STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 18, 2019

In re BUTLER, Minors.

No. 346607
Kalamazoo Circuit Court
Family Division
LC No. 2016-000418-NA

In re A. M. BUTLER, Minor.

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Before: K. F. KELLY, P.J., and FORT HOOD and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals, respondent-mother, T. Butler, and respondent-father, C. Skinner, appeal as of right the trial court's order terminating their parental rights to their common child, AB, and also terminating Butler's parental rights to an additional child, NB. The trial court terminated the parental rights of both respondents under MCL 712.19b(3)(c)(*i*), (c)(*ii*), (g), and (j). Because we conclude that there were no errors warranting relief in either appeal, we affirm.

I. FACTUAL BACKGROUND

This family's history with Child Protective Services ("CPS") dates back to 2005 when Butler's oldest child, AN, was born testing positive for cocaine and marijuana. AN was removed from Butler's care, a petition was filed, and the court took jurisdiction of the child. Sometime during these 2005 proceedings, Butler voluntarily relinquished her parental rights to AN. In 2008, Butler gave birth to her second daughter, NB, one of the children at issue in this appeal. At the time of the child's birth, NB tested positive for marijuana and cocaine, which resulted in the child being removed from Butler's care. Butler regained custody of NB, but between 2008

and 2013, NB would be removed from Butler's home three times because of allegations of abuse and neglect. In 2015, Butler began a relationship with Skinner. Their relationship became volatile and violent. In April 2016, Butler obtained a personal protection order ("PPO") preluding Skinner from having any contact with her. In the fall of 2016, Butler gave birth to Skinner's daughter, AB. Shortly thereafter, both AB and NB were removed from respondents' care after a physical altercation between Skinner and Butler.

The Department of Health and Human Services ("DHHS") filed a petition requesting that the court take jurisdiction of the children. After the court found statutory grounds to assume jurisdiction over NB and AB, respondents were order to comply with the provisions of a parent-agency treatment plan. When respondents' compliance with the treatment plan was deemed insufficient, petitioner sought to terminate respondents' parental rights. After a three-day hearing that concluded in September 2018, the trial court terminated respondents' parental rights. Thereafter, these appeals ensued.

II. DISCUSSION OF THE ISSUES

A. REASONABLE EFFORTS

For her first issue on appeal, Butler does not directly challenge the trial court's findings that there existed statutory grounds to terminate her parental rights. Instead, Butler asserts that the trial court erred when it found that reasonable efforts were made to reunify the family. Because Butler did not raise this issue in a timely manner in the trial court, and did not object to the service plan or argue that the services provided were inadequate, this issue is not preserved for appellate review. *In re Frey,* 297 Mich App 242, 247; 824 NW2d 569 (2012). In general, we review a preserved issue regarding reasonable efforts for clear error, *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005), but unpreserved issues are reviewed for "plain error affecting substantial rights." *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id*. at 9. After reviewing the lower court record, we conclude that Butler has failed to demonstrate that petitioner did not make reasonable efforts to reunify the family.

Before a court may contemplate termination of a parent's parental rights, the petitioner must 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 has the responsibility to not only cooperate and participate in the services, she must also benefit therefrom. *In re TK*, 306 Mich App 698, 711; 859 NW2d 208 (2014). A thorough review of the record does not support Butler's assertion that DHHS failed to make reasonable efforts to preserve and reunify this family.

Butler argues that petitioner's efforts at family reunification were not reasonable because necessary referrals were not made to address her mental health issues. Butler asserts that such

referrals were necessary for her to successfully complete her treatment plan.[1] After reviewing the lower court record, there is no support for Butler's position that petitioner's efforts to address her mental health needs were deficient.

Butler asserts that petitioner failed to timely refer her for a psychological evaluation and make other treatment referrals that would have been necessary to address her mental health issues. This is not accurate. Initially, we note that in prior child protective proceedings, Butler underwent at least two psychological evaluations, one in 2005 and the other in 2010. Early in these proceedings, at a dispositional hearing on October 31, 2016, the trial court and the parties discussed the need for an updated psychological evaluation. Butler's counsel specifically questioned the need for a psychological evaluation because Butler was already treating with a counselor at Community Mental Health ("CMH"). Butler's counsel characterized an additional psychological evaluation as superfluous, but thought that CMH should make any recommendation. The trial court also added that a psychological evaluation might not be warranted in light of Butler's recent inpatient treatment. At the end of the hearing, the trial court indicated that it was not going to order an updated psychological evaluation at that time because Butler was already treating with a psychiatrist who had prescribed medications and who knew Butler's circumstances better than someone who had not met Butler before and would spend only a limited amount of time with her.

Throughout these proceedings, Butler participated in medication reviews and counseling with a psychiatric physician's assistant and she attended weekly counseling with therapist Julie French. While initially French addressed Butler's substance abuse issues, after Butler obtained some degree of sobriety, the two began to work on and delve more deeply into Butler's mental health issues that in large part stemmed from severe childhood trauma. French explained that when someone such as Butler has a dual diagnosis of substance abuse and mental health issues, the protocol is to first address the substance abuse, then work on the mental health. The therapy is focused in this order because once a client has obtained sobriety, they are better equipped to working on deeper issues. French cautioned that particular care must be taken with a dual-diagnosis client because delving in too deeply or too quickly regarding past trauma can trigger substance abuse relapse. French indicated that while she was primarily a substance abuse counselor, she was qualified to treat Butler for her mental health concerns. Moreover, when asked, Butler indicated that she was not interested in treating with another counselor. Based on this record, there is insufficient support for Butler's claim that DHHS failed to adequately address her mental health issues.

Butler specifically asserts that petitioner's failure to refer her for an updated psychological evaluation delayed the diagnosis and treatment of Butler's depression. In support of this argument, Butler appears to rely on a psychiatric evaluation that occurred in the midst of the termination hearing. On May 2, 2018, Dr. Mauli Verma, a psychiatrist with Kalamazoo CMH, assessed Butler and diagnosed her as suffering from depression. Dr. Verma concluded

[1] Butler does not argue that she was entitled to accommodation under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., simply that necessary referrals were not made.

that her only recommendation would be that Butler might benefit from an antidepressant. Butler seems to suggest that this was the first time she was found to have depression and that the diagnosis was delayed by petitioner's conduct. However, Butler's position is unsupported by the record.

Initially, it should be noted that during Dr. Verma's May 2018 assessment, Butler disclosed that she had a history of depression. Indeed, she reported being depressed since a fairly young age and having two episodes of major depression. She also reported that in the past, she had been prescribed Zoloft, Cymbalta, and Prozac, all antidepressants, but that recently her medications had been discontinued. Butler also reported that her depression and anxiety were well controlled by her use of medical marijuana from a dispensary. Moreover, psychiatric physician's assistant Jennifer Richardson confirmed that Butler's depression had been diagnosed early on and that she had been treating Butler for this condition, among others, since February 2014. Similarly, in an April 18, 2018 correspondence, French specifically represented that since February 2014 she had been treating Butler for "Major Depressive Disorder and Post Traumatic Stress Disorder." Contrary to Butler's representations, there was no delay in the diagnosis or treatment of Butler's depression.

Finally, Butler has failed to provide any support for her position that if yet another referral for individual counseling had been made, the results would have been different. Considering Butler's history, it is unlikely that even if additional services or modifications had been pursued, Butler would have cooperated with or benefited from these efforts. Under these circumstances, there is no indication that Butler would have fared better had additional or alternative services been offered.

Petitioner made the necessary referrals to address both Butler's substance abuse and mental health issues. After reviewing the record, we find no merit to Butler's assertion that petitioner's allegedly deficient efforts contributed to her failure to remove the barriers to reunification. While Butler faults petitioner for failing to make even more referrals, the record demonstrates that this is a case where Butler was unable to sufficiently benefit from the services offered during the two years her children were wards of the court living in foster homes. "While the [DHHS] 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." *In re Frey*, 297 Mich App at 248. Further, "[n]ot only must respondent cooperate and participate in the services, she must benefit from them." *In re TK*, 306 Mich App at 711. Accordingly, we reject this claim of error.

B. STATUTORY GROUNDS

For his first issue on appeal, Skinner argues that the statutory grounds for termination of his parental rights to AB were not established by clear and convincing evidence. 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). This Court reviews the trial court's findings under the clearly erroneous standard. 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 committed. *In re Miller,* 433 Mich 331, 337; 445 NW2d 161 (1989).

At the time of the termination hearing, MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j) permitted termination of parental rights under the following circumstances:

> (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.
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> (*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.[2]

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[2] MCL 712A.19b(3)(g) was amended by 2018 PA 58, effective June 12, 2018. As amended, this paragraph now provides:

> (g) The parent, although, in the court's discretion, financially able to do so, 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.

The supplemental permanent custody petition, filed on February 22, 2018, cited the preamendment version of the statute that was in effect at the time. The hearing on the permanent custody began on April 19, 2018, before the effective date of the amendment. It ended on September 11, 2018, after the effective date of the amendment, but during closing arguments the parties argued the preamendement version of MCL 712A.19b(3)(g). In its October 4, 2018

Because the facts that support the statutory grounds overlap, they will be discussed concurrently.

The court took jurisdiction of AB, in part, because of Skinner's issues with domestic violence and substance abuse. Services offered to Skinner included parenting classes, drug screens, counseling referrals, parenting time, and a psychological evaluation. Skinner did not successfully participate in or complete any of the services. A parent's failure to comply with a 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. *In re Trejo,* 462 Mich at 346 n 3; *In re BZ*, 264 Mich App 286, 300; 690 NW2d 505 (2004).

In August 2017, a psychologist opined that Skinner might benefit from participating in cognitive behavioral therapy. Accordingly, the caseworker referred Skinner for counseling of this nature. When the termination hearing began in April 2018, Skinner still had not complied with the referral. By the time the hearing concluded five months later, Skinner had only recently, indeed in the preceding week, attended an intake session. Skinner also was ordered to attend domestic violence counseling. He only attended three sessions after which he was discharged for poor attendance. Because this was also a term of his probation from a domestic violence conviction, Skinner did not successfully complete his probation.

It is clear that at the time of termination, Skinner had not overcome his anger management and domestic violence issues. While he may not have been convicted of any additional domestic violence charges other than that which precipitated CPS involvement in September 2016, Skinner did continue to have volatile relationships with other women that escalated to physical altercations. In his own testimony, Skinner readily admitted that he had anger issues. He stated that when he got mad, he got "mad mad." With regard to one girlfriend, he admitted that he grabbed her and slapped her, but maintained that he "wasn't physically fighting her." When asked if he had any other convictions for assaultive conduct, Skinner did not know if his recent conviction of assaulting or resisting an officer constituted assaultive conduct. Skinner's conduct was clearly concerning and evidence that AB would be at risk of harm in his care.

Skinner also continued to test positive for controlled substances. Indeed, in the month before termination of his parental rights, he tested positive for cocaine and methamphetamines.

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written opinion, the court similarly applied the preamendment language. Respondents did not challenge the trial court's reliance on the preamendment version of the statute below, and they do not raise that issue on appeal. Indeed, the parties cite the preamendment version of the statute. In any event, as discussed later, we conclude that termination was also proper under §§ 19b(3)(c)(*i*), (c)(*ii*), and (j). Because petitioner need only establish one statutory ground for termination, *In re Trejo,* 462 Mich at 350, any error by the trial court in relying on the preamendment version of § 19b(3)(g) would be harmless. *In re HRC,* 286 Mich App 444, 461; 781 NW2d 105 (2009).

Skinner had not completed or attended any substance abuse counseling. Skinner also was unable to obtain and maintain suitable housing or a stable income.

The evidence demonstrated that at the time of termination, Skinner had yet to address, in a meaningful way, any of the conditions that caused AB to come into care. Moreover, there was clear and convincing evidence from which the court could conclude that Skinner would be unable to remove the barriers to reunification any time soon. In August 2017, the then 22-year-old Skinner underwent a psychological evaluation. The clinician found that Skinner demonstrated a "serious lack of insight into personal problems and dynamics." Skinner was noted to be quite immature and impulsive, and the clinician opined that it was unlikely that he would benefit from therapy, particularly once CPS was out of his life. Because Skinner lacked insight and did not believe that he required or could benefit from services, it was unlikely that he would change his behavior in the future or put his daughter's interests ahead of his own.

In sum, the trial court did not clearly err when it found clear and convincing evidence to terminate Skinner's parental rights to AB pursuant to MCL 712A.19b(3)(c)(*i*), (c)(*ii*), (g), and (j).

C. BEST INTERESTS

Finally, both respondents argue that the trial court erred when it found that termination of their parental rights was in the children's best interests. We disagree. Once a statutory ground for termination has been established, the trial court must find that termination of parental rights 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). 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). We review for clear error a trial court's finding that termination of parental rights is in a child's best interests. *In re Jones,* 286 Mich App 126, 129; 777 NW2d 728 (2009).

A trial 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. *In re Olive/Metts*, 297 Mich App at 42. The court may also consider psychological evaluations, the child's age, continued involvement in domestic violence, and a parent's history. *In re Jones,* 286 Mich App at 131.

After considering the totality of the record, the trial court concluded that a preponderance of the evidence demonstrated that it was in the children's best interests to terminate respondents' parental rights. After reviewing the record, we are not left with a definite and firm conviction that a mistake has been made.

During the two years that the children were in care, Butler failed to adequately address her mental health and substance abuse issues. In addition, Butler could not maintain even part-time employment because of attendance and attitude issues. Butler also never obtained stable and suitable housing. Clearly, the children would not be safe in her care.

Additionally, Butler was unable to demonstrate appropriate parenting skills. While Butler consistently attended parenting time, her behavior in front of the children was

inappropriate. She was unable to control her anger with the caseworkers and foster parents. Consequently, the children frequently witnessed Butler's angry outbursts and excessive profanity. During one visit, security removed Butler from the agency's premises. During one incident within a few weeks of the termination hearing, NB witnessed Butler's volatile behavior. Her body evidenced a visceral reaction to Butler's conduct and when she returned to her foster home, she ran into her bedroom crying. Butler's conduct similarly affected AB's behavior, particularly after visits with Butler. At day care, there were frequent reports of AB biting, hitting, and scratching. AB would also hit Skinner during parenting time. Butler's inability to control her demeanor clearly impacted her children's emotional well-being.

NB was particularly affected by Butler's behavior. NB had been removed from Butler's care and placed in foster homes four times during her young life. This instability had taken its toll on the child. NB underwent trauma and attachment assessments in 2017. The clinicians found that because of her chaotic childhood, she was "greatly struggling with symptomology of PTSD." Moreover, there was evidence that NB may have been underreporting and suppressing her exposure to trauma as a means of dissociation and avoidance. With respect to the attachment assessment, the clinician noted that NB presented with an insecure attachment to Butler. Butler showed minimal structure and engagement. Butler failed to be in tune with NB or display any genuine nurturing. Butler was ambivalent toward NB, making it difficult for an attachment to form. It was unclear whether, as a result of trauma, NB's attachment issues were confined to Butler or if she would have problems forming healthy attachments with anyone. Returning the children to Butler's care placed them at risk of further damage to their fragile well-being.

Similarly, the evidence supports the trial court's finding that termination of Skinner's parental rights was in AB's best interests. Skinner had not adequately addressed his anger management and substance abuse issues. He continued to be involved in physical altercations with women and lacked insight into the nature of his conduct. Skinner refused to participate in services, and believed that he did not require any treatment. He further unrealistically believed that there was nothing a two-year-old child could do to make him angry. Skinner also failed to demonstrate that he could live a substance-free lifestyle. Skinner tested positive for methamphetamines and cocaine just weeks before the final hearing. Moreover, this was even after the court had granted Skinner an additional three months to work toward reunification.

It was readily acknowledged that Skinner fairly consistently attended parenting time and that the visits went well. Indeed, a bond was observed between Skinner and AB. However, while Skinner and AB may have a bond, that factor does not outweigh AB's need for a safe and stable home that is free from drug abuse and domestic violence. Given AB's young age, it is critical that she be placed with someone who can provide adequate care and supervision. Accordingly, the trial court did not clearly err by finding that it was in AB's best interests to terminate Skinner's parental rights.

Both respondents seem to suggest that because the children's placement has been so unstable in this case, the children would be better off with them, their biological parents. While it is true that the children had been moved an inordinate number of times, respondents' position ignores the reason why the children are in a foster home to begin with. Had respondents fully participated in and benefited from their treatment plans from the outset, their children would not have been in circumstances that required them to be moved around. In any event, the current

foster mother testified that the children were doing well in her care and their behaviors had recently begun to improve. Moreover, there was also evidence that the current foster parents were willing to adopt both children. When balancing the best-interest factors, it is appropriate to consider the advantages of a foster home over the parent's home. *In re Olive/Metts,* 297 Mich App at 42. In this case, the evidence supported the conclusion that the foster home offered the children the greatest opportunity for positive growth and development.

After having been subject to instability most, if not all, of their young lives, the children are entitled to stability, consistency, and finality. Accordingly, the trial court did not clearly err when it held that termination of respondents' parental rights was in the children's best interests.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood
/s/ James Robert Redford