

STATE OF MICHIGAN
COURT OF APPEALS

In re R. DRAKE-STEELE, Minor.

UNPUBLISHED
October 19, 2017

No. 336927
Ingham Circuit Court
Family Division
LC No. 15-000933-NA

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Respondent mother appeals as of right the order of the trial court terminating her parental rights to her minor child under MCL 712A.19b(3)(c)(i) (conditions of adjudication continue to exist), (g) (failure to provide proper care and custody), and (j) (the child will likely be harmed if returned). We affirm.

FACTS

The child in this case, RD, lived with respondent mother and respondent father until she was approximately five years old. After respondents separated, RD lived with respondent mother until she was almost seven years old. Respondent mother did not have housing and she and RD moved from house to house staying with various people. RD reported that while in the care of respondent mother she was sexually assaulted by a boyfriend of respondent mother as well as another friend of respondent mother. RD also reported that respondent mother had beaten her with “her hands, hangers, extension cords, belts or shoes,” that she witnessed respondent mother and her boyfriend “sniff[] white stuff [through] a white and red straw,” and had also witnessed respondent mother and a boyfriend having sex in the same bed where RD was sleeping.

In September 2014, RD was taken by relatives to live with respondent father, apparently because respondent mother had been arrested. According to respondent mother, respondent father thereafter prevented her from having any contact with RD and during much of the time that RD was in his care she did not know where RD was.

In July 2015, while RD was in respondent father's care, another child¹ living in the household died after being repeatedly beaten by respondent father. The trial court assumed jurisdiction of RD and terminated respondent father's parental rights to RD. This Court affirmed the trial court's order in that case. See *In re Lynch/Mapp/Fillmore Minors*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2016 (Docket Nos. 331826; 331829; 331871).

RD was placed first in a foster home, and then with a relative. However, RD exhibited violent, aggressive behavior while in those placements, and eventually was moved to a group home affiliated with a children's center. There, the staff reported that RD had aggressive and sexualized behaviors which sometimes were directed at other children, and resulted in her move to another group home. At the time of the dispositional hearing in January 2017, RD was continuing to live in a group home and her behavior had shown some improvement, but the foster care worker reported that RD was not ready to move back into the community.

At the time that respondent father's parental rights to RD were terminated, petitioner sought reunification of RD with respondent mother. The trial court ordered respondent mother to attend substance abuse assessment, participate in substance abuse testing, complete substance abuse treatment, obtain and maintain suitable housing, obtain a lawful source of income, cooperate with psychological, psychiatric, and medical services as directed by the foster care worker, and participate in and benefit from counseling as directed by the foster care worker.

Petitioner thereafter put into place a service plan including referrals for substance abuse assessment and treatment, drug testing, family counseling, individual therapy, and visits with RD. Respondent mother, however, failed to participate in the service plan. According to the foster care worker, the barriers to reunification were respondent mother's mental health problems, substance abuse, lack of parenting skills, lack of employment, and lack of housing. With respect to mental health, respondent mother had been diagnosed with schizoaffective disorder. At respondent mother's request, she was receiving mental health services through Detroit Health East where she was already receiving services. Her therapist at Detroit Health East, however, described respondent's attendance at therapy sessions as "sporadic." The foster care worker testified that although respondent mother had been prescribed medication, respondent mother reported that she only took the medication when she felt that she needed it.

With respect to respondent mother's substance abuse, she participated in only two of 58 drug screens and failed to complete substance abuse assessment. Respondent mother was referred for relapse prevention with Alcoholics Anonymous and Narcotics Anonymous, but attended only two sessions. Petitioner referred respondent mother for family counseling with RD, but respondent mother failed to attend the scheduled sessions. After respondent mother missed four scheduled sessions with RD, the counseling was discontinued because it was too disruptive for RD when respondent mother failed to attend.

¹ The other child was the child of respondent father's girlfriend and was not related to RD.

Respondent mother also failed to visit regularly with RD. In 2015, respondent mother attended 13 of 24 scheduled visits with RD. In 2016, respondent mother attended nine of 32 scheduled visits with RD. The foster care worker reported that RD greatly looked forward to visiting with respondent mother and was very happy whenever respondent mother attended a visit. RD, however, was very anxious before each visit regarding whether respondent mother would attend. At the dispositional hearing, respondent mother testified that she missed some of the visits because she was unable to use the bus tickets that petitioner had provided to her.

The foster care worker testified that respondent mother did not have independent housing and that attempts to verify that she was living with a cousin had been unsuccessful. Respondent mother failed to provide verification of employment. Respondent mother was referred for parenting classes and reportedly completed a parenting class of her own choosing, but the class related to infant mortality and was not applicable to RD's needs.

Following the dispositional hearing, the trial court found that clear and convincing evidence supported termination of respondent mother's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), and also concluded that termination was in the child's best interests. This appeal followed.

DISCUSSION

I. REASONABLE EFFORTS

Respondent first argues that petitioner failed to make reasonable efforts to accommodate her mental illness when implementing a case service plan, and thus termination was improper. We disagree.

To preserve for appellate review the issue of an allegedly inadequate opportunity to participate in services, this Court has repeatedly held that a respondent must raise the issue when services are offered, being when the trial court adopts the service plan or soon thereafter. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). This Court has also concluded that when a respondent waits until the trial court's dispositional hearing to first raise the issue of failure to accommodate a disability, the issue is waived. See *In re Terry*, 240 Mich App 14, 26 n 5; 610 NW2d 563 (2000).

Recently, however, our Supreme Court in *In re Hicks/Brown*, ___ Mich ___, ___; 893 NW2d 637 (2017); slip op at 4, stated that it is "skeptical of this categorical rule[.]" In a footnote, our Supreme Court explained:

Certainly, a service plan deficient on its face should produce an immediate objection. But it will not always be apparent at the time a service plan is adopted, or even soon afterward, that the service plan is insufficient, either in design or execution, to reasonably accommodate a parent's disability. This is perhaps especially true with respect to intellectual disabilities, which may present in subtle ways and require fine-tuned, albeit reasonable, accommodations. [*In re Hicks/Brown*, ___ Mich at ___ n 9; slip op at 7.]

In *Hicks/Brown*, the respondent's attorney had inquired repeatedly before the trial court regarding the petitioner's efforts to ensure that his client was receiving services and to request more individualized assistance for the respondent. By contrast, in this case respondent mother failed to object to the service plan or to otherwise indicate before the trial court that the service plan was inadequate until the dispositional hearing, and then only by counsel stating during closing argument that there had been "little effective participation" on the part of petitioner. This issue is therefore unpreserved, see *In re Frey*, 297 Mich App at 247, and we review it for plain error affecting substantial rights, being clear or obvious error that prejudiced respondent or affected the outcome of the lower court proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

Generally, petitioner is obligated to make reasonable efforts to reunify a child with his or her family before seeking termination of a parent's parental rights. MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2); *In re Hicks/Brown*, ___ Mich at ___; slip op at 4. Reasonable efforts must include petitioner's creation of a service plan that outlines the steps that it, along with the parent, will take "to rectify the issues that led to court involvement and to achieve reunification." *Id.* The parent then has a commensurate responsibility to participate in the services that are offered. See *In re Frey*, 297 Mich App at 248. Further, before a child who has come within the jurisdiction of the family court will be returned to a parent, that parent, whether disabled or not, must show that he or she can meet their child's basic needs. *In re Terry*, 240 Mich App at 28. "If a parent cannot or will not meet her irreducible minimum parental responsibilities, the needs of the child must prevail over the needs of the parent." *Id.* (quotation marks and citation omitted).

On appeal, respondent mother argues that petitioner did not make reasonable efforts because it failed to accommodate her mental illness as a disability under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* In *Hicks/Brown*, our Supreme Court explained the interplay between the Probate Code and the ADA, as follows:

The Department also has obligations under the ADA that dovetail with its obligations under the Probate Code. Title II of the ADA requires that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 USC 12132. Public entities, such as the Department, must make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless . . . the modifications would fundamentally alter . . . the service" provided. 28 CFR 35.130(b)(7) (2016).

Absent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA to reasonably accommodate a disability. In turn, the Department has failed in its duty under the Probate Code to offer services designed to facilitate the child's return to his or her home, see MCL 712A.18f(3)(d), and has, therefore, failed in its duty to make reasonable efforts at reunification under MCL 712A.19a(2). As a result, we conclude that efforts at reunification cannot be reasonable under the

Probate Code if the Department has failed to modify its standard procedures in ways that are reasonably necessary to accommodate a disability under the ADA. [*In re Hicks/Brown*, ___ Mich at ___, slip op at 4-5.]

