STATE OF MICHIGAN

COURT OF APPEALS

In re J. C. OWEN, Minor.

UNPUBLISHED
July 19, 2018

Nos. 342054; 342055
Lapeer Circuit Court
Family Division
LC No. 17-012432-NA

Before: FORT HOOD, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In these consolidated appeals, in Docket No. 342054, respondent-mother appeals by right the trial court order terminating her parental rights to the minor child, JO, pursuant to MCL 712A.19b(3)(c)(*i*) (conditions of adjudication continue to exist); (c)(*ii*) (failure to rectify other conditions); (g) (failure to provide proper care and custody); and (j) (reasonable likelihood that the child will be harmed if returned to the parent). In Docket No. 342055, respondent-father appeals by right the same order terminating his parental rights to the minor child pursuant to the same statutory grounds. We affirm.

I. STANDARD OF REVIEW

"We review for clear error both the court's decision that a ground for termination has been proven by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). Similarly, this Court reviews a trial court's decision regarding reasonable efforts for clear error. *In re Frey*, 297 Mich App 242, 244, 248; 824 NW2d 569 (2012). "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) (quotation marks and citation omitted). Unpreserved issues are reviewed for plain error affecting a respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). Mother argues that she was denied the effective assistance of counsel. Whether mother was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, while constitutional issues are reviewed de novo. *Id*. In cases such as the instant case in which there was no evidentiary hearing held, "this Court's review is limited to mistakes apparent on the record." *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

II. DOCKET NO. 342054

Mother argues that the trial court erred in finding that (1) petitioner the Department of Health and Human Services (DHHS) made reasonable efforts at reunification, (2) statutory grounds for termination existed, and (3) termination was in JO's best interests.[1] Mother also argues that she was denied the effective assistance of counsel.

A. REASONABLE EFFORTS

Mother argues that DHHS did not provide reasonable efforts because the agency did not make accommodations under the ADA, 42 USC 12101 *et seq*. This Court has previously held that to preserve a claim that a service plan violates the ADA, a respondent must raise an objection " 'either when a service plan is adopted or soon afterward.' "[2] *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). In this case, where mother did not raise the issue of the accommodations under the ADA until the termination hearing, mother did not preserve this issue for review. Nevertheless, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice[.]" *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). Failure to address this issue would result in a manifest injustice in the event that DHHS failed to comply with the ADA. Therefore, we will consider this issue despite mother's failure to preserve the issue.

"In general, petitioner must make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008). "As part of these reasonable efforts, the Department 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). "Not only must respondent cooperate and participate in the services, she must benefit from them." *In re TK*, 306 Mich App 698, 711; 859 NW2d 208 (2014). In challenging the services offered, a respondent must establish that he or she would have fared better if other services had been offered. See *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

The Michigan Supreme Court has explained that under the ADA, 42 USC 12101 *et seq*., " '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 subject to discrimination . . . .' " *In re Hicks/Brown*, 500 Mich at 86, quoting 42 USC 12132. Therefore, DHHS 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." *Id*.,

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[1] We reject petitioner's argument that this Court does not have jurisdiction. Respondents each timely filed their claim of appeal with this Court. See MCR 7.204(A)(1)(c). Moreover, untimely appellate briefs do not deprive this Court of jurisdiction.

[2] The Michigan Supreme Court recently indicated that it was "skeptical of this categorical rule." *In re Hicks/Brown*, 500 Mich 79, 88-89; 893 NW2d 637 (2017). However, the *Hicks/Brown* Court had no occasion to address the validity of the rule and it remains viable post-*Hicks/Brown*. See *id*. at 89.

quoting 28 CFR 35.130(b)(7) (2016). The Court explained, "[a]bsent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA . . . ." *Id*. at 86. "Once the Department knew of the disability, its affirmative duty to make reasonable efforts at reunification meant that it could not be passive in [its] approach . . . as far as the provision of accommodations is concerned." *Id*. at 87-88 (quotation marks and citation omitted).

In this case, Dr. Harold Sommerschield, Ph.D., conducted a psychological evaluation of mother. He confirmed at the termination hearing that he had all of the information he needed to complete the evaluation. Although he was unaware of some of mother's mental health history, when counsel listed some of mother's previous diagnoses, he stated that such information would not have impacted the conclusions in the psychological evaluation. He testified that mother was borderline range for intelligence and was a slow learner. She showed a significant indication of depression and paranoia. He recommended a psychiatric evaluation and treatment with medication. He also agreed that a parent aide and counseling were important for mother.

The record reflects that DHHS provided services to mother in an effort to reunify her with her minor child. For example, DHHS facilitated psychological counseling at CMH. However, mother's attendance was "very poor." Foster care worker Mary Bukosky testified that mother started counseling with CMH on March 21, 2017. Mother attended counseling for about a month and then missed 9 or 10 appointments and did not inform the caseworker at the time that she stopped attending. Mother had a parent aide that offered to provide transportation assistance. After that, mother attended Concepts in Counseling for a "few sessions," and then, at the caseworker's encouragement, completed another intake with CMH and attended one session before moving to Genesee County. The caseworker informed mother that the move would necessitate that she contact Genesee Access to arrange different counseling, but mother did not call Genesee Access.

In addition to the counseling, DHHS provided mother with a parent aide to assist her in overcoming her limitations. Specifically, Christina Nelson assisted both respondents with transportation, obtaining employment, information on obtaining Medicaid, supervised parenting time, and education services. Nelson testified that she attempted to teach respondents things, and felt like she accommodated mother's slow learning skills and that mother understood and comprehended what was taught. Dr. Sommerschield agreed that counseling and a parenting aide were important to help mother overcoming her barriers, but her inadequate participation in the services showed that she was not benefiting from the services. See *In re TK*, 306 Mich App at 711 ("Not only must respondent cooperate and participate in the services, she must benefit from them.").

Moreover, unlike in *In re Hicks/Brown*, 500 Mich at 86, in this case, mother does not identify any services that would have benefited her to the extent that reunification would have been a possibility. In contrast, in *In re Hicks/Brown*, the respondent identified a program that would have benefited her, yet the petitioner refused to consider the program; the Court explained:

> Despite the recommendations of the Department's medical professionals that [respondent] could benefit from services tailored to her disability through an

> organization such as the NSO, and despite the Department's failure to provide those court-ordered services, the circuit court nonetheless concluded that the Department had made reasonable efforts at reunification and terminated [respondent's] parental rights. The circuit court seemed not to have considered the fact that the Department had failed to provide the specific services the court had ordered to accommodate [respondent's] intellectual disability; nor did it consider whether, despite this failing, the Department's efforts nonetheless complied with its statutory obligations to reasonably accommodate [respondent's] disability. This was error. As stated earlier, efforts at reunification cannot be reasonable under the Probate Code unless the Department modifies its services as reasonably necessary to accommodate a parent's disability. [*Id*. at 89-90.]

Mother argues that the caseworker did not alter the treatment plan to accommodate her, that the caseworker was uneducated on the ADA standards, and that the caseworker testified that it was mother's responsibility to follow through with services. However, mother does not indicate with any specificity what services DHHS could have offered her that would have made reunification more likely. Instead, mother notes that DHHS did not modify the treatment plan to provide reasonable accommodations such as "relaxing deadlines, assisting in the preparation of documents, or helping her fill out job applications." However, as noted above, mother did not fully participate in important services such as psychological counseling and parent aide services. Dr. Sommerschield testified that these services were important to help mother overcome her disability. Moreover, Nelson testified that she assisted mother with finding and completing job applications, education services, and transportation to and from job interviews. Further, Nelson reopened mother's case to provide additional services and allow her an opportunity to overcome her barriers. Mother complied with the services at first, but she stopped complying after reengaging in a relationship with father.

Dr. Sommerschield recommended that mother undergo a psychiatric evaluation and treatment with medication. DHHS encouraged mother to undergo a psychiatric evaluation, however, according to Bukosky, the previous caseworker reported that mother informed her she could not undergo a psychiatric evaluation because she was pregnant. Dr. Sommerschield testified that pregnancy would not interfere with an evaluation but may interfere with the ability to take medication. Even if DHHS could have done more to arrange the psychiatric evaluation, mother cannot show how it would have benefited her, particularly where she did not fully participate and engage in the services that DHHS did provide. See *In re Fried*, 266 Mich App at 542-543. On this record, unlike in *In re Hicks/Brown*, mother has not shown that DHHS failed to offer services to accommodate her disability. Therefore, the trial court did not clearly err in finding that DHHS made reasonable efforts at reunification.

B. STATUTORY GROUNDS

"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).

The trial court found clear and convincing evidence to terminate mother's parental rights, in part,[3] pursuant to the following statutory provision:

> (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:
>
> (*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. [MCL 712A.19b(3).]

The trial court did not clearly err in finding grounds for termination under MCL 712A.19b(3)(c)(*i*). This Court has held that termination is proper when "the totality of the evidence" reflected that the respondents did not accomplish "any meaningful change in the conditions" that led to adjudication. *In re Williams*, 286 Mich App 253, 272; 779 NW2d 286 (2009). In this case, the conditions that led to the adjudication included JO's failure to thrive and his hospitalization. Mother does not dispute that over 182 days had elapsed since the trial court issued the initial dispositional order. Mother did not overcome the conditions that led to the adjudication, and there is no reasonable likelihood that the conditions would be rectified within a reasonable time considering JO's age. In particular, Bukosky testified that mother did not benefit from the services that were provided to her. She appeared disengaged during parenting time and was not prepared. Mother did not complete her psychological counseling and instead missed multiple appointments and had a poor attendance record at CMH. Mother did not have stable housing and had only recently obtained employment. Secure and safe housing and a stable income are necessary to allow a young child to thrive, and mother did not show that she was able to maintain these necessities for an extended period. It was not likely that JO would thrive within a reasonable amount of time given mother's struggles with overcoming her barriers. Mother needed to first learn to care for herself before she could adequately care for JO. While mother was doing well after Nelson reopened her parent aide case, mother stopped complying after she resumed her relationship with father. Nelson testified that respondents did not benefit from parenting classes and that they did not see the value in the parenting classes. Nelson also testified that respondents did not take advantage of a general education diploma (GED) program, and that it was difficult to get mother to follow through with services. She did not think that mother would benefit from further services, and she stated that there was nothing more that she could do for mother. Nelson's testimony supported that mother could not provide an environment in which JO could thrive within a reasonable amount of time considering JO's age. On this record, the trial court did not clearly err in finding clear and convincing evidence to support termination under MCL 712A.19b(3)(c)(*i*).

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[3] The trial court also found grounds for termination under MCL 712A.19b(3)(c)(*ii*), (g), and (j). However, because we conclude that the trial court did not clearly err by finding at least one statutory ground for termination, we need not address those additional grounds. See *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

C. BEST INTERESTS

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. In considering best interests, the focus is on the child rather than the parent. *Id*. at 87. A trial court may consider such factors as "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[.]" *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). A trial court may also consider the duration that a child has lived with a foster family and whether "the child could be returned to [the] parent's home within the foreseeable future, if at all." *In re Frey*, 297 Mich App at 248-249.

In this case, the trial court did not clearly err in finding that termination of mother's parental rights was in JO's best interests. The record showed that mother had several issues that prevented her from being able to adequately care for JO. Mother did not show an ability to maintain stable employment or housing, she did not benefit from services, and she did not show an ability to rectify the conditions that led to the adjudication within a reasonable amount of time. Given the circumstances, it was unlikely that JO would thrive or be safe under mother's care. Mother had significant issues of her own to address, and she did not show an ability to adequately care for herself. Moreover, Nelson could not agree that JO had a bond with mother, and testimony showed that JO was thriving in foster care and that all of his needs were being met. Nelson also testified that mother did not benefit from parenting classes and failed to comply with parent aide services after she resumed her relationship with father. There was significant instability in mother's life, and mother could not provide the stability or permanency that JO needed. On this record, the trial court did not clearly err in finding that termination was in JO's best interests.

Mother argues that DHHS erred when it failed to place JO with a cousin or a grandparent. However, contrary to mother's argument on appeal, the third-cousin was not an appropriate relative placement. See MCL 712A.13a(1)(j) (defining "relative" for purposes of DHHS placement). Similarly, after an unsuccessful attempt at a home visit with the great-grandparent, the caseworker concluded that placement was not appropriate. To the extent that mother argues that placement was proper with the maternal grandmother, trial counsel for mother indicated before trial that the maternal grandmother only recently became involved in the case. Mother fails to articulate how DHHS erred in failing to find that placement with the maternal grandmother was proper when she was absent until immediately before the trial. In short, DHHS complied with the requirements of MCL 722.954a(2), and mother's arguments to the contrary are unavailing.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Mother argues she was denied the effective assistance of counsel. "In analyzing claims of ineffective assistance of counsel at termination hearings, this Court applies by analogy the principles of ineffective assistance of counsel as they have developed in the criminal law context." *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). To establish ineffective

assistance of counsel, "it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance prejudiced the respondent." *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). To establish prejudice, a respondent must show that there is a "reasonable probability that but for [] counsel's unprofessional errors, the result of the proceeding would have been different." *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000) (quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citation omitted).

Even if we were to accept mother's contention that trial counsel's performance was in some manner deficient, mother has not demonstrated that this alleged deficient performance resulted in prejudice. Here, DHHS made accommodations for mother, and mother did not fully participate in those accommodations. Specifically, DHHS arranged for mother to have access to psychological counseling and to have a parent aide. Dr. Sommerschield testified that counseling and a parent aide were important services for mother. Mother did not fully participate in either of these services. Her attendance at psychological counseling was "very poor" and sporadic at best, and she missed multiple counseling sessions. The parent aide offered assistance with numerous different issues, and the parent aide testified that she thought that she accommodated mother's slow learning skills. However, after the parent aide reopened mother's case, mother stopped complying after she resumed her relationship with father. The parent aide ultimately closed the case and testified that there was nothing more that she could do for either parent. In short, the record reflects that DHHS made reasonable efforts to assist mother with overcoming her barriers, however mother cannot show that trial counsel was ineffective for failing to request additional services when she did not fully participate in the services that were offered. Moreover, mother does not identify with any specificity what additional services DHHS should have provided. See *In re Hicks/Brown*, 500 Mich at 86. In sum, mother's claim of ineffective assistance of counsel is without merit.

Mother also argues that trial counsel was ineffective during the termination trial when he failed to introduce witnesses or evidence to corroborate mother's compliance with the service plan. Mother also argues that trial counsel failed to call her employer, her counselor, or her obstetrician to testify that her lack of employment was due to her pregnancy.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009) (quotation marks and citation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this case, mother argues that trial counsel should have called her counselor, her employer, and her obstetrician as witnesses at trial. Mother also argues that trial counsel should have offered evidence to show her compliance with the treatment plan. However, mother fails to make an offer of proof to show what these witnesses would have testified to and how they would

have helped her case at trial. Similarly, although mother made progress in certain areas of the treatment plan, she does not articulate with specificity what evidence could have been offered to show that she was in full compliance with the treatment plan. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600 (quotation marks and citation omitted). Because mother has not established the factual predicate for her claim, she cannot show that she was denied the effective assistance of counsel. Moreover, trial counsel extensively cross-examined Dr. Sommerschield about his psychological evaluation of mother. Trial counsel also cross-examined the other witnesses and made persuasive arguments against termination. Mother cannot show that trial counsel's strategic decision not to call any witnesses or present other evidence was deficient on an objective standard of reasonableness.

II. DOCKET NO. 342055

Father argues that the trial court erred in finding that (1) DHHS made reasonable efforts at reunification and (2) statutory grounds for termination existed. Father further contends that DHHS failed to accommodate his disability.

A. REASONABLE EFFORTS

In this case, Dr. Sommerschield diagnosed father with a mild personality disorder. He recommended psychological counseling but did not recommend psychiatric treatment. At the termination trial, Dr. Sommerschield testified that treatment of the disorder included cognitive therapy. He also agreed that father needed to be held accountable for the services that DHHS provided for him. He agreed that father needed to submit himself to therapy and that father should face the consequences if he failed to comply with the treatment plan. DHHS offered services that aligned with Dr. Sommerschield's recommendations. For example, DHHS offered services such as psychological counseling, a parent aide, and parenting time. Father did not fully participate in these services. Father missed counseling sessions, and his case was closed. Later, he did not want to attend CMH and did not follow through with Catholic Charities. He missed 30 out of 80 parenting-time sessions. Father disappeared for months at a time and did not communicate with anyone. Father simply cannot show that he would have benefited from any further services where he did not participate in the services that were offered. See *In re Fried*, 266 Mich App at 542-543.

Moreover, unlike in *In re Hicks/Brown*, 500 Mich at 86, in this case, father does not identify any services that would have benefited him to the extent that reunification would have been a possibility. See *id*. at 89-90; see also *In re Fried*, 266 Mich App at 542-543. In support of his claim, father points to a letter that his counsel sent to Bukosky. In the letter, father's counsel requested a psychiatric review of father, CMH services, and other services such as employment services, transportation, housing, food assistance, assistance with attending appointments, and a relaxation of timelines. However, Dr. Sommerschield did not recommend psychiatric services for father. Instead, he recommended psychological counseling. As noted above, DHHS provided counseling services. Father attended the first two counseling sessions and then missed the remaining sessions. After that, father did not want to attend CMH and did not follow through with counseling at Catholic Charities. However, father never followed

through with attending any other counseling. With respect to the other requested accommodations, DHHS offered other services that were designed to assist father with overcoming his barriers. DHHS provided a parent aide, parenting time, parenting education, and counseling sessions. Father did not fully participate in the services and did not benefit from the services. On this record, unlike in *In re Hicks/Brown*, father has not shown that DHHS failed to offer services to accommodate his disability. Therefore, the trial court did not clearly err in finding that DHHS made reasonable efforts at reunification.

B. STATUTORY GROUNDS

The trial court found clear and convincing evidence to terminate father's parental rights, in part,[4] pursuant to MCL 712A.19b(3)(c)(*i*).

The trial court did not clearly err in finding clear and convincing evidence to support termination under MCL 712A.19b(3)(c)(*i*). Father does not dispute that more than 182 days elapsed from the initial dispositional order to the termination. The conditions that led to the adjudication included JO's failure to thrive and hospitalization. The evidence showed that there was no reasonable likelihood that the conditions would be rectified within a reasonable amount of time considering JO's age. Here, father disappeared for months at a time and did not communicate with anyone during his absence. This was a pattern in a previous proceeding as well. He did not fully participate in services. Father only attended the first two counseling sessions and then was absent for the remaining sessions. His case was closed. Father missed nearly half of the parenting-time sessions. Father did not maintain stable housing or stable employment. A caseworker testified that she contacted father's employer, and the employer indicated that father did not appear for work very often. Father did not follow through with direction and guidance from the parent aide. He did not follow through with a GED training program. This evidence clearly showed that JO would not thrive or be safe in father's care; father could not take care of his own needs or overcome his own barriers. There was no evidence that father could provide an environment in which JO could thrive. See *In re Williams*, 286 Mich App at 272. Accordingly, the trial court did not clearly err in finding that the conditions that led to the adjudication continued to exist and that there was no reasonable likelihood that the conditions would be rectified within a reasonable amount of time.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

[4] As with mother, the trial court found additional grounds for termination of father's parental rights. But we need not consider them here. See *In re HRC*, 286 Mich App at 461.