STATE OF MICHIGAN

COURT OF APPEALS

In re CARVER, Minors.

UNPUBLISHED
January 19, 2017

Nos. 332107; 332417
Wayne Circuit Court
Family Division
LC No. 11-503989-NA

Before: TALBOT, C.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

In this consolidated appeal, respondent father appeals as of right the order terminating his parental rights to the minor child EC under MCL 712A.19b(3)(g) (failure to provide proper care or custody) and (h) (imprisonment for more than two years), and respondent mother appeals as of right the same order terminating her parental rights to the minor children, JC, EC, and TC, under MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm). With respect to respondent mother, we affirm. With respect to respondent father, we vacate the portion of the order terminating respondent father's parental rights to EC and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Respondent father is the father of the minor child EC. He was incarcerated before his son's birth and continued to be imprisoned at the time of the termination hearing. The fathers of the two minor children JC and TC are unknown. Respondent mother is the mother of all three minor children. Her case history began in September 2011, when the oldest child, JC, was a few days old. The newborn was removed from respondent mother's care because she abandoned him with a relative. It was determined that respondent mother did not have suitable housing for JC, was not taking prescribed medication for her mental illness, had assaulted JC's case worker during an incident in which she threatened to kill everybody in the house while holding a knife, and left JC with a relative without permission. It was also determined that the father of JC was unknown. The Department of Health and Human Services (DHHS) filed a petition for temporary custody of the child, and he entered care on November 1, 2011. Respondent mother was provided with services toward reunification for just over four years. During that time, she gave birth to EC and TC, who were also placed in temporary care. Ultimately, the trial court terminated her parental rights, as well as those of respondent father and the unknown fathers.

II. DOCKET NO. 332107

Respondent father challenges the statutory grounds for termination of his parental rights to EC. "To terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *In re Laster*, 303 Mich App 485, 491; 845 NW2d 540 (2013) (citation and quotation marks omitted). We review a trial court's findings in this regard for clear error. *Id*. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (citation and quotation marks omitted).

The trial court terminated respondent father's parental rights under MCL 712A.19b(3)(g) and (h), which provide that the trial court may terminate the parent's rights to a child if the court finds, by clear and convincing evidence, the following:

> (g) 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.
>
> (h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, 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.

On appeal, respondent father asserts that the trial court terminated his parental rights based solely on his inability to care for his child as a result of his incarceration and cites *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), as support for his argument. We hold that the trial court clearly erred in applying MCL 712A.19b(3)(h) to the facts. Our Supreme Court in *Mason* clarified that "[t]he mere present inability to personally care for one's children as a result of incarceration does not constitute grounds for termination." *Id*. at 160. The Court explained that the incarcerated parent does not need to personally care for the child, and instead can provide proper care and custody through placement with a relative. *Id*. at 161 and n 11.

With regard to MCL 712A.19b(3)(h), the trial court found that, even if respondent father were released at the earliest date possible, his total confinement would have exceeded two years. However, it seems the trial court considered his past incarceration in making this determination. The court stated, "He's in prison for a period where the child is going to be deprived of a normal home for a period of two years before the filing of the date of the petition." This ground is forward-looking and requires proof that the imprisonment will deprive the child of a normal home for two years in the future, not whether it has already deprived the child of a normal home. *Mason*, 486 Mich at 161 n 12. The termination hearing occurred in January 2016. Respondent father's release date was uncertain, but could have been as early as May 2016 or as late as 2033. According to respondent father, he had already met with the parole board and was waiting for its decision. Respondent father indicated that the parole board told him that it would decide within 30 days. As with the respondent in *Mason*, respondent father anticipated that he would be

paroled in less than two years. *Id*. at 162. The evidence also indicated that respondent father would require approximately six months following his release from prison before he could plan for the child. The trial court speculated that the parole board would not permit his release for at least a year or two above the minimum. MCL 712A.19b(3)(h) specifies that the time period exceeds two years. Because of the uncertainty that respondent father would be unable to care for EC for an additional two years, the finding of the trial court by clear and convincing evidence that the child will be deprived of a normal home for a period exceeding two years was erroneous.

Additionally, the court also erred in determining by clear and convincing evidence that respondent father did not provide for the child's proper care and custody and that there was no reasonable expectation that he would be able to provide proper care and custody within a reasonable time considering the child's young age. The trial court noted that respondent father had not provided any support for the child. The court did not believe that he had anybody from his family step forward to be able to help to do things in his absence. We disagree with the trial court's assessment because the evidence at the termination hearing established that respondent father was participating in services in prison, took an active interest in having a relationship with his son, and, most importantly, put forth the name of a relative placement option, which DHHS did not consider.

The evidence indicated that respondent father was interested in establishing a relationship with EC. Respondent father expressed a desire to participate in EC's life, and there was evidence that cards and photographs were prepared, but were not sent to respondent because of a mistake involving the caseworker. The foster-care worker testified that respondent father asked questions regarding EC as well. The termination hearing testimony also established that respondent father participated in services while in prison. According to the foster-care worker, respondent father participated in parenting classes, took drug screens, and engaged in other self-help groups while in prison. He was also participating in a program to assist him in continuing his progress after his release. However, the foster-care worker was unaware whether respondent father was participating in any other programs. In fact, the foster-care worker was unsure whether the prison offered any additional services and thus could not address whether respondent father failed to take advantage of services while in prison. The foster-care worker admitted during the hearing that she had not spoken with respondent father since July 2015, approximately six months before the hearing, and that she may not be aware of whether respondent father participated in any other programs for that reason. Ultimately, the foster-care worker opined, "I believe that he is doing what he needs to do to make it easier once he's released to get [EC] back." She also agreed that respondent father was making efforts to better himself so that he would be more prepared when he was released from prison.

There was also evidence that respondent father had a plan following his release from prison. Respondent father testified that he planned to return to his job of cutting grass following his parole and mentioned that he had done that line of work before going to prison and had worked part-time at a grocery store. He also received social security benefits. Respondent father used this income to support his daughter, who was not at issue in this case. Respondent father testified that he knew what his financial responsibility was with regard to EC. There was no testimony indicating that respondent father's plan following his release from prison would provide insufficient income to care for the child.

Importantly, respondent father offered the name of his mother as a potential relative placement option for the child while he was unable to care for him. However, DHHS did not investigate respondent father's mother as a potential placement option. The foster-care worker explained, "He has presented me with his mother's contact information before so I would have to check her out to know if she would be suitable." DHHS's failure to investigate respondent father's relative placement option left a hole in the evidence on which the trial court based its decision to terminate respondent father's parental rights. See *Mason*, 486 Mich at 160. Because of DHHS's failure to investigate respondent father's mother as a placement option before the termination hearing, the trial court lacked clear and convincing evidence that respondent father failed to provide proper care and custody during the period of his incarceration, and that there was no reasonable expectation that respondent father would be able to provide proper care and custody within a reasonable time considering the child's age. Accordingly, there was not clear and convincing evidence that termination was warranted under MCL 712A.19b(3)(h).

The only other ground for termination of respondent father's parental rights was MCL 712A.19b(3)(g), which provides for termination if 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." This ground for termination is factually repetitive and wholly encompassed within MCL 712A.19b(3)(h). See *Mason*, 486 Mich at 164-165. Thus, for the reasons articulated with regard to MCL 712A.19b(3)(h), the trial court lacked clear and convincing evidence to terminate respondent father's parental rights under MCL 712A.19b(3)(g). Because we conclude that the trial court lacked statutory grounds to terminate respondent father's parental rights, we need not address the issue whether the court properly concluded that termination was in the child's best interests.

III. DOCKET NO. 332417

Respondent mother argues that the grounds for termination of her parental rights to the children were not established by clear and convincing evidence because DHHS failed to make reasonable efforts to reunify the family by providing her with services for the cognitively impaired. We disagree.

Again, "[t]o terminate parental rights, a trial court must find by clear and convincing evidence that at least one statutory ground under MCL 712A.19b(3) has been established." *Laster*, 303 Mich App at 491 (citation and quotation marks omitted). In general, before termination may be considered, DHHS must make "reasonable efforts" to reunify the child and family. *Mason*, 486 Mich at 152. The reasonableness of the agency's efforts affects the sufficiency of the evidence in support of the grounds for termination. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

This Court recently addressed the issue of what the court and DHHS must do when confronted with a parent having "*a known or suspected* intellectual, cognitive, or developmental impairment." *In re Hicks/Brown*, ___ Mich App at ___, ___; ___ NW2d ___ (2016) (Docket No. 328870); slip op at 16, lv pending. In *Hicks/Brown*, the respondent mother had an IQ of 70 and exhibited cognitive impairment. *Id*. at ___; slip op at 1. It took DHHS 10 months from the time the child was placed in care to provide a case service plan for the respondent, and those

services were geared toward a parent with average cognitive function. *Id*. at ___; slip op at 2, 4. Although providing more "hands-on assistance" in some areas, the social worker had not sought wrap-around services for the cognitively impaired or referred the respondent for the correct type of services. *Id*. at ___; slip op at 4-5. Despite her attorney's assertion that reasonable efforts had not been made to reunite the family, the trial court terminated the respondent's parental rights under MCL 712A.19b(3)(c)(*i*) and (g). *Id*. at ___; slip op at 6.

This Court stated that "Michigan caselaw is sparse regarding the level of services necessary to reasonably accommodate a disabled parent." *Hicks/Brown*, ___ Mich App at ___; slip op at 12. This Court reviewed several cases in this jurisdiction and other jurisdictions and clarified the law as follows:

> In such situations, neither the court nor the DHHS may sit back and wait for the parent to assert his or her right to reasonable accommodations. Rather, the DHHS must offer evaluations to determine the nature and extent of the parent's disability and to secure recommendations for tailoring necessary reunification services to the individual. The DHHS must then endeavor to locate agencies that can provide services geared toward assisting the parent to overcome obstacles to reunification. If no local agency catering to the needs of such individuals exists, the DHHS must ensure that the available service providers modify or adjust their programs to allow the parent an opportunity to benefit equal to that of a nondisabled parent. If it becomes clear that the parent will only be able to safely care for his or her children in a supportive environment, the DHHS must search for potential relatives or friends willing and able to provide a home for all. And if the DHHS shirks these duties, the circuit court must order compliance. [*Id*. at ___; slip op at 16.]

Further, this Court held that the trial court is not required to file a termination petition based on the child's placement in foster care for 15 out of the last 22 months where there was a delay in providing reasonably accommodating services or if the evidence established that the parent could properly care for the child within a reasonable time provided there is a reasonable extension of the services period. *Id*. at ___; slip op at 16. Nevertheless,

> [i]n the event that reasonable accommodations are made but the parent fails to demonstrate sufficient benefit such that he or she can safely parent the child, then the court may proceed to termination. If honest and careful evaluation reveals that no level or type of services could possibly remediate the parent to the point he or she could safely care for the child, termination need not be unnecessarily delayed. [*Id*. at ___; slip op at 16 (citations omitted).]

Based on the clarification of the parameters of necessary services, this Court concluded that the agency did not fulfill its duties toward the respondent, and the trial court did not recognize the agency's shortcoming. *Id*. at ___; slip op at 16. When the results of the respondent's psychological evaluation were finally available, they showed she fell into the low and extremely low range on different assessments and lacked reading comprehension and the ability to write in complete sentences. *Id*. at ___; slip op at 17. Yet, the agency ordered her to earn a GED and find employment and housing without reevaluating these generalized requirements. *Id*. at ___;

slip op at 17. It failed to follow the psychologist's recommendation to " '[administer] a measure of adaptive functioning to determine specific strengths and weaknesses with regard to activities of daily living.' " *Id*. at ___; slip op at 17. This resulted in DHHS ordering the respondent "to climb mountains that she could not possibly surmount." *Id*. at ___; slip op at 17. Any case service plan that ignored the realities of the respondent's condition "was simply unreasonable and not individually tailored to the parent's needs." *Id*. at ___; slip op at 17. There was evidence that DHHS failed to refer the respondent to specialized services for the cognitively impaired following her evaluations. *Id*. at ___; slip op at 17. Rather, it waited until just before the termination hearing to make the proper referrals and only made a "half-hearted" attempt to transfer her to the recommended services. *Id*. at ___; slip op at 17. Further, the record did not indicate whether the limited accommodations that the agency recommended were implemented. *Id*. at ___; slip op at 18. In concluding, this Court recognized that, even with specialized services, the respondent might not be able to safely parent her children. *Id*. at ___; slip op at 18. However, this Court held that such a conclusion was premature because of the inadequate reunification services provided and remanded for the provision of services with reasonable accommodation for her cognitive impairment. *Id*. at ___; slip op at 18.

We find that the instant case is distinguishable from *Hicks/Brown*. In this case, respondent mother was found to be cognitively impaired. Her psychological evaluation revealed an IQ of 56. This is in "the extremely low range," an amount that is "less than two tenths of a percent of her peers." Further, she has ongoing mental health concerns.

DHHS provided services to respondent mother for more than four years. These services included the requirement of addressing emotional and mental health issues and participating in individual therapy, parenting classes, a psychological evaluation, a psychiatric evaluation, and supervised visitations. She was also required to maintain a lifestyle free of substances and to submit to random drug screening. Further, she was required to maintain suitable housing and a legal source of income. After respondent mother completed her psychological evaluation showing her cognitive impairment, the referee ordered that the agency seek services for the cognitively impaired. He named Community Living Services and The Wayne Center as appropriate agencies for such services. He also noted that these agencies could provide case management services to help respondent mother in possibly caring for JC, her only child at the time. He indicated that the report showed her ability to understand and communicate with a child were "extremely low."

The case worker attempted to refer respondent mother to specialized services at the suggested agencies. However, the agencies did not accept respondent mother's insurance coverage and recommended Southwest Solutions for placement instead, but respondent mother did not show up at the agency. When asked about whether she personally helped respondent mother make the appointment or reminded her of it, the worker stated, "I have tried to assist her." The worker added that "it depends on her mood if she likes what I have to say or not." The referee noted that he was unsure whether Southwest Solutions offered services for the cognitively impaired and stated that respondent mother needed specialized services.

At the following dispositional review hearing, the case worker's supervisor testified that respondent mother was terminated from several services for lack of availability or cooperation and had been referred for services again. Respondent mother's attorney inquired into whether

the referrals were for "special needs" and not the standard counseling or therapy. The case manager supervisor responded that the agency had been "looking . . . to identify some places that can get some special services for [the] cognitively delayed." He acknowledged that respondent mother required more than the usual assistance and agreed that he would direct the case worker to provide "more hands on help" in getting her registered for the appropriate classes. A counselor supervisor similarly testified at the next hearing that respondent mother's cognitive disabilities would require "a lot of hand holding" to get through the process. She noted that respondent mother understands some things. "She knows that she needs to call whomever she needs to call." She needed help to get financial assistance and had not received it. The referee expressed frustration at the lack of assistance given to respondent mother and ordered the continuation of services, including aid from a source specifically equipped to assist the cognitively impaired.

At the next review hearing, the case worker testified that respondent mother had been referred to the Development Center, where she was to be assessed to determine if she qualified for services for her developmental delay and mental health problems relating to her bipolar disorder. The Development Center could provide her with services for the cognitively impaired, including educational planning and mental health services. The case worker assisted respondent mother by setting up the appointment with the center. Respondent mother attended the initial meeting but, apparently, did not return until much later when DHHS filed a permanency petition. She was also referred to parenting classes for the cognitively impaired. Further, she received mental health services from Team Mental Health and was prescribed some medication. The extent of her participation was unknown because the most recent report merely stated that she received a psychiatric and psychological evaluation.

Respondent mother continued with the case service plan but made little progress. At the final termination hearing, there was evidence that she had completed parenting classes but had not benefited from them. She was inconsistent in visiting her children. She had recently returned to individual therapy but had not completed therapy, and her therapist could not determine if there had been progress. She also did not have suitable housing or a consistent, legal source of income. She had not properly addressed her mental health issues and had even expressed that she did not believe treatment for her condition was necessary. Despite having been referred to an agency for specialized services and having received some services specific to her condition, there had been no substantial improvement. The trial court noted that these issues were ongoing and concluded that there were statutory grounds to support termination of respondent mother's parental rights.

Given this record, we find that DHHS made reasonable efforts to provide respondent mother with appropriate services for reunification based on her disability. Respondent mother's cognitive function was extremely low, and there was a delay in referring her to an agency that could provide specialized services. Part of the delay resulted from the lack of coverage for some programs through no fault of DHHS. DHHS acknowledged that respondent mother required hand-holding because of her impairment and provided additional aid. Most notably, her case worker assisted respondent mother in contacting an agency for the cognitively impaired and ensuring her entry. Unlike the respondent in *Hicks/Brown*, who was referred to specialized programs just before the termination hearing, respondent mother's referral to an agency specializing in services for the cognitively impaired came more than 2 ½ years before the final

termination hearing and while services continued. See *Hicks/Brown*, ___ Mich App at ___; slip op at 17. Although respondent mother did not always avail herself of the services, she was provided the opportunity and some assistance to do so. It seems she knew of the importance of the plan enough to return to the Development Center after DHHS filed the petition for permanent custody. In addition, she was not referred solely for services for an individual of average intelligence and health as was the respondent in *Hicks/Brown*. See *id*. at ___; slip op at 4. Rather, respondent mother was provided with programs designed to aid the cognitively impaired in the form of special parenting classes and mental health assistance. We find that her condition was taken into account and specialized aid was offered in sufficient time to allow for progress and reunification. Because DHHS properly accommodated respondent mother's cognitive impairment, the trial court's conclusion that termination was warranted was not premature and did not preclude a best-interest hearing.[1]

IV. CONCLUSION

For the reasons discussed, respondent mother's argument that DHHS failed to properly accommodate her cognitive impairment is without merit. However, because there was evidence that respondent father was eligible for release from prison within several months and because of DHHS's failure to investigate respondent father's relative placement option, the trial court's decision to terminate respondent father's parental rights under MCL 712A.19b(3)(g) and (h) was erroneous.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[1] Because respondent mother does not assert an argument against the statutory grounds or against the best-interest determination, we do not address these separate sufficiency issues.