STATE OF MICHIGAN

COURT OF APPEALS

In re COLEMAN, Minors.

UNPUBLISHED
April 17, 2018

Nos. 339827, 339855
Genesee Circuit Court
Family Division
LC No. 99-111009-NA

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal by right the trial court's order terminating their parental rights to their minor children, MC and TC, under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (c)(*ii*), (g), and (j). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondents are the parents of MC and TC, as well as an adult child, RC. In addition, respondent-mother is the mother of two other adult children, LC and AC. Although the record related to earlier court intervention is limited, it appears that this family's history with Child Protective Services ("CPS") dates back to at least 1998. RC was placed in a guardianship in 1999, respondent-mother's parental rights to AC were terminated in February 2000, and her parental rights to LC were terminated in 2003.

MC was born in 2006; TC was born in 2012. Both children tested positive for THC[1] at the time of their births. In October 2015, CPS investigated a complaint that included allegations that respondent-father was the perpetrator of domestic violence against respondent-mother, that the children's home environment was unfit, and that the children had truancy issues. Respondent-father would not allow the investigator inside the home. The investigator observed that respondent-mother had a black eye, and also confirmed that MC was not attending school, that there was no running water in the home, and that MC and TC had not seen a doctor since 2006 and 2013, respectively. A petition was filed on November 4, 2015 containing allegations of domestic violence, unfit home environment, and truancy; the petition additionally alleged that

[1] A controlled substance found in marijuana. See *People v Carruthers*, 301 Mich App 590, 595-596; 837 NW2d 16 (2013).

respondent-father both used and manufactured methamphetamine in the home. Petitioner, the Department of Health and Human Services (DHHS) requested that respondents be compelled to cooperate with the CPS investigation. The children initially remained in respondents' care, but were removed from respondents' home after the January 2016 adjudication trial, which neither respondent attended. Respondents were ordered to participate in services that included (1) a substance abuse assessment and recommendations; (2) drug screens; and (3) domestic violence counseling. Respondents were assigned a caseworker from the Ennis Center for Children to assist them in complying with their court-ordered service plans. Respondents were also granted supervised parenting time.

Over the course of the next several months, respondents refused every service ordered by the court and offered by petitioner, except parenting time. Respondent-father's behavior during visits was aggressive and confrontational, frequently resulting in him arguing with and threatening Ennis Center employees. On one occasion, he was escorted from the building. After a hearing on March 16, 2016, respondent-father's parenting time was suspended until he participated in a psychological evaluation and followed the recommendations thereafter. Respondent-father never completed such an evaluation and never again participated in parenting time. Respondent-mother's parenting time was never suspended. However, after the court suspended respondent-father's parenting time, respondent-mother never exercised her own parenting time. Respondents never completed drug screens or otherwise complied with their service plans, and were frequently out of contact with their caseworker; the caseworker assigned to the case in October 2016 testified that she was never able to reach respondent-mother, and that while she occasionally reached respondent-father by phone, these calls usually resulted in him hanging up on her. Respondent-father never attended any meetings to refer him to services.

In light of respondents' wholesale failure to comply with their treatment plans, a supplemental permanent custody petition was filed on March 31, 2017. A termination hearing was held in July 2017. Respondent-mother testified that she had mental health issues for which she had been prescribed antipsychotic medication; however, she admitted that she was not taking that medication. Respondent-father testified that he had done nothing wrong and saw no need to comply with any court-ordered services. At the conclusion of the hearing, the trial court found clear and convincing evidence to terminate respondents' parental rights under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (c)(*ii*), (g), and (j). These appeals followed.

II. ISSUES IN BOTH DOCKET NUMBERS

A. STATUTORY GROUNDS FOR TERMINATION

Both respondents argue that the trial court erred by finding statutory grounds for termination of their parental rights. We disagree. In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination has been established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000). We review for clear error the trial court's finding that a statutory ground for termination has been proven. MCR 3.977(K). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Respondents' parental rights were terminated under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (c)(*ii*), (g), and (j), which permit termination of parental rights when the following conditions are satisfied:

> (a) The child has been deserted under either of the following circumstances:
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> * * *
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> (*ii*) The child's parent has deserted the child for 91 or more days and has not sought custody of that child during that period.
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> * * *
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> (c) 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:
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> (*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.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
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> (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.
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> * * *
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> (j) There 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.

After reviewing the record, we conclude that the trial court did not clearly err when it terminated respondents' parental rights under MCL 712A.19b(3), (c)(*i*), (c)(*ii*), (g), and (j). With regard to the grounds found in MCL 712A.19b(3)(a)(*ii*) (desertion), we do agree that respondents engaged in conduct that could be viewed as "an intentional and willful act" of desertion for more than 91 days. See *In re B & J*, 279 Mich App 12, 18 n 3; 756 NW2d 234 (2008). Respondent-

father refused to obtain a psychological evaluation in order to resume his parenting-time visits, and respondent-mother's refused to attend parenting-time visits without respondent-father, despite the fact that her visits were never suspended. Additionally, respondents never sent any letters, cards, gifts, or other forms of communication to the children while they were in foster care. Nonetheless, we note that our desertion cases are generally based on pre-petition conduct, see e.g., *In re TM (After Remand)*, 245 Mich App 181, 193–194; 628 NW2d 570 (2001) (termination supported where the respondent "failed to make any substantial effort to communicate with [the child] or obtain assistance in regaining custody of her for a period well beyond the statutory period" prior to filing of the petition), overruled in part on other grounds by *In re Morris*, 491 Mich 81, 115–121; 815 NW2d 62 (2012), or a complete failure to participate in proceedings following a petition, see *In re Mayfield*, 198 Mich App 226, 230, 235; 497 NW2d 578 (1993) (termination supported where the respondent never responded to any notices, attended any hearings, visited his child, or provided financial support during the pendency of termination hearings). While respondents' participation in these proceedings was minimal and inconsistent, respondents did periodically make some efforts to obtain custody of their children; we are not convinced that this statutory ground was demonstrated by clear and convincing evidence. However, as only one statutory ground for termination must be proven, *Trejo*, 462 Mich at 355, any error in the trial court's finding concerning desertion was harmless.

The original petition contained allegations of domestic violence, medical and educational neglect, and an unfit home. At the adjudication, the caseworker testified that there was no running water in the home, MC had not been attending school, neither child had undergone a medical examination in years, and respondent-mother had a black eye. Further, respondents refused to cooperate with the CPS investigation. Respondents were ordered to comply with a treatment plan that included a substance abuse assessment, drug screens, domestic violence counseling, and a psychological examination. Respondents were further ordered to comply with any professional recommendations that followed the drug assessment and psychological evaluations. Respondents were provided bus passes and granted supervised parenting time. Despite being offered these services, respondents failed to participate in the services and benefit from them.

The evidence established that respondents essentially refused to participate in their treatment plans. Respondent-father testified that he would not participate in services because he had not done anything wrong. Respondent-mother initially appeared willing to attend therapy, but she never followed through, and her caseworker was then unable to contact her for several months. Petitioner attempted to engage respondent-mother in services, and repeated efforts were made to communicate with respondent-mother by mail and telephone, but these efforts proved unsuccessful.

Respondents argue that their parental rights were terminated simply because they failed to comply with the treatment plans. While respondents' wholesale failure to engage in services is perhaps the most obvious evidence of their neglect and risk of harm to the children, this failure was not the only basis for the termination of their parental rights. The record shows that respondents could not provide a stable home for the children and were unable to properly parent their children. At the termination hearing, respondent-father admitted that he did not have stable housing and was living in a motel. While he asserted that he had $3,200 in the bank that he was saving to buy a house, he provided no verification of this claim. Respondent-father also

admitted that his utilities were frequently shut off because he could not afford to pay them. Although respondents claimed there was no domestic violence, the caseworker observed respondent-mother's black eye and respondent-mother admitted that she and respondent-father engaged in "pushing and shoving matches."

Respondents also failed to visit their children or provide for any of their emotional or financial needs. Respondents argue that they could not visit their children because the court suspended their parenting time. However, not only was respondent-mother's parenting time never suspended, but this position demonstrates respondents' failure to acknowledge that it was their own actions that precipitated the court's order. During the two months that respondent-father was granted parenting time, his behavior was so inappropriate that the court ordered that he undergo a psychological evaluation. Because he never complied with the court's orders, his parenting time never resumed. The record shows that respondent-father frequently argued with and threatened the workers assigned to assist him. Respondent-father was heard telling MC that there were cameras watching the children in their foster home. Respondent-father's confrontational and argumentative behavior with respondent-mother and the caseworkers frequently upset the children. And, as stated, respondent-mother's parenting time was never suspended. Nonetheless, respondent-mother admitted that she did not attend visits with her children for 16 months simply because respondent-father was precluded from attending parenting time. Respondent-mother chose, to her children's detriment, to put her and respondent-father's issues ahead of the children's needs. Moreover, even though they could or did not visit their children, neither respondent made any additional efforts to connect with or support the children. Neither parent sent any money, letters, birthday cards, or Christmas cards to the children the entire time they were in care.

There was also evidence from which the court could conclude that substance abuse continued to plague the family. Respondents were each offered more than 60 drug screens. Respondent-father never participated in a screen. He also admitted at the termination hearing that if he were screened that day, he would test positive for marijuana. Early on, respondent-mother submitted to one drug test and it was positive for marijuana. Respondent-mother further admitted to a long history of crack cocaine use. Respondent-mother testified that she resumed substance abuse treatment shortly before the termination hearing, but she provided no verification that she was participating in services, and she never informed the caseworker or even her attorney that she was in treatment. Based on this evidence, the trial court could conclude that substance abuse remained a barrier to reunification.

Respondent-mother's mental health issues similarly had not been adequately addressed. For 18 months, respondent-mother refused to undergo a psychological examination or participate in therapy. However, she testified that shortly before the termination hearing, she experienced "a nervous breakdown" that required a 10-day hospitalization. During this in-patient treatment, respondent-mother was apparently prescribed four psychotropic medications. At the time of the termination hearing, however, respondent-mother was no longer taking these medications because she did not like the way they made her feel. Based on this testimony, it is clear that at the time of the termination hearing, respondent-mother had yet to adequately address her mental health issues.

Respondents also failed to communicate with their caseworkers. While there was an occasional telephone conversation between the caseworker and respondent-father, these calls were usually brief and unproductive because respondent-father would routinely curse at the worker and then hang up. The caseworker testified that she had no meaningful contact with respondent-mother, either face-to-face or by phone, from the time she was assigned the case in October 2016 until the termination hearing in July 2017. Respondents also only sporadically attended court hearings.

Based on the foregoing, there was clear and convincing evidence to terminate respondents' parental rights to the minor children under (c)(*i*), (c)(*ii*), (g), and (j). The evidence supported a finding that, despite being offered services, respondents failed to comply with and benefit from the services offered. Respondents had not adequately addressed the conditions that brought the children into care. Indeed, there was a wholesale failure to participate in services. As a result of this failure, respondents could not demonstrate at the time of the termination hearing that they were in a position to properly parent their children. Moreover, considering the fact that both respondents believed that they had not done anything wrong, it was unlikely that they would be in a position to safely parent their children within a reasonable time. A parent's failure to comply with the court-ordered treatment plan is indicative of neglect and evidence that return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being. *Trejo*, 462 Mich at 346 n 3; *In re BZ*, 264 Mich App 286, 300; 690 NW2d 505 (2004). And a parent's failure to benefit from his or her treatment plan can be evidence that the child will be harmed if returned to a parent's care. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). Therefore, the trial court did not clearly err when it found that several statutory grounds for termination had been proven by clear and convincing evidence. *Trejo*, 462 Mich at 355.

B. BEST INTERESTS

Respondents also argue that the trial court clearly erred by finding that termination of their parental rights was in the children's best interests. We disagree. Whether termination of parental rights is in a child's best interests must be proven by a preponderance of the evidence. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). This Court reviews for clear error a trial court's finding that termination of parental rights is in the child's best interests. *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of the parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). The court may consider several factors when deciding if termination of parental rights is in a child's best interests, including 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. *Olive/Metts*, 297 Mich App 35, 42; 823 NW2d 144 (2012. The court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *Jones*, 286 Mich App at 131.

The trial court did not clearly err when it found that termination of respondents' parental rights was in the children's best interests. At the time of the termination hearing, the children had been in non-relative foster care for 18 months. During this time, respondents unequivocally refused to participate in services, failed to communicate with caseworkers, and only sporadically attended court hearings. Indeed, respondent-mother did not visit the children for 16 months. Respondents assert that the court denied them the ability to see their children, but the suspension of respondent-father's parenting time was clearly a product of his own making, and respondent-mother's parenting time was never suspended. Through the entire case, respondents demonstrated that they were unwilling to make even the most minimal efforts to ensure a continued relationship with their children. It is questionable whether, under these circumstances, any bond continued to exist between respondents and their children at the time of the termination hearing. *Olive/Metts*, 297 Mich App at 42.

Further, the children were flourishing in foster care. The children had been placed together in the same foster home since their removal in January 2016. The foster parents were meeting all of the children's needs, including love, support, and medical and mental health needs. When TC was removed from respondents' care, he was not talking and was not toilet-trained. TC was assessed for speech, language, developmental, and motor skill delays. While in foster care, he was, for the first time, enrolled in an early pre-school program. After 18 months in foster care, TC continued to have some moderate delays with speech and language, but he had made significant progress and was now meeting all of his developmental milestones. At the time MC was removed from respondents' care, she was not attending school and, despite respondent-father's assertions, the caseworker did not believe that MC was being homeschooled. At the time of the termination hearing, MC was in school and doing very well. She had an Individual Learning Plan (IEP) designed to address her cognitive delays.

When balancing the best-interest factors, a court may consider the advantages of a foster home over the parent's home and the possibility of adoption. *Id*. at 41-42. The children were thriving in their foster home. Their special needs were being satisfied. It is clearly apparent that the children were placed in a stable home where they were progressing and that this progress could continue because the foster parents had indicated a desire to adopt the children.

After having been in care for 18 months, the children were entitled to stability, consistency, and finality. The children were at an age where they required stability, permanency, and finality in order to foster their continued growth and development. *Jones*, 286 Mich App at 129. Accordingly, the trial court did not clearly err when it held that termination of respondents' parental rights was in the children's best interests.

III. ADDITIONAL ISSUE IN DOCKET NO. 339827

Respondent-mother additionally argues that the trial court's termination of her parental rights was improper because petitioner failed to make reasonable efforts to accommodate her mental health issues when providing services. We disagree.

In *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012), this Court, relying on *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000), held that "the time for asserting the need for accommodation in services is when the court adopts a service plan," and a claim challenging

the reasonableness of reunification services is deemed unpreserved if a respondent "fail[s] to object or indicate that the services provided to them were somehow inadequate." The record reflects that respondent-mother never took issue with the manner in which the case was being serviced. Therefore, based on *Frey*, it would appear that this issue was not properly preserved.[2] This Court generally reviews for clear error a trial court's finding "that reasonable efforts were made to preserve and reunify the family." *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). However, we review unpreserved issues for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Utrera*, 281 Mich App at 9.

Respondent-mother argues that petitioner's efforts at family reunification were not reasonable because they failed to take into consideration her diagnoses of bipolar disorder, depression, and borderline personality disorder. After reviewing the lower court record, we conclude that respondent-mother has failed to demonstrate any error.

Before a court may contemplate termination of a parent's parental rights, the petitioner must, with certain exceptions, make reasonable efforts to reunite the family. MCL 712A.19a(2). "The adequacy of the [DHHS]'s efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights." *In re Rood*, 483 Mich 73, 89; 763 NW2d 587 (2009). However, a respondent also has a responsibility to participate in services offered by petitioner. *Frey*, 297 Mich App at 248.

In *In re Hicks/Brown*, 500 Mich 79; 893 NW2d 637 (2017), our Supreme Court considered whether DHHS made reasonable efforts to reunify an intellectually disabled parent with her children. The Court considered obligations that arise under both the Americans with

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[2] We observe that recently, in *In re Hicks/Brown*, 500 Mich 79; 893 NW2d 637 (2017), our Supreme Court commented on, but did not overrule, the statements in *In re Terry*. The Court noted:

> The Department and the children's lawyer-guardian ad litem argue that Brown did not timely raise in the circuit court her disability-based objection and that she has therefore forfeited that argument on appeal. Relying on dictum in *Terry*, they argue that objections to a service plan are always untimely if not raised "either when a service plan is adopted or soon afterward." *Terry*, 240 Mich App at 26, 610 NW2d 563. With the exception of the panel below, the Court of Appeals has treated this language as the rule since the *Terry* decision. While skeptical of this categorical rule, we have no occasion to decide whether the objection in this case was timely because neither the Department nor the children's lawyer-guardian ad litem raised a timeliness concern in the circuit court. [*In re Hicks/Brown*, 79 Mich at 88-89 (Footnotes omitted).]

Disabilities Act (ADA), 42 USC 12101 *et seq*., and the Michigan Probate Code, MCL 712A.18f(3)(d). The Court held that the DHHS neglects its duty under the ADA to reasonably accommodate a disability when it fails to implement reasonable modifications to services or programs offered to a disabled parent. *Id*. Similarly, the Court stated 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." *Id*. The Court noted, however, that DHHS cannot accommodate a disability of which it is unaware. *Id*. Keeping in mind the foregoing principles, we conclude that, in this case, there is insufficient evidence on the record that petitioner failed to accommodate respondent-mother's mental health issues.

Records from respondent-mother's earlier termination proceedings show a history of mental health issues dating back to at least 1999. Early on in this most recent case, petitioner documented a diagnosis of bipolar disorder in the February 2016 parent-agency agreement. Recognizing that respondent-mother had significant mental health issues, petitioner requested, and the trial court ordered, that respondent-mother undergo a psychological assessment and that she thereafter comply with the resulting professional recommendations. Despite obtaining the necessary referrals, respondent-mother failed to follow through with the psychological evaluation or therapy. Petitioner attempted to maintain contact with respondent-mother over the entire course of the proceedings through written correspondence and telephone calls. Because respondent-mother failed to return calls, respond to written correspondence, or attend meetings, petitioner's efforts to engage her were unsuccessful. Respondent-mother claimed that she had no telephone number for her caseworker, but she acknowledged that she knew where the Ennis Center for Children was located and that she could have gone there for assistance.

While respondent-mother faults petitioner for failing to modify the service plan to accommodate her mental health issues, the record demonstrates that this is a case where there was a wholesale failure by respondent-mother to cooperate with, and benefit from, the services offered to her. Respondent-mother refused to participate in the initial services that would have assisted petitioner in identifying her needs and thereafter making the necessary referrals. "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 services that are offered." *Frey*, 297 Mich App at 248. Considering respondent-mother's unequivocal refusal to cooperate, petitioner cannot be criticized for failing to take additional measures to accommodate respondent-mother's mental health issues.

Moreover, respondent-mother has failed to identify what services petitioner should have provided to accommodate her specific needs. Based on the record before this Court, it is unlikely that even if additional services or modifications had been pursued, respondent-mother would have cooperated with those efforts. Respondent-mother testified that shortly before the termination hearing she voluntarily sought mental health treatment. While she did not provide any documentation verifying her participation in treatment, she testified that she was hospitalized for 10 days. During this hospitalization, she was purportedly prescribed several medications to address her mental health issues. At the time of the termination hearing, however, she candidly admitted that she was no longer taking these medications because she did not like the way they made her feel. Considering that respondent-mother refused to undergo a psychological evaluation, to participate in therapy, and to take prescribed medications, there is no indication

that respondent-mother would have fared any better had additional or alternative services been offered. Therefore, the trial court did not err when it found that petitioner's efforts toward family reunification were reasonable.

Finally, respondent-mother argues that petitioner failed to make reasonable efforts because it did not provide her with an opportunity to participate in parenting time separately from respondent-father. The record does not support this claim. In February 2016, respondent-mother informed petitioner that she had left respondent-father because of domestic violence issues. She then requested separate parenting time. On March 1, 2016, petitioner notified respondent-mother that it had scheduled separate parenting time for her. The caseworker even called respondent-mother to remind her of the new visitation times. Thereafter, respondent-mother failed to appear at the scheduled visit with her children and did not return the agency's calls. Then, on March 16, 2016, respondent-father's parenting time was indefinitely suspended. For the 16 months that followed, respondent-mother could have independently visited the children, had she made the effort. At the termination hearing, respondent-mother testified that she would never visit her children without respondent-father. Clearly, respondent-mother was offered, but failed to take advantage of, separate parenting time. Accordingly, respondent-mother is not entitled to relief on that basis.

Affirmed.

/s/ Mark T. Boonstra
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause