STATE OF MICHIGAN

COURT OF APPEALS

In re A. ATCHLEY, Minor.

FOR PUBLICATION
April 21, 2022
9:00 a.m.

Nos. 358502; 358503
Eaton Circuit Court
Family Division
LC No. 19-020150-NA

Before: BOONSTRA, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

In these consolidated appeals[1] respondent-father and respondent-mother appeal as of right the order terminating their parental rights to their minor child under MCL 712A.19b(3)(c)(*i*) and MCL 712A.19b(3)(j). We affirm for the reasons stated in this opinion.

I. BASIC FACTS

In March 2020, petitioner, the Department of Health and Human Services, filed a petition seeking removal of respondents' child from their care. In May 2020, respondents entered a plea of admission to testing positive for amphetamines and methamphetamines. Additionally, respondents pleaded no-contest to several allegations in the petition, including that they had physical altercations in the child's presence, the child was not attending school, the child was not clean, the home was dirty, they left the child unsupervised in the bathtub, and they left the child with respondent-father's brother who is a drug user. Based on the admissions and testimony from a caseworker detailing the history of the case, the trial court found that statutory grounds for jurisdiction existed and entered an order taking jurisdiction over the child.

A case services plan was developed that required respondents to address their issues with substance-abuse, domestic violence, and emotional instability. Respondents only minimally complied with the services offered, and they did not demonstrate any progress toward

[1] *In re Atchley Minor*, unpublished order of the Court of Appeals, entered September 28, 2021 (Docket Nos. 358502 and 358503).

reunification. As a result, in March 2021, petitioner filed a supplemental petition seeking termination of respondents' parental rights to the child. Following a termination hearing, the trial court entered an order terminating their parental rights.

II. REASONABLE REUNIFICATION EFFORTS

A. PRESERVATION AND STANDARD OF REVIEW

Respondents argue that the order terminating their parental rights must be reversed because petitioner failed to make reasonable efforts at reunification. In order to preserve an argument that petitioner failed to provide "adequate services" the respondent must "object or indicate that the services provided to them were somehow inadequate . . . ." *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). "The time for asserting the need for accommodation in services is when the court adopts a service plan . . . ." *Id*., quoting *In re Terry*, 240 Mich App 14, 27; 610 NW2d 563 (2000). The *In re Terry* Court stated that a parent challenging the adequacy of an accommodation must raise an objection "either when a service plan is adopted or soon afterward." *In re Terry*, 240 Mich App at 26. Consequently, under *Frey* and *Terry*, the earliest point at which a respondent can object to or indicate inadequacy with the case services plan is when the initial case services plan is adopted.

However, even if a parent does not object or otherwise indicate that the services provided were inadequate when the initial case services plan is adopted, such an objection or challenge may also be timely if raised later during the proceedings. Child protective proceedings constitute a single continuous proceeding that begins with a petition and continues until either reunification of the family occurs or the court terminates the respondent's parental rights, *In re Ferranti*, 504 Mich 1, 23; 934 NW2d 610 (2019) (citations omitted). Moreover, in cases where the child is placed outside the home, the case services plan must be "be updated and revised at 90-day intervals . . . ." MCL 712A.18f(5).[2] *In re Ferranti* and MCL 712A.18f(5) recognize what common sense dictates: services that are adequate at the beginning of the case may become inadequate as the case proceeds. For example, a parent with insurance that covers his or her mental-health services may lose that coverage. As a result, in order to satisfy its statutory duty to make reasonable efforts to reunify the child with his or her family, petitioner may have to take steps to ensure that the respondent-parent continues to have access to counseling that it deems necessary to reunify the child with the family. It is because of the constantly changing dynamic in a child protective case that a respondent has multiple opportunities to, as the circumstances change, object to the adequacy of the services being provided.

In this case, respondents did not object to or otherwise indicate that the initial case services plan was inadequate. However, at later dispositional review/permanency planning hearings, both respondents challenged the adequacy of the services being provided. Specifically, respondent-father stated that a number of services were provided virtually, but that he did not have consistent

[2] In this case, the trial court ordered respondents to comply with the initial case services plan, but then added that "[s]hould additional services be necessary," the case services plan would be "adapted and changed, and we will move forward."

access to a phone with internet capabilities. In turn, respondent-mother contended that additional time was necessary given the general turmoil caused by the COVID-19 pandemic. Although the challenges to the adequacy of the service were not in the form of a traditional objection, we conclude that, respondents' arguments were sufficient to "otherwise indicate" that the services provided were inadequate, thereby preserving for appeal their challenge to the reasonableness of the reunification efforts provided by petitioner. Consequently, we review for clear error the trial court's factual finding that petitioner made reasonable efforts to reunify respondents with the child. See *In re Smith*, 324 Mich App 28, 43; 919 NW2d 427 (2018). "A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted).

B. ANALYSIS

Except under aggravating circumstances not present in this case, petitioner has a statutory duty to make "reasonable efforts to reunify the child and the family . . . ." MCL 712A.19a(2). This means petitioner "must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks/Brown*, 500 Mich 79, 85-86; 893 NW2d 637 (2017). "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 the services that are offered." *Frey*, 297 Mich App at 248. This means a respondent-parent must both participate in services and "demonstrate that they sufficiently benefited from the services provided." *Id*.

1. RESPONDENT-FATHER

On appeal, respondent-father argues that he should have been provided with a phone and gas cards so that he could better participate in the services offered. There is no evidence respondent-father needed transportation assistance. Indeed, at the termination hearing respondent-father agreed he had "adequate transportation throughout" this case. And, although issues with his phone persisted, petitioner took steps to reunify him with the child despite those issues. Specifically, the caseworker testified that, although respondent-father frequently complained about his telephone, he never asked for assistance in obtaining a phone. Instead, he told her that he would find a working phone on his own. She indicated that she nevertheless communicated frequently with him both in person and via text messages. Further, the record reflects that respondent-father's phone issues were not so significant as to prevent him from frequently participating in court proceedings using Zoom, a video conferencing app.

Moreover, although petitioner did not provide respondent-father with assistance in ensuring that he had continual access to a working phone with an internet connection, it nevertheless accounted for the phone issues when providing services. First, parenting-time visits were both in person and over Zoom. Respondent-father missed multiple visits, seemingly without regard to whether they were in-person or over Zoom. And, although some visits were missed because of purported issues with his phone, he never provided any documentation to allow for the times to be rescheduled.

Next, to address respondent-father's substance abuse issue, petitioner provided him with random drug screens and referrals for substance-abuse counseling. Citing issues with his phone,

respondent-father requested that petitioner switch from a mobile screener to ADAM for the drug screens.[3] Despite petitioner accommodating respondent-father's request for a new provider, the call log for ADAM indicates that he never placed a call to see if he had to submit to a drug screen. Similarly, although petitioner provided respondent-father with a referral for substance-abuse treatment, he did not complete the service and instead asked petitioner to refer him to a different provider. Again, petitioner accommodated his request, but, even after receiving the referral to a second provider, respondent-father continued to not participate in substance-abuse treatment. Finally, throughout the case, he continued to miss drug screens and to test positive for amphetamines and methamphetamines, and THC.

To address respondent-father's domestic-relations barrier, petitioner referred him to Prevention and Treatment Services. But respondent-father did not engage with that service provider. Instead, in response to the provider reaching out to him, respondent-father asked via e-mail why the provider was contacting him. Although the provider responded to his e-mail, respondent-father did not offer any further reply. Given that services were never established, it is unclear how respondent-father purported phone issues could have even affected his ability to complete this service.

In light of the foregoing, we conclude that the trial court did not clearly err in finding that petitioner made reasonable efforts to reunify respondent-father with his child.

2. RESPONDENT-MOTHER

Respondent-mother argues that because of the COVID-19 pandemic, "reasonable efforts" means something more extensive than what might normally be required. She also contends that the "standard amount of time" was inadequate to provide her with a "true opportunity for reunification." However, she does not identify what additional services should have been provided or detail how the services provided throughout the case were inadequate. Moreover, although she contends that more time is needed in her case, she has not provided any evidence indicating that the trial court erred by finding that she would be unable to rectify the conditions leading to adjudication within a reasonable time considering the age of her child. See MCL 712A.19b(3)(c)(*i*).[4]

The services provided to respondent-mother included parenting-time, both in person and via Zoom, substance-abuse counseling, mental-health counseling, and drug screens. With regard to the parenting-time visits, respondent-mother missed only a few sessions and, at times, when she was unable to attend in-person she was offered parenting time over Zoom instead. Respondent-

[3] It appears that the mobile screener refers to an app on respondent-father's phone that would tell him whether he had to submit to a drug screen on any given day. In contrast, respondent-father had to call a number at ADAM to determine whether he was scheduled for a drug screen. Although both services required him to have access to a phone, the service through ADAM did not require internet access or for respondent-father to use his own phone to make the call.

[4] The trial court's finding that statutory grounds to terminate her parental rights existed will be discussed later in this opinion.

mother completed a substance-abuse assessment, but did not follow through with the recommendations. She did not follow through with referrals for mental-health counseling. At one point, she requested permission to locate her own providers because she did not want the providers offered by petitioner. Although she was given leeway to locate such a provider, she did not actually engage with the provider she located. The caseworker indicated that, although respondent-mother had scheduled multiple sessions with the therapist she had chosen, she did not attend any of them. Nor did respondent-mother comply with the required drug screening. Throughout the proceedings, she tested positive, missed drug screens, or refused to submit to the screens. Although her caseworker noted that the COVID-19 pandemic caused a gap in drug screens between March 2020 and May 2020, even after the screenings resumed, respondent-mother continued to test positive, refused screens, and did not show up for scheduled screens. Communication with respondent-mother was both in-person and via text message. Based on the record before this Court and, even in light of the pandemic, we discern no clear error in the trial court's finding that petitioner made reasonable efforts to reunify respondent-mother with the child.

III. STATUTORY GROUNDS

A. STANDARD OF REVIEW

Respondents argue that the trial court erred by finding statutory grounds to terminate their parental rights. We review for clear error the trial court's finding that there are statutory grounds for termination of a respondent's parental rights. *In re Frey*, 297 Mich App at 244.

B. ANALYSIS

The trial court first found statutory grounds for termination under MCL 712A.19b(3)(c)(*i*) and (j). Termination is warranted under subdivision (c)(*i*) if:

> (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.

Here, it is undisputed that more than 182 days have elapsed since the initial dispositional order was issued. We, therefore, turn to a consideration of whether the conditions that led to adjudication continued to exist and, if so, whether there was a reasonable likelihood that they could be rectified within a reasonable time considering the young child's age.

As to respondent-father, the conditions that led to adjudication included both domestic violence and substance abuse. Neither condition had been rectified at the time the termination hearing was held. At the termination hearing, respondent-father admitted that he used methamphetamines throughout this case. That admission was supported by the objective evidence, which showed that on multiple occasions he tested positive for amphetamines and methamphetamines or he was presumed positive because he did not submit to the random drug

screen. The positive and presumed positive tests persisted from the time the child was removed until just before the termination hearing was held. The trial court, therefore, did not clearly err by finding that respondent-father's substance abuse issues had not been rectified. Moreover, given that respondent-father regularly did not submit to random drug screens and given that he had yet to participate in any substance-abuse treatments, there was nothing on the record to support a finding that there was a reasonable likelihood that he would be able to rectify his substance-abuse issues within a reasonable time considering the child's young age. Respondent-father made no progress toward rectifying his issues with domestic violence. Instead, respondent-father never followed through on petitioner's referral for a domestic-violence assessment and treatment. And, at the time of the termination hearing, he continued to have an unresolved bench warrant for his arrest in relation to a domestic-violence incident that had occurred in March 2020. In light of this record, the trial court did not clearly err by finding that termination of respondent-father's parental rights was warranted under MCL 712A.19b(3)(c)(*i*).

As to respondent-mother, the conditions that led to adjudication included substance abuse and emotional stability. Like respondent-father, she was provided with random drug screens and referrals for substance-abuse counseling. She continued to test positive for amphetamines, methamphetamines, and THC throughout the case and she missed multiple drug screens, each of which was presumed to be positive. Respondent-mother admitted at the termination hearing that she had consistently used methamphetamines throughout the case. She attributed her ongoing use to the fact that she "slipped" and "made a mistake" because it was hard to have the child taken from her a second time. On appeal, she contends that she needed additional time to get sober because of the difficulties inherent in living through a global pandemic. But the record reflects that despite being provided with services that specifically accounted for the pandemic—including mobile drug screening and telehealth visits—respondent-mother had made virtually no progress toward reunification. Given that no progress was made after more than a year of services, the trial court did not clearly err by finding that respondent-mother's substance abuse issues had not been rectified and that there was no reasonable likelihood that they would be rectified within a reasonable time considering the child's age. Additionally, the court did not clearly err by finding that respondent had not rectified her issue with emotional stability. Indeed, the record reflects that despite selecting her own service provider, respondent-mother had yet to engage in any counseling services. On this record, therefore, the trial court did not clearly err by finding termination of respondent-mother's parental rights was appropriate under MCL 712A.19b(3)(c)(*i*).[5]

IV. BEST INTERESTS

A. STANDARD OF REVIEW

Respondent-mother argues the trial court erred by finding that termination of her parental rights was in the child's best interests because (1) respondent-mother had a strong bond with the child and (2) the child was placed with a relative. We review for clear error a trial court's factual

[5] Because only one statutory ground for termination of a respondent's parental rights need be established, *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011), we need not address whether termination was also warranted under MCL 712A.19b(3)(j).

finding that termination of a parent's parental rights is in the child's best interests. *In re Trejo*, 462 Mich 341, 356–357; 612 NW2d 407 (2000).

B. ANALYSIS

"The focus at the best-interest stage has always been on the child, not the parent." *In re Payne/Pumphrey/Fortson Minors*, 311 Mich App 49, 63; 874 NW2d 205 (2015) (quotation marks, citation, and brackets omitted). When determining whether termination of a respondent-parent's parental rights is in the child's best interests, the trial court "should weigh all evidence available to it," and may consider:

> 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. Other considerations include the length of time the child was in care, the likelihood that the child could be returned to her parents' home within the foreseeable future, if at all, and compliance with the case service plan. [*Id*. at 63-64 (quotation marks and citations omitted).]

"A child's placement with relatives is a factor that the trial court is required to consider." *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015). Placement with a relative weighs against termination, but that fact is not dispositive given that a trial court "may terminate parental rights in lieu of placement with relatives if it finds that termination is in the child's best interests," *In re Olive/Metts Minors*, 297 Mich App 35, 43; 823 NW2d 144 (2012).

Respondent-mother argues the trial court erred in terminating her parental rights because she shared a strong bond with the child. According to respondent-mother, the trial court should have afforded her more time to work on her issues so she could maintain this bond with the child. The trial court, however, considered respondent-mother's strong bond with the child, but found that the bond was "waning very quickly." The testimony showed that the child had been in foster care for a significant proportion of her life, and she was at the point where she did not want to speak about respondents. As a result, the court found that the bond did not weigh for or against termination in this case. That finding is not clearly erroneous. Moreover, although the child was placed with a relative, the court considered that fact as well, and concluded that, given respondent-mother's consistent lack of progress toward reunification—including her ongoing and unrectified substance-abuse issues—termination was nevertheless in the child's best interests. The child was doing better in foster care and her need for stability and permanency weighed in favor of termination. The trial court, therefore, did not clearly err by finding that termination of respondent-mother's parental rights was in the child's best interests.

Affirmed.

/s/ Mark T. Boonstra
/s/ Michael J. Kelly
/s/ Brock A. Swartzle