support application of this statutory ground to respondent mother. Compare *In re Laster*, 303 Mich App 485, 492; 845 NW2d 540 (2013). However, to the extent that the circuit court erroneously invoked § 19b(3)(a)(ii) with respect to respondent mother, the error qualifies as harmless because the court did not clearly err in finding that clear and convincing evidence supported termination of her parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). See *id.* at 495.

The testimony of the caseworkers and respondent father agreed that he failed to contact AJP for 91 or more days. Respondent father excused his omission, in part, on the basis that the conditions of his parole for a third-degree criminal sexual conduct conviction precluded him from having contact with children. However, respondent father acknowledged that the no-contact provision had concluded in 2014, and he could not substantiate any regular contact with

AJP during 2015 or 2016. Furthermore, testimony of the caseworkers, respondents, and the children's paternal grandmother agreed respondent father had made only seven support payments during AJP's lifetime, and respondent father provided no other regular, substantial support for AJP. We conclude that the record clearly and convincingly established respondent father's abandonment of his obligation to support AJP for at least 91 days.

B. MCL 712A.19b(3)(c)(i)

A circuit court may order termination of parental rights under MCL 712A.19b(3)(c)(i) if the record clearly and convincingly establishes:

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.

Clear and convincing evidence established that 182 or more days had elapsed between the circuit court's dispositional orders and the close of the termination hearing. Approximately 20 months had elapsed between the circuit court's entry of an initial dispositional order concerning AJP and the close of the termination hearing. On February 12, 2014, the circuit court authorized the filing of a petition requesting that it exercise temporary jurisdiction over AJP on the basis of the child's neglect by respondents. On May 15, 2014, the circuit court exercised temporary jurisdiction over AJP. Respondent mother admitted that she lacked stable housing, overused multiple medications prescribed to combat mental illnesses, used marijuana, and that her drug abuse interfered with her capacity to parent AJP. Respondent father conceded that he had been convicted of third-degree criminal sexual conduct involving a 15-year-old child, MCL 750.520d, and abused marijuana. On June 17, 2014, the circuit court ordered respondents to maintain appropriate housing and a legal income source, complete and benefit from individual counseling including to address domestic violence, attend parenting classes, obtain substance abuse treatment, and attend parenting times and random drug screens. The circuit court further ordered respondent mother to participate in a pain management program and a psychological evaluation, and required respondent father to follow the terms of his parole.

Approximately eight months had elapsed between the circuit court's entry of an initial dispositional order concerning ZLP and the close of the termination hearing. On June 8, 2015, the circuit court exercised jurisdiction over ZLP on the basis of respondent mother's admissions that AJP remained a temporary court ward, that ZLP tested positive for hydrocodone, hydromorphone, and marijuana at birth, that respondent mother tested positive for marijuana at ZLP's birth, and that respondent mother lacked stable housing, had been diagnosed with bipolar disorder and depression, and had active warrants for her arrest. On June 10, 2015, the circuit court ordered respondent mother to immediately participate in a drug treatment program and comply with the other elements of her treatment plan.

Clear and convincing evidence also established that the conditions leading to the children's adjudications continued to exist in February 2016. At the termination hearing, Tresna Tupper, the caseworker between September 2014 and September 2015, and Anastasia Zuzak, the caseworker beginning in October 2015, offered similar testimony. Petitioner offered respondents parenting classes, random drug screens, substance abuse treatment, mental health classes, individual therapy, and psychological evaluations. Respondents also agreed to remain in regular contact with their caseworkers, and maintain appropriate housing and a legal income. The circuit court also ordered respondent mother to attend a psychological evaluation.

Although Tupper referred respondent mother for all of the offered services at least four times, Tupper denied that respondent mother had achieved any of her treatment-plan goals, or offered excuses for her failure to participate. Tupper denied that between September 2014 and September 2015, respondent mother had attended any drug screens or enrolled in individual therapy, mental health education or treatment, substance abuse treatment, or parenting classes. Tupper testified that she made extensive, usually unsuccessful, efforts to contact respondent mother, including mailing many certified letters to addresses that Tupper had obtained at court hearings from either respondent mother or her attorney, and personally visited respondent mother's addresses in fruitless efforts to contact her and assess her residences.

Respondent mother attended five supervised parenting times in April and May 2015, but none between mid-May 2015 and August 2015. Respondent mother initially enjoyed unsupervised parenting times at her mother's house, but the unsupervised parenting times concluded after respondent mother stole AJP's clothing and toys and her mother's food-stamp card. At three parenting times in April and May 2015, respondent mother started falling asleep, and she sometimes arrived late for parenting times and told Tupper that "she did not have a ride," although Tupper had offered her bus tickets. Tupper believed that respondent mother and AJP shared a minimal level of bonding, which seemed more distant as the proceeding progressed, and did not share any bond with ZLP.

At the time of the termination hearing, respondent father was incarcerated because of a parole violation. Although respondent father received referrals for the services in his treatment plan, he failed to participate in any respect or provide AJP support.

Zuzak encouraged respondent mother to contact an inpatient substance abuse treatment agency, but she refused because she denied having substance abuse issues. Respondent mother also failed to provide any weekly, random drug screens, or complete any other court-ordered services. Respondent mother usually responded when Zuzak attempted to contact her. In October 2015, Zuzak learned that respondent mother had kidnapped AJP from her mother, and respondent mother told Zuzak that she intended to overdose by taking 12 packets of heroin. Regarding housing, respondent mother reportedly had to leave the recent home she shared with her boyfriend and his family because "they were all using crack," and staying there "would jeopardize [her] sobriety." But a few days before Zuzak's testimony on December 4, 2015, respondent mother informed Zuzak that she had returned to live in the same house with her boyfriend. Zuzak described the house as unsuitable, in part because the house was small, respondent mother and her boyfriend occupied the basement, the basement lacked a sufficient number of bedrooms and furnishings, and respondent mother had no income.

Zuzak testified that respondent mother had missed two parenting times since November 2015, which she attributed to a medical issue and a lack of transportation. Although Zuzak offered respondent mother bus tickets, respondent mother denied requiring any tickets “because her boyfriend’s father had a car and he could drive her wherever she needed to go.” Although a doctor had opined that ZLP, who was small, would not gain weight if respondent mother continued feeding ZLP baby food, and not formula, respondent mother refused to feed ZLP formula because she did not like it.

Concerning respondent father, Zuzak testified that he remained incarcerated, and could be released in February 2016. Although Zuzak referred respondents for services in which they could participate while incarcerated, neither respondent had completed any of these services. Respondent father’s mother advised Zuzak that respondent father had paid limited child support for AJP. Zuzak recommended termination of respondents’ parental rights because AJP had spent approximately 20 months in foster care, ZLP had lived in foster care for her entire life, respondents had failed to rectify their parenting deficiencies, and the children needed permanency and stability in loving and safe homes.

We conclude that the record clearly and convincingly establishes that the concerns regarding respondent father’s emotional and physical neglect of AJP, and respondent mother’s substance abuse and neglect of the children, still existed at the time of the termination hearing. Furthermore, the record clearly and convincingly establishes the unlikelihood that respondents might improve their parenting skills within a reasonable time. AJP had spent approximately two years as a temporary court ward, ZLP had spent her entire life in foster care, respondents made minimal progress toward improving their parenting skills, respondent mother had failed to substantiate any progress toward addressing her substance abuse problem, and the children urgently needed permanency and stability. Accordingly, the circuit court did not clearly err in finding that § 19b(3)(c)(i) was established by clear and convincing evidence with respect to both respondents. See *In re LE*, 278 Mich App 1, 28; 747 NW2d 883 (2008); *In re Dahms*, 187 Mich App 644, 648; 468 NW2d 315 (1991).

C. MCL 712A.19b(3)(g)

Pursuant to MCL 712A.19b(3)(g), a circuit court can terminate a respondent’s parental rights “if the court finds, by clear and convincing evidence,” that “[t]he 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.” Abundant evidence established respondents’ failures to properly care for, protect, and supervise the children, and the unlikelihood that respondents might within a reasonable time improve their parenting skills. See *In re JK*, 468 Mich at 213-214.

Clear and convincing evidence showed that respondents had improperly parented the children. In May 2014, respondent mother admitted that she lacked stable housing, overused multiple medications prescribed to control her mental illnesses, used marijuana, and her drug abuse interfered with her capacity to parent AJP. Respondent father conceded that he had abused marijuana and was convicted of third-degree criminal sexual conduct involving a 15-year-old female. In June 2015, the circuit court exercised jurisdiction over ZLP on the basis of respondent mother’s admissions that AJP remained a temporary court ward, that ZLP tested

positive for hydrocodone, hydromorphone, and marijuana at birth, that respondent mother tested positive for marijuana at ZLP's birth, and that respondent mother lacked stable housing, had been diagnosed with bipolar disorder and depression, and had active warrants for her arrest.

Clear and convincing evidence also proved the unlikelihood that respondents might rectify their parental shortcomings within a reasonable time in light of the children's ages. See *In re LE*, 278 Mich App at 28; *In re Dahms*, 187 Mich App at 648. In June 2014, the circuit court ordered respondents to maintain appropriate housing and a legal income source, complete and benefit from individual counseling including to address domestic violence, parenting classes, and substance abuse treatment, and attend parenting times and random drug screens. The circuit court further ordered respondent mother to participate in a pain management program and a psychological evaluation, and directed respondent father to follow the terms of his parole. In June 2015, the circuit court ordered respondent mother to immediately participate in a drug treatment program and comply with the other elements of her treatment plan concerning AJP.

As summarized in the discussion regarding the propriety of termination under § 19b(3)(c)(i), for approximately two years after AJP had arrived in foster care, respondents failed to meaningfully participate in or improve their capacities to parent AJP. Like when AJP was born, respondent mother continued abusing marijuana at the time of ZLP's birth, ZLP remained in foster care for her entire life, and respondent mother still failed to improve her parenting skills or substantiate her participation in substance abuse treatment. And clear and convincing evidence established that respondents lacked housing, and respondent mother did not possess a legal income. Accordingly, the circuit court did not clearly err in finding that § 19b(3)(g) was established by clear and convincing evidence with respect to both respondents.

D. MCL 712A.19b(3)(j)

A circuit court also can terminate parental rights if the record clearly and convincingly establishes that "[t]here 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." MCL 712A.19b(3)(j). The record clearly and convincingly established that the event precipitating the child protective proceeding involved respondent father's failure to attempt to parent AJP, respondent mother's abuse of multiple substances, her bipolar disorder, anxiety, and depression, and the children's positive testing for marijuana at the times of their births. For approximately 20 months, respondents failed to significantly improve their parenting skills or substantiate any significant progress toward addressing or resolving their substance abuse issues. Approximately a month before the termination hearing commenced, respondent mother kidnapped AJP and called Zuzak threatening to commit suicide with a heroin overdose. We detect no clear error in the circuit court's conclusion that clear and convincing evidence established the likelihood that the children remained at risk of potential emotional and physical harm in respondents' care. See *In re Hudson*, 294 Mich App 261, 268; 817 NW2d 115 (2011) (explaining that the risk of harm to children includes both potential emotional and physical harm).

IV. REASONABLE EFFORTS

Both respondents argue that petitioner failed to make reasonable efforts to reunify them with their children. We find no merit to this argument. Although petitioner has the

“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 Laster*, 303 Mich App at 495 (quotation marks and citation omitted). Petitioner offered respondents a plethora of services, including parenting classes, random drug screens, substance abuse treatment, mental health classes, individual therapy, and psychological evaluations. After respondents were incarcerated, Zuzak referred respondents for services in which they could participate while incarcerated, but neither completed any of these services. Between April 2015 and late-June 2015, respondent mother failed to contact Tupper. In late-June 2015, respondent mother left Tupper a message that she had recently left jail and wanted to contact Tupper. Tupper immediately returned respondent mother’s call, but never successfully contacted respondent mother. Although Tupper referred respondent mother for all of the offered services at least four times, Tupper denied that respondent mother had achieved most of her treatment-plan goals, or offered excuses for her failure to participate. Tupper testified that she had made extensive, often unsuccessful efforts to contact respondent mother, including mailing many certified letters to the addresses that Tupper had obtained at hearings from either respondent mother or her attorney, and visited respondent mother’s addresses in fruitless efforts to assess her homes. Respondent mother sometimes arrived late for parenting times and told Tupper that “she did not have a ride,” although Tupper had offered respondent mother bus tickets. Although Zuzak also referred respondent mother for services, Zuzak denied that respondent mother had substantiated her successful completion of most of the services. Zuzak similarly testified that respondent mother had refused Zuzak’s offer of bus tickets to any of the services. The evidence clearly and convincingly establishes that petitioner made reasonable efforts to reunify respondent mother with her children, but that for approximately 20 months respondent mother failed to pursue most of the many services that were offered. See *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

The caseworkers similarly testified that they referred respondent father for all of the services in his treatment plan, which he did not substantially complete. On appeal, respondent father fails to explain what additional services he should have been offered. In sum, the record does not support respondent father’s argument that petitioner failed to make reasonable efforts to reunify him with his child.

V. BEST INTERESTS

“Even if the trial court finds that the [petitioner] has established a ground for termination by clear and convincing evidence, it cannot terminate the parent’s parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children.” *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). Only respondent mother challenges the trial court’s determination that termination of her parental rights was in the children’s best interests.

In *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014), this Court stated:

The trial court should weigh all the evidence available to determine the children’s best interests. To determine whether termination of parental rights is in a child’s best interests, the court should consider a wide variety of factors that may 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. The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. [Quotation marks, footnotes, and citations omitted.]

Tupper believed that respondent mother and AJP shared a minimal level of bonding, which seemed more distant as the proceeding progressed. Zuzak also noted a loving bond between respondent mother and AJP. But Tupper and Zuzak disbelieved that respondent mother shared a bond with ZLP. Tupper opined that termination of respondent mother's parental rights would serve the children's best interests in light of the lengthy period the children had lived in foster care, and respondent mother's minimal participation in and benefit from services. The caseworkers agreed that they had repeatedly referred respondent mother for parenting classes and substance abuse treatment, but that she had failed to establish any significant progress in these areas. Because AJP had lived in foster care for approximately 24 months, and ZLP had lived in foster care for her entire life, the children strongly needed permanency and stability. The children's foster homes had met all of their needs, and the children's paternal grandmother testified concerning her interest in adopting the children. The circuit court did not clearly err in finding that termination of respondent mother's parental rights served the children's best interests.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Kurtis T. Wilder