STATE OF MICHIGAN

COURT OF APPEALS

In re HOFFMAN, Minors.

UNPUBLISHED
February 22, 2018

No. 338105
Lenawee Circuit Court
Family Division
LC No. 15-000457-NA

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

PER CURIAM.

Respondent appeals by right the trial court's order terminating her parental rights to her two minor children under MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist), (c)(*ii*) (other conditions exist that cause the child to come within the court's jurisdiction), (g) (failure to provide proper care or custody and no reasonable expectation that parent will be able to do so within reasonable time), and (j) (reasonable likelihood that child would be harmed if returned to parent's home). For the reasons stated below, we vacate the trial court's order terminating respondent's parental rights and remand for further proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondent is the mother of two minor children. In 2015, she was the victim of at least two domestic assaults perpetrated by the children's legal father[1], with whom she then shared a home. These assaults caused her to move with the children into a domestic violence shelter in July 2015. However, respondent later returned to the family home against the advice of Child Protective Services (CPS). In August 2015, respondent and the children's father were involved in a physical altercation with two other people in the family home in front of the children, prompting petitioner to file a petition for the children's removal. Respondent admitted that she and the children's father had a history of domestic violence and were involved in two separate "domestic violence incidents" involving another man and woman on August 3, 2015 in the family home, and admitted that both she and the children's father were injured. She pleaded no

[1] The children's father was a party to the proceedings below and the trial court also terminated his parental rights. However, he is not a party to this appeal. We have omitted from our factual summary portions of the proceedings that solely concern his parental rights.

contest to the allegation in the petition that she had assaulted the woman while her children were in the home. The trial court authorized the petition and removed the children, who were placed with their paternal great-grandmother.

Over the next several months, respondent made significant progress in complying with her service plan, which included individual counseling, couple's counseling, and domestic violence classes. Respondent also participated in services beyond what was ordered in her plan, including another parenting class and a domestic violence support group, although she struggled with finding stable housing and employment. The children were moved to nonrelative foster care by the time of the July 2016 review hearing, after their great-grandmother expressed that her age and health problems made it difficult for her to care for the children. At this hearing, for the first time, respondent's caseworker stated that, although respondent had ended her relationship with the children's father and was engaged in services, she was not progressing, and recommended that the goal be changed from reunification to termination, based primarily on respondent's inability to obtain stable housing and income. Respondent had recently been psychologically evaluated, and the examination had revealed a "mild cognitive impairment" and "some intellectual deficits" such that respondent "may require some assistance in particular areas, such as reasoning through situations regarding her children's behavior and emotional reactions." However, respondent was "able to learn in areas related to parenting and employment . . . [and] is able to read sufficiently well so as to learn from literature such a[s] parenting magazines, especially if the articles are followed up with discussion of the main point to help her translate knowledge to implementation," and had "the ability to learn and expand her repertoire of parenting responses." The trial court found that respondent had made progress towards reunification and ordered that petitioner should continue to make reasonable efforts toward reunification.

In August 2016, a permanency planning hearing had to be adjourned after respondent was assaulted by the children's father and hospitalized; respondent's caseworker stated that respondent would be filing a police report and seeking a Personal Protection Order (PPO). Later in August, at the rescheduled hearing, respondent's caseworker stated that respondent had been participating in services and had completed almost her entire service plan, and had additionally been approved for housing assistance, although she had not yet begun to receive it. Notwithstanding these statements, the caseworker opined that respondent had not benefitted from the services she had completed. Respondent disagreed and stated that she had learned how to discipline her children, and also asserted that she was actively seeking employment, was trying hard to progress, and wanted to care for her children. The trial court directed respondent's caseworker to make sure that respondent was "fully evaluated," and to do everything she could to "accommodate any disabilities or perceived disabilities." The trial court ordered petitioner to provide any needed accommodations under the Americans with Disabilities Act (ADA) and "any and all" other reasonable accommodations to respondent. The trial court kept the goal as reunification.

In October 2016, petitioner filed a supplemental petition seeking to terminate respondent's parental rights. The petition alleged that respondent had failed to demonstrate that she had benefited from the services she was provided, had failed to obtain suitable housing or employment, could not financially care for herself or her children, and "may lack ability to properly care for her kids" because she lacks empathy, lacks the insight necessary to care for

children, and struggles to care for herself. Further, the petition indicated that respondent may lack the cognitive ability to maintain employment to support her children.

The termination trial on the supplemental petition began at the end of November 2016 and ultimately concluded four months later in March 2017. In the meantime, respondent continued to engage in services and attend parenting time. At the end of trial, the trial court found that termination of respondent's parental rights was warranted, holding that, along with domestic violence and substance abuse, "other conditions" had also caused the children to come into care, and that those conditions continued to exist. The trial court stated that respondent was offered a "tremendous amount of services" before the children were removed from her care and before the termination petition was filed, but that no evidence demonstrated that respondent had benefited from those services or that respondent would be able to provide proper case and custody to her children within any amount of time. The trial court acknowledged that respondent had made a good effort to comply with her service plan and was bonded with her children. However, the court reiterated that respondent had failed to benefit from her extensive services and that the children were doing "tremendous" in their placement. The trial court then determined that it was in each child's best interests to terminate respondent's parental rights because the children needed permanency and stability and their foster parents had expressed a desire to adopt both children

This appeal followed.

II. STANDARD OF REVIEW

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). This Court reviews for clear error a trial court's finding that, despite reasonable efforts at reunification by petitioner, such a statutory ground has been proven. See *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). A finding is clearly erroneous if this Court has "a definite and firm conviction that a mistake has been committed." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

III. ANALYSIS

Respondent argues that the trial court erred by terminating her parental rights because, in developing her service plan and in making efforts towards reunification, petitioner had failed to make reasonable efforts to accommodate her cognitive disability.[2] We hold that remand is

[2] We recognize that this Court has held that in order to preserve for appellate review the issue of inadequate services, a respondent must raise the issue when the trial court adopts the service plan or soon thereafter. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Respondent raised no such issue when her service plan was adopted. However, our Supreme Court recently stated that it is "skeptical" of any "categorical rule" that "objections to a service plan are always untimely if not raised 'either when a service plan is adopted or soon afterward' " as it may not always be obvious that a service plan is inadequate where a parent has an intellectual disability.

required for the trial court to consider whether petitioner met its burden of making reasonable efforts toward reunification.

Petitioner had a statutory obligation to make reasonable efforts to reunify respondent with her children. MCL 712A.18f(4); see also *Terry*, 240 Mich App at 26. "As part of these reasonable efforts, [petitioner] must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks/Brown*, 500 Mich 79, 85-86; 893 NW2d 637 (2017), citing MCL 712A.18f(3)(d).[3] Further, under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., petitioner also had an obligation to make reasonable modifications to those services in order to accommodate a parent with a disability[4] and avoid discrimination on the basis of that disability. *Hicks/Brown*, 500 Mich at 86, citing MCL 712A.18f(3)(b) and (c); MCL 712A.19a(2). When petitioner fails to make reasonable modifications to a service plan necessary to accommodate a parent's disability, it fails in its duty to make reasonable efforts at reunification. *Id*.

In this case, as far as the evidence in the record shows, petitioner did not become aware of respondent's intellectual disability until approximately eight months after the children came into care (when a psychological evaluation was performed), despite the fact that petitioner had been provided services for years, even before the children's removal. Notwithstanding the fact that her service plan did not accommodate her disability, and even though she had difficulty implementing parenting techniques that she had been taught during parenting times and struggled with obtaining stable housing and income, respondent demonstrated that she was engaged and motivated to complete her service plan.

After becoming aware of respondent's cognitive limitations, the trial court directed petitioner to do everything it could to "accommodate any disabilities or perceived disabilities," and to provide ADA accommodations to respondent as necessary. At that point, petitioner had an affirmative duty to provide such accommodations. See *Hicks/*Brown, 500 Mich at 87-88. Yet the record is devoid of evidence that any accommodations were made. Dr. Patricia Muldary performed respondent's psychological evaluation and testified at the termination trial that she believed respondent could "be a marginally adequate parent if she is taking advantage of

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In re Hicks/Brown, 500 Mich 79, 88-89 & 89 n 9; 893 NW2d 637 (2017), quoting *Terry*, 240 Mich App at 26. In this case, we hold that respondent's repeated requests to the trial court for additional time to benefit from services preserved this issue for appeal.

[3] Our Supreme Court issued its decision in *Hicks/Brown* approximately one month after the trial court issued its opinion in this case.

[4] "[T]he ADA defines a disability as " 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual.' " *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996), quoting 42 USC 12102(2). "For purposes of both the ADA [42 USC 12101 *et seq*.] and the Rehabilitation Act [29 USC 701 *et seq*.], administrative regulations define 'major life activities' as 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' " *Id*., quoting 29 CFR 1630.2(*i*).

opportunities to learn more complex parenting skills" and that "she should be capable of being employed in unskilled positions." Muldary further stated that respondent could benefit from additional parenting classes and a parent aide to provide a hands-on demonstration of parenting techniques, and "had potential to adequately parent her children despite her deficits and that all of the barriers could be overcome with the appropriate services." Several of respondent's service providers testified that they believed respondent to be capable of eventually benefiting from services.

As far as the record shows, respondent was never provided the opportunity to work with a parent aide. In fact, the record does not show that, after becoming aware of respondent's intellectual disability, petitioner made any modification to respondent's service plan in order to accommodate her disability or that it afforded respondent any additional time in which to demonstrate a benefit from the services she was provided or had completed. It is not clear from the record whether her service providers were notified of her cognitive limitations so as to better tailor her existing services to her needs. Additionally, not long after becoming aware of respondent's intellectual disability and being ordered to provide reasonable accommodations, and without any apparent modification to respondent's service plan, petitioner filed a supplemental petition for termination that asserted, in part, that respondent may lack the cognitive ability to maintain employment to support her children.

When it determined that respondent's parental rights should be terminated, the trial court did not consider how petitioner's apparent failure to modify respondent's service plan or provide accommodation for respondent's disability impacted its determination regarding whether petitioner had complied with its statutory obligations. See *Hicks/Brown*, 500 Mich at 86, 90. The trial court therefore appears to have predicated its termination order on "an incomplete analysis of whether reasonable efforts were made," because reunification efforts cannot be reasonable unless petitioner reasonably modifies its services as necessary to accommodate a parent's disability. *Id*. at 90. Termination of parental rights is "improper without a finding of reasonable efforts." *Id*. The trial court therefore clearly erred by terminating respondent's parental rights without determining whether petitioner had accommodated respondent's disability and considering the impact of any failure to do so. *Fried*, 266 Mich App at 542-543.

We accordingly vacate the trial court's order terminating respondent's parental rights and remand for further proceedings. On remand, the trial court should consider whether petitioner reasonably accommodated respondent's disability as part of its efforts towards reunification in light of *Hicks/Brown*, 500 Mich at 90. Because we vacate the termination order on this ground, we need not address respondent's argument that the trial court erred in its best interest determination.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark T. Boonstra
/s/ Michael F. Gadola