

STATE OF MICHIGAN  
COURT OF APPEALS

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*In re* N. L. HERNANDEZ, Minor.

UNPUBLISHED  
June 20, 2017

No. 336306  
Ingham Circuit Court  
Family Division  
LC No. 15-001022-NA

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Before: TALBOT, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to her child under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j). For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

This case arose after law enforcement raided the apartment respondent shared with her boyfriend. According to the petition, law enforcement discovered a bag of marijuana in the kitchen, a possible drug ledger and packaging material, a loaded revolver, a bag of crack cocaine, a safe, a digital scale with cocaine residue on it, and \$1,971 in cash. The petition also alleged that respondent had a substance abuse problem and had threatened to leave the state with her child. The child was removed from the home, and the court took jurisdiction over her in September 2015.<sup>1</sup>

Thereafter, in October 2016, petitioner filed a supplemental petition seeking termination of respondent's parental rights. The petition asserted that respondent was unemployed and advertised herself as an escort, did not comply with substance abuse counseling, tested positive for marijuana, and skipped multiple drug screenings. The petition further alleged that respondent had been discharged from individual counseling, lacked stable housing, had a mixed history of exercising parenting time, and had parenting time suspended by the court.

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<sup>1</sup> Petitioner actually removed two children from respondent's care. The other child, however, was later released into the custody of his legal father and is longer a subject of the proceedings leading to this appeal.

At the termination hearing, respondent's caseworker testified that the barriers to reunification were substance abuse, housing, employment, and emotional stability. After a substance abuse evaluation, the caseworker recommended counseling and drug screenings. She testified, however, that respondent did not comply with counseling, tested positive for marijuana 20 times, and missed 79 screenings. The caseworker clarified that respondent started seeing a counselor, but was discharged because she consistently failed to keep appointments. The caseworker added that respondent had recently sought counseling at Community Mental Health and seemed to be "a little bit more stable." However, with regard to housing, the caseworker testified that although respondent initially had stable housing, she was unable to maintain it. Similarly, the caseworker testified that although respondent had verifiable employment until March 2016, she was unable to verify any employment after that, and the caseworker believed that respondent had posted multiple "Backpages" escort advertisements. Finally, the caseworker testified that respondent's parenting time had been suspended on August 3, 2016, after she failed to appear at a show-cause hearing and missed several parenting time visits. According to the caseworker, respondent was also discharged from a parenting education program for noncompliance and was discharged from a third-party visitation program that had allowed her to visit her child in the community rather than at petitioner's office.

The trial court held that petitioner established grounds to terminate parental rights under MCL 712A.19b(3)(a)(ii), (c)(i), (g), and (j). The Court also found that it was in the child's best interests to terminate respondent's parental rights.

## II. STATUTORY GROUNDS

### A. STANDARD OF REVIEW

Respondent contends that the trial court clearly erred by terminating her parental rights under MCL 712A.19B(3)(a)(ii). The trial court's decision that a ground for termination of parental rights has been proved by clear and convincing evidence is reviewed for clear error. *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). "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." *Id.* at 296-297.

### B. ANALYSIS

A court may terminate a parent's parental rights under MCL 712A.19b(3)(a)(ii) if the court finds by clear and convincing evidence that "[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." Here, respondent did not have any visitation with the child from the end of July 2016 until the December 2016 termination hearing. In its termination order, the court relied on the lack of visitation to support its finding that respondent deserted the child. However, the record reflects that the primary reason respondent did not visit with the child was because the court suspended her parenting time after she failed to attend a show-cause hearing where she could have been subject to criminal contempt of court. Although the court alluded to the fact that respondent could have resolved the issue but chose not to because she was worried about her "own liberty interests," it is plain that the reason she could not visit the child was ultimately because the state suspended her parenting time. It is a violation of a parent's due process rights for a state or state agency to

“deliberately take[] action with the purpose of ‘virtually assur[ing] the creation of a ground for termination of parental rights,’ and then proceed[] to seek termination on that very ground[.]” *In re B & G*, 279 Mich App 12, 19-20; 756 NW2d 234 (2008) (second alteration in original). The state, therefore, was not entitled to seek termination under this ground.

Furthermore, in order to terminate a respondent’s parental rights under MCL 712A.19b(3)(a)(ii), the trial court must find: (1) that the parent deserted the child for 91 or more days, and (2) that the parent has not sought custody of the child during that period. “[D]esertion is an intentional or willful act.” *In re B & G*, 279 Mich App at 18 n 3. Given that respondent was prohibited by court order from visiting with her child, we do not see respondent’s lack of visitation with the child as an intentional or willful act. Moreover, the trial court failed to make a finding that respondent had failed to seek custody of her child during the 91-day period. The record, however, reflects that respondent was in contact with her caseworker, was attempting to complete some services, and was attempting to set up a legal guardianship for her child. As a result, on the record before us—even assuming that the state could seek termination under subsection (a)(ii)—the trial court clearly erred in finding by clear and convincing evidence that termination was proper under MCL 712A.19b(3)(a)(ii).

Nevertheless, we need not reverse the court’s termination order because “[o]nly one statutory ground need be established by clear and convincing evidence to terminate a respondent’s parental rights, even if the court erroneously found sufficient evidence under other statutory grounds.” *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). Aside from desertion under MCL 712A.19B(3)(a)(ii), the trial court also terminated respondent’s parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), and respondent did not challenge the substantive basis of those statutory grounds on appeal.

Respondent instead asserts that she suffered from mental health issues, including bipolar disorder and depression, which were not diagnosed and treated until shortly before the termination hearing. Respondent argues that the court should have allowed more time for treatment and that the court did not consider her untreated mental health issues when terminating her parental rights under MCL 712A.19b(3)(c)(i), (g), and (j).

The issue of whether reasonable services were offered to a respondent ultimately relates to the issue of sufficiency of the evidence for termination of parental rights. *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). Except in certain circumstances not applicable here, when a child is removed from his or her parents’ custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child’s removal by adopting a service plan. MCL 712A.18f(1), (2), and (4). “While the [petitioner] has a 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 Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012).

Here, respondent’s caseworker testified that respondent initially saw a counselor for mental health treatment, but was discharged because she consistently failed to keep appointments. The caseworker also stated that respondent had only recently sought counseling before the termination hearing. To the extent that the full scope of respondent’s mental health issues were not identified and treated earlier, it is clear that respondent’s failure to comply with

services played a part. Respondents have an obligation to participate in the services offered by petitioner, and it is clear that respondent did not participate in counseling services until shortly before the termination hearing. Indeed, the trial court addressed respondent's argument, finding that respondent was noncompliant with services for over a year and characterizing petitioner's referrals for mental health treatment as a "centerpiece" of the service plan for respondent. Further, respondent testified that it was a court-ordered medical evaluation that resulted in a diagnosis of depression and bipolar disorder. Respondent cannot fault petitioner for failing to allow sufficient time to identify and address all her mental health issues when respondent failed to comply with mental health counseling services in the first instance.

Respondent also complains that the trial court did not take into account evidence that she had recently restarted counseling and was taking medication. In support, respondent points out that the trial court indicated it was not interested in hearing the testimony of respondent's most recent therapist. Nevertheless, respondent testified that she had recently restarted therapy and had begun taking medication for depression. Therefore, there was no indication that the court was unaware of these facts.

Finally, respondent cannot demonstrate that services were not offered such that there was insufficient evidence to terminate her parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). Instead, the evidence established that respondent did not comply with numerous services and did not address barriers to reunification, including substance abuse, lack of housing and employment, and mental health issues. Adequate services were provided and adequate time was given for respondent to address her issues such that the trial court did not clearly err by terminating respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j).

Affirmed.

/s/ Michael J. Talbot  
/s/ Jane M. Beckering  
/s/ Michael J. Kelly