In this case, from the outset, respondent mother was offered numerous services intended to address her mental health issues and substance use, and to improve her parenting skills. The treatment plan included substance-abuse treatment and mental health services. Respondent mother requested that she be permitted to work with a mental health care provider of her own choosing and was permitted to do so. Respondent mother then chose not to regularly participate in those services. Respondent mother did not request accommodation or additional services, and there is no indication that such accommodation or additional services would have prompted her to participate when she was already declining to participate in services with providers of her own choosing. Under the circumstances, offering more or different services was not a reasonable course of action, nor was it required to make petitioner's efforts "reasonable."

Although 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 at 248. Given respondent mother's failure to take advantage of the services offered, respondent mother did not show that she could meet the basic needs of a young child with significant behavioral issues. See *In re Terry*, 240 Mich App at 28. We conclude that the case service plan accommodated respondent mother's special limitations or disabilities, considering that it did include mental health services, and respondent did not request additional or other services below, and does not specify on appeal how petitioner could have done better in this regard. The record provides no basis for concluding that the outcome of the proceedings would have been different had petitioner provided additional services or accommodations. The trial court therefore did not err when it determined that petitioner made reasonable efforts to avoid termination.

II. BEST INTERESTS

Respondent mother also argues that, given the bond between RD and respondent mother, the trial court erred when it found that termination was in the child's best interests. Again, we disagree.

Once a statutory ground for termination has been proven, the trial court must find, by a preponderance of the evidence, that termination is in the child's best interests before it may terminate parental rights. MCL 712A.19b(5); *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). In considering whether termination of parental rights is in the best interests of the child, a wide variety of factors should be considered including, potentially, the existence of a bond between the child and the parent, the parent's ability to parent, the child's need for permanency and stability, the advantages of a foster home over the parent's home, the parent's compliance with his or her service plan, the parent's visitation history with the child, the child's well-being, and the possibility of adoption. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

This Court reviews a trial court's decision that termination is in the child's best interests for clear error. *In re Johnson*, 305 Mich App 328, 335; 852 NW2d 224 (2014). For a decision to

be clearly erroneous, it must be “more than just maybe or probably wrong.” *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009). Further, we give due regard “to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” *In re Ellis*, 294 Mich App 30, 33; 817 NW2d 111 (2011).

Here, in determining that termination was in RD’s best interests, the trial court considered a variety of factors, including the bond between the parent and child, the parent’s parenting ability, the child’s need for permanency, finality, and stability, the advantages of the foster home over the parent’s home, the fact that RD was not in relative placement, and the length of time that RD had been in foster care. Regarding the bond between RD and respondent mother, the trial court acknowledged that RD enjoys seeing respondent mother, looks forward to visits and phone calls with respondent mother, and has improved behavior after contact with respondent mother. The trial court also noted, however, that RD becomes anxious before each visit because she is unsure whether respondent mother will attend, and that RD told a foster care worker that she does not believe that respondent mother can keep her safe.

The trial court next considered respondent mother’s parenting ability and noted respondent mother’s inappropriate past parenting including physically abusing RD, allowing inappropriate people access to RD, and allegations of sexual abuse of RD by those people. The trial court further considered RD’s serious emotional and behavioral problems and respondent mother’s total lack of insight into RD’s needs.

With respect to permanency, finality, and stability, the trial court emphasized that RD needed permanence and stability, and to feel safe. The trial court noted that RD was aware even at her young age that respondent mother was unable to provide RD with safety. The trial court further noted that respondent mother had been unable to provide herself with appropriate permanence.

With respect to the advantages of the foster home, the trial court noted that the group home in which RD was living provided her with safety and structure, and was meeting her physical and mental health needs. By contrast, respondent mother was not yet able to do so and there was no indication that she would be able to do so within a reasonable time, given the testimony of respondent mother, her lack of permanent housing, and her lack of participation in the services offered to her. The trial court further noted that RD was not in relative placement. We conclude that the trial court did not clearly err when it found that a preponderance of the evidence indicated that termination was in the child’s best interests

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola