

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
September 29, 2011

In the Matter of BUDD/BUDD-
DONAHUE/DONAHUE, Minors.

No. 301995
Wayne Circuit Court
Family Division
LC No. 08-483774

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Respondent A. Donahue appeals as of right from the trial court's order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (j). For the reasons set forth in this opinion, we conditionally affirm and remand for further proceedings.

The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(K); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003).

With respect to § 19b(3)(c)(i), the trial court was permitted to apprise itself of all relevant circumstances when evaluating the conditions that led to the adjudication. *In re Jackson*, 199 Mich App 22, 26; 501 NW2d 182 (1993). Here, the trial court obtained jurisdiction over the children pursuant to respondent's plea of admission to allegations that she was unable to provide a stable and suitable home for the children, and that she exercised poor judgment by exposing the children to domestic violence with her husband and by associating with a known sex offender of children. Although respondent made some progress in rectifying these conditions while the children were placed outside her home, the evidence showed that she continued to maintain contact with the sex offender and lied about doing so. We find no merit to respondent's argument that she was placed in a position of having to choose between violating a court order prohibiting contact with the sex offender or violating a different court order for drug testing. Not only did respondent lie under oath about her contact with the sex offender, the trial court previously informed her that she should contact her caseworker if she believed that the sex offender was the only person who could help her. Because the children were not in respondent's custody, her parental fitness could only be judged in other ways, such as her work on the court-ordered treatment plan. *In re Sours*, 459 Mich 624, 638; 593 NW2d 520 (1999). The evidence that respondent was unable or unwilling to cease her contact with the sex offender demonstrated that she continued to lack the ability or capacity to understand how to make choices to safeguard the children from a risk of harm. Considering respondent's lack of progress and the length of

time the children had been temporary court wards, the trial court did not clearly err in finding that there was no reasonable likelihood that respondent would be able to rectify the conditions that led to the adjudication within a reasonable time considering the children's ages.

The same evidence also supports the trial court's determination that §§ 19b(3)(g) and (j) were each proven. A parent must sufficiently benefit from services to enable the court to find that he or she is able to provide a home for the child where there would no longer be a risk of harm. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Respondent's inability to demonstrate that she could make appropriate choices to safeguard the children or could be reasonably expected to do so within a reasonable time, considering the children's ages, supports the trial court's finding that § 19b(3)(g) was proven. The evidence also establishes that, given respondent's conduct or capacity, there is a reasonable likelihood that the children would be harmed if they were returned to respondent's home. Accordingly, the trial court did not clearly err in finding that § 19b(3)(j) was also established by clear and convincing evidence.

We are not persuaded that petitioner's motions to suspend parenting time violated respondent's statutory or constitutional rights, or otherwise provide a basis for vacating the trial court's finding that the statutory grounds for termination were established. Our Supreme Court has stated: "[a] due process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich at 210. The material issue for purposes of evaluating petitioner's actions is the reasonableness of its efforts to reunify the family. When a child is removed from a parent's custody, petitioner is required to make reasonable efforts to rectify the conditions that caused the removal by adopting a case service plan. *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005); see also MCL 712A.18f. In general, the reasonableness of the services offered to a respondent may affect the sufficiency of the evidence offered to establish a statutory ground for termination. *In re Fried*, 266 Mich App at 541. Here, respondent has failed to establish anything about the actual services provided by petitioner that would preclude the trial court from finding that the statutory grounds for termination were established by clear and convincing evidence. Additionally, the judicial oversight provided in this case provided a means for respondent to challenge petitioner's motions. *Martin v Children's Aid Society*, 215 Mich App 88, 98; 544 NW2d 651 (1996). Accordingly, we affirm the trial court's decision.

We note that the minor children also argue on appeal that the trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests. However, respondent has not challenged the trial court's best interests decision and, accordingly, has abandoned any claim of error associated with that decision. *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998) ("failure to brief the merits of an allegation of error is deemed an abandonment of an issue").

Petitioner and the minor children also raise an issue concerning compliance with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* Although respondent does not raise any issue involving the ICWA, we believe that consideration of the issue is appropriate in this case in the interests of justice. *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), *rev'd on other grounds* 445 Mich 502 (1994); see also *In re BR*, 176 Cal App 4th 773, 779; 97 Cal Rptr 3d 890 (2009).

Ordinarily, our review of unpreserved issues in a child protection proceeding is limited to plain error affecting substantial rights. *In re Mitchell*, 485 Mich 922; 773 NW2d 663 (2009); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Here, the only arguable plain error is that the trial court did not make an on-the-record determination that the ICWA notice requirements were satisfied. Because respondent disclosed at the preliminary hearing that she had Indian heritage, the court had a duty to ensure compliance with the ICWA notice requirements. *In re IEM*, 233 Mich App 438, 447; 592 NW2d 751 (1999).

We decline to consider the documents submitted with petitioner's brief on appeal to establish that it satisfied the ICWA notice requirements. Although this Court has discretion to allow additions to the record, MCR 7.216(A)(4), the appropriate means for an appellee to amend the record is by motion. *Golden v Baghdoian*, 222 Mich App 220, 222 n 2; 564 NW2d 505 (1997). Limiting our review to the record, we conclude that the order terminating respondent's parental rights under Michigan law should be conditionally affirmed and that the case should be remanded to the trial court to determine whether petitioner complied with the ICWA notice requirements, consistent with *In re IEM*, 233 Mich App at 448-450, and *In re TM (After Remand)*, 245 Mich App 181, 190-192; 628 NW2d 570 (2001). If petitioner establishes compliance with the ICWA, the order terminating respondent's parental rights shall be affirmed. If petitioner is unable to establish compliance, the trial court shall conduct further proceedings to ensure compliance with the ICWA.

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

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello