STATE OF MICHIGAN

COURT OF APPEALS

In re STIMMER/GARROW, Minors.

UNPUBLISHED
June 11, 2020

No. 350778
Crawford Circuit Court
Family Division
LC No. 17-004368-NA

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Before: CAMERON, P.J., and BOONSTRA and LETICA, JJ.

PER CURIAM.

In Docket No. 350778, respondent-mother appeals by right the trial court's order terminating her parental rights to her three minor children, LS, KS, and RG, under MCL 712A.19b(3)(c)(*i*) (conditions leading to adjudication continue to exist and are not likely to be rectified within a reasonable time) and (j) (risk of harm to the children). In Docket No. 350779, respondent-father appeals by right the same order terminating his parental rights to LS and KS under MCL 712A.19b(3)(c)(*i*). These appeals were consolidated by this Court.[1] We affirm.

I. FACTUAL BACKGROUND

Respondent-mother is the mother of LS, KS, and RG, as well as of one additional child who was not a part of these proceedings.[2] Respondent-father is the father of LS and KS.

[1] See *in re Stimmer/Garrow Minors*, unpublished order of the Michigan Court of Appeals, entered October 11, 2019 (Docket Nos. 350778 & 350779).

[2] RG's father, who is also the father of respondent-mother's fourth child born during these proceedings, was not a respondent below and is not a party on appeal.

Respondents have an extensive history with Children's Protective Services (CPS), including prior substantiated claims of domestic violence and substance abuse. In January 2017, petitioner, the Department of Health and Human Services (DHHS), filed a petition for removal of the three children from respondent-mother's home, alleging that respondent-mother had struck KS hard enough to knock her off her feet, had picked up KS and thrown her across the room to punish her, and had held RG in her arms while punching RG's father. At the time the petition was filed, respondent-father was incarcerated. Respondent-mother pleaded no contest to the allegations in the petition, and respondent-father admitted that he was incarcerated and had a substantial CPS history that included substance abuse and domestic violence. The children were removed from the home and placed in nonrelative foster care.

Respondent-mother's initial psychological evaluation indicated that she had chronic illness, dyslexia, low-average intelligence, and a personality disorder. Although respondent-mother participated in services and initially made progress, she was unable to make progress on her emotional stability. On several occasions, respondent-mother yelled at DHHS workers and others, including during parenting time visits and while holding her youngest child. Because of this, DHHS was concerned that respondent-mother's anger issues underlying her abuse of her children had not been addressed.

After respondent-father was released from prison, he repeatedly tested positive for cocaine and marijuana, was unsuccessfully discharged from a substance abuse counseling program, and never completed substance abuse counseling or treatment. The children were discovered to have special needs and required stability and a predictable routine to prevent them from engaging in self-harm and suicidal ideation. Respondent-father inconsistently visited the children and was often late to visits, which caused KS to act out and LS to exhibit anxiety. Respondent-father also failed to attend a trauma-informed parenting class that was offered once during his case, although he was attending that class at the time of the termination hearing and had completed it before his parental rights were terminated.

Petitioner initially sought to terminate respondents' parental rights in July 2018. However, at a dispositional review hearing in December 2018, the trial court stated that it was "very concerned" about whether the services petitioner had provided to respondent-mother had addressed her diagnosed borderline personality disorder (BPD). It found that respondent-mother had not received therapy that addressed BPD specifically. Accordingly, it declined to authorize the termination petition, and ordered petitioner to provide respondent-mother with dialectical behavioral therapy (DBT) counseling, as respondent-mother's psychological evaluator had recommended. It also ordered respondent-mother to follow the other recommendations in her psychological evaluation, including seeing a gastroenterologist to determine whether marijuana was an appropriate treatment for her Crohn's disease.

Subsequently, respondent-mother did not follow through on the steps necessary to enroll in DBT or comply with the evaluator's recommendations. The trial court allowed petitioner to petition to terminate respondents' parental rights. Petitioner also filed a petition to terminate respondent-father's parental rights on the basis of his lack of progress with addressing his substance abuse issues, his positive drug tests, and his sporadic participation in parenting time and other services.

The termination hearing was held on April 24, 2019. Two days before the hearing, the parties filed a stipulation to adjourn the hearing due to a scheduling conflict of the children's lawyer-guardian ad litem (L-GAL). The trial court denied the requested adjournment. At the start of the hearing on April 24, the trial court was informed that respondent-mother had gone to Florida based on her assumption that the adjournment would be granted. The hearing proceeded. Following the termination hearing and a supplemental dispositional review hearing, the trial court terminated respondents' parental rights as described. This appeal followed.

II. REASONABLE EFFORTS—BOTH RESPONDENTS

Respondents both argue that petitioner failed to make reasonable efforts to reunify them with their children. Respondent-mother argues that petitioner did so by failing to accommodate her disabilities under the Americans with Disability Act (ADA), 42 USC 12101 *et seq*. Respondent-father argues that petitioner did so by failing to notify him that a trauma-informed parenting class would only be offered once and by requiring him to complete that class as a condition of reunification. We disagree with both arguments.

We generally review for clear error a trial court's factual findings. We also review for clear error its determination that statutory grounds for termination have been proven, including that the petitioner made reasonable efforts to reunify respondents with their children. See *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). A finding is clearly erroneous if, after reviewing the entire record, this Court is definitely and firmly convinced that the trial court made a mistake. *Id*. We defer to the special ability of the trial court to judge the credibility of witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). However, while respondent-father raised a reasonable-efforts argument before the trial court, respondent-mother did not. A parent must raise an issue before the trial court for it to be preserved for appellate review. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). A respondent must make a timely claim that a case service plan does not accommodate or address the parent's disabilities, in violation of the ADA. *In re Terry*, 240 Mich App 14, 26-27; 610 NW2d 563 (2000). A parent who has a concern about his or her case service plan must address that concern before the circuit court. *In re Hicks/Brown*, 500 Mich 79, 88-89; 893 NW2d 637 (2017). Respondent-mother's claim is therefore unpreserved. This Court reviews an unpreserved claim for plain error affecting a parent's substantial rights. *Utrera*, 281 Mich App at 8. An error affects substantial rights if it affects the outcome of the proceedings. *Id*. at 9.

Petitioner has an affirmative duty to make reasonable efforts to reunify a family before seeking termination, unless certain conditions, not present here, are met. *Hicks/Brown*, 500 Mich at 85. This includes the duty to create a service plan addressing the issues that led the trial court to assume jurisdiction over the children, and reasonably accommodating any disabilities of which petitioner is made aware. *Id*. at 85-86.

A. RESPONDENT-MOTHER

From the outset of the proceedings below, respondent-mother informed petitioner and the trial court that she had learning disabilities and difficulty reading, and that it took her longer to understand things unless they were explained to her. At the dispositional hearing in August 2017, the trial court stated that it had reviewed a 2012 psychological evaluation that indicated that

respondent-mother had difficulty reading. Additionally, respondent-mother's July 2017 psychological evaluation diagnosed her with, among other issues, dyslexia, low-average intellectual functioning, and "Personality Disorder Not Otherwise Specified with Narcissistic and Avoidant Features." A third psychological evaluation in 2018 agreed with these diagnoses. The 2017 evaluation also found that respondent-mother read at a fourth-grade level.

Respondent-mother's caseworker read respondent-mother's case service plan and other documents to her on multiple occasions, and she helped respondent-mother fill out forms. However, when the caseworker attempted to answer respondent-mother's questions, respondent-mother would frequently yell at the caseworker, and the caseworker was "not able to physically get a word in to answer any of her questions." The caseworker categorized her efforts with respondent-mother as "active," explaining that she personally supervised parenting visits, redirected respondent-mother, attempted to answer her questions, and went to extensive lengths to model behavior for her. The record reflects no error, much less any plain error, regarding the reasonableness of the efforts that petitioner made to accommodate respondent-mother's dyslexia, learning disabilities, and intellectual functioning challenges. *Utrera*, 281 Mich App at 9.

Respondent-mother also argues that petitioner did not undertake reasonable efforts to address her personality disorder. While petitioner did not initially address respondent-mother's disorder in her service plan, this error did not affect the outcome of respondent-mother's case because the trial court corrected this error when it ordered petitioner to provide respondent-mother with DBT to address her disorder and provided respondent-mother with additional time to demonstrate a willingness to engage in services. See *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014) (noting that a parent must be offered the opportunity to engage in appropriate services).

The record shows that respondent-mother failed to participate in services aimed at reasonably accommodating her disability despite the trial court's and petitioner's efforts. At a review hearing, respondent-mother's caseworker testified that she had provided respondent-mother with intake forms for DBT therapy, but that respondent-mother did not pick up the information packet for about a week. The caseworker read the information to respondent-mother and respondent-mother stated that she understood it, but at a subsequent family-team meeting, respondent-mother stated that the form was confusing. The caseworker then provided respondent-mother with a step-by-step process for filling out the form. After respondent-mother returned an incomplete form, the caseworker sat down with respondent-mother and helped her fill out the form completely, except for respondent-mother's license plate number, which was unavailable. Respondent-mother stated that she would provide the caseworker with the license plate number, but did not do so for about a week. Subsequently, the caseworker told respondent-mother to call the DBT clinic's intake number and be placed on a waiting list. Respondent-mother stated that she had done so, but when the caseworker called the clinic to confirm, respondent-mother had not actually called.

At the time of the termination, respondent-mother had not successfully entered DBT therapy, had not provided medical documentation, and had not seen a gastrointestinal doctor. We conclude that the trial court did not err when it terminated respondent-mother's parental rights after giving her additional time to address the issues identified in her second psychological evaluation. Children should not have to wait for long periods in foster care for "the mere

possibility of a radical change in [the parent's] life." *In re Williams*, 286 Mich App 253, 273; 779 NW2d 286 (2009). While petitioner initially failed to provide respondent-mother with services to address her personality disorder, the trial court corrected this deficiency by ordering petitioner to provide specific services and granting respondent-mother additional time to do so. Respondent-mother did not follow through on those services. There was no error, plain or otherwise. *Utrera*, 281 Mich App at 9.

B. RESPONDENT-FATHER

LS and KS were diagnosed with various special needs relating to childhood traumas, which included self-harming behaviors. Caseworkers testified that respondent-father had attended parenting classes, but that LS and KS continued to have "meltdowns" during supervised visitation that respondent-father was unable to control. The children's trauma-specialized caseworker testified that respondent-father would benefit from a trauma-informed parenting class to provide him with information about how to parent in the face of his children's difficulties.

Respondent-father testified that although he had been referred to a trauma-informed parenting class, he had not completed it because he was not living in the area where the class was held at the time, he was not capable of arriving at the class on time, and he was afraid that he would lose his job if he was required to drive to the class. The caseworker testified that she had informed respondent-father of the class schedule, but that respondent-father moved without providing her with a new address and his phone was disconnected, which prevented her from reminding him that the class was starting. Respondent-father attempted to enroll in the class four weeks after it started, which was not permitted. Respondent-father testified that he was not aware that the class would only be offered once and that, had he known, he would have made greater efforts to attend.

The children's caseworker agreed that the trauma-informed parenting class had not been offered since the previous July, stating that the class was only offered when there was enough demand for it, which meant when three people wanted to take the class. She also agreed that the class had once been offered to a parent in prison on a one-on-one basis, when it was the only requirement preventing reunification.

The trial court found that respondent-father had failed to benefit from one parenting class and had failed to timely start his trauma-informed parenting class. It acknowledged that it would be unfair if a parent could not receive a required class in a timely manner, but in this case, respondent-father had been "informed of the class and made a choice not to take it the first time." The court did not credit respondent-father's testimony that the caseworker did not communicate to him the importance of taking the class.

When a child has special needs, a parent's failure to "undertake the special efforts that those special needs demand[]" may support terminating the parent's parental rights. *In re LaFrance Minors*, 306 Mich App 713, 728; 858 NW2d 143 (2014). In this case, the trial court found that respondent-father had failed to undertake these special efforts, despite being offered the services to aid him in doing so. The trial court's decision was based on its assessment of the relative credibility of respondent-father and the caseworker. See *Miller*, 433 Mich at 337. Petitioner made reasonable efforts to reunify respondent-father with the children when it offered

him the parenting class and he chose not to participate in it.[3] We find no clear error. *Mason*, 486 Mich 142, 152.

III. RESPONDENT-MOTHER (DOCKET NO. 350778)

Respondent-mother also argues that her counsel provided ineffective assistance by failing to raise her ADA arguments before the trial court prior to termination, and by failing to make sufficient objections or call and question witnesses at the termination hearing. Respondent-mother also argues that the trial court erred by declining to adjourn the termination hearing when it learned that she was out of the state. We disagree.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

The standards regarding ineffective assistance of counsel in criminal proceedings apply by analogy to child-protective proceedings. *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). Therefore, to succeed on a claim of 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." *Id*. Because no *Ginther*[4] hearing was held, our review of respondent-mother's claim is limited to errors apparent on the record. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). A party cannot establish ineffective assistance of counsel when counsel fails to raise an issue, but that issue is nonetheless subsequently presented to the court. See *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

In this case, respondent-mother's counsel did not raise before the trial court the issue of whether respondent-mother's service plan adequately addressed her personality disorder. Rather, petitioner raised this issue when it requested a second psychological evaluation. In any event, this issue was ultimately considered and addressed by the trial court. The court held that respondent-mother had not received sufficient services to specifically address her disorder, ordered additional services, and gave respondent-mother time to participate in them. Respondent-mother has not established that she was prejudiced by the mere fact that her counsel was not the one to raise this issue. *Id*.

Respondent-mother also argues that her counsel was ineffective in failing to call witnesses on respondent-mother's behalf, in failing to question witnesses, and in making only three objections at the termination hearing. Respondent-mother has not established that counsel's strategic decisions were unreasonable or prejudicial.

Counsel's decisions to call and investigate witnesses, as well as decisions concerning what evidence to present, are generally presumed to be the result of trial strategy. *Horn*, 279 Mich App

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[3] We also note that respondent-father's participation in other services was sporadic, other reasons supported terminating respondent-father's parental rights, and the trial court's determination that respondent-father chose not to participate was not inconsistent with the balance of the record.

[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

at 39; 755 NW2d 212 (2008). In this case, two of the witnesses that respondent-mother asserts should have been called at the termination hearing—respondent-mother's counselor and a previous psychological evaluator—were each called at a review hearing in December 2018 and offered favorable testimony of which the trial court was aware. Respondent-mother has not identified by name the third counselor respondent-mother asserts that trial counsel should have called, nor has she identified what testimony the additional counselor would have offered. Respondent-mother has not demonstrated that counsel's decision not to call the first two witnesses yet again to provide additional testimony was unreasonable, and has not demonstrated how counsel's failure to offer the testimony of an additional counselor was either unreasonable or prejudicial. *Martin*, 316 Mich App at 85. The trial court noted that it had taken notice of the entire file and record before it, which included previous testimony in support of reunification.

Respondent-mother also broadly asserts that counsel did not sufficiently question witnesses, but does not identify any specific questions that she believes should have been asked. Relatedly, respondent-mother also asserts that counsel was ineffective for making few objections at the termination hearing, but does not identify any specific objections counsel should have made. A party abandons an issue on appeal if they "merely announce their position and leave it to this Court to discover and rationalize a basis for their claims . . . ." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotation marks and citation omitted). Respondent-mother has not carried her burden of showing that her counsel's performance at the termination hearing was unreasonable and prejudicial. *Martin*, 316 Mich App at 85.

B. ADJOURNMENT

Respondent-mother argues that the trial court violated her due-process rights by failing to adjourn the termination hearing when it learned that she was not available. We disagree. This Court reviews for an abuse of discretion a trial court's decision to deny a motion for adjournment or continuance. *Utrera*, 281 Mich App at 8. The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*. at 15. Generally, "[w]hether child protective proceedings complied with a parents' right to procedural due process presents a question of constitutional law, which we review de novo." *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). However, because respondent-mother did not raise this issue below, it is unpreserved; we review unpreserved claims of constitutional error for plain error affecting substantial rights. See *In re TK*, 306 Mich App 698, 703; 859 NW2d 208 (2014).

As an initial matter, respondent-mother does not address how a failure to grant an adjournment is a constitutional error that implicates due-process rights. We reiterate that merely announcing a position is not sufficient to present an issue. *Matuszak*, 263 Mich App at 59. A party abandons its assertions when it fails to provide any authority to support its assertions. *Id*. We conclude that respondent-mother has abandoned her constitutional argument.[5]

[5] We note that respondent-mother admits that she received notice of the termination hearing and was represented by counsel at the hearing. Procedural due process generally requires that a party receive a meaningful opportunity to be heard and notice of that opportunity. *In re Rood*, 483 Mich

In any event, the trial court's decision to deny respondent-mother's request for an adjournment did not fall outside the range of principled outcomes. Adjournments in child-protective proceedings may be granted only "(1) for good cause, (2) after taking into consideration the best interests of the child, and (3) for as short a period of time as necessary." MCR 3.923(G). Good cause for an adjournment exists when a party has shown "a legally sufficient or substantial reason" for the adjournment. *Utrera*, 281 Mich App at 11 (quotation marks and citation omitted).

On the day of the termination hearing, respondent-mother's counsel requested an adjournment because respondent-mother had left the state, believing that the hearing would be adjourned on the basis of the stipulation filed by the parties. Respondent-mother's counsel told the trial court that he had told respondent-mother that the stipulation was waiting on the Court's approval, and that he did not tell her that the case was adjourned. Respondent-mother had not told her counsel that she would be unavailable on the scheduled day of the hearing.

Respondent-mother voluntarily chose to leave the state while a request for an adjournment was pending, without knowing whether the adjournment would be granted. We conclude that respondent-mother did not show a legally sufficient reason to adjourn the hearing on the basis of her absence, *Utrera*, 281 Mich App at 11, and that the trial court's decision to deny respondent-mother's request for an adjournment fell within the range of principled outcomes. *Id*. at 15.

V. RESPONDENT-FATHER (DOCKET NO. 350779)

Respondent-father also argues that the trial court erred by terminating his parental rights under MCL 712A.19b(3)(c)(*i*). We disagree.

This Court reviews for clear error the trial court's factual findings and ultimate determinations on the statutory grounds for termination. *Mason*, 486 Mich at 152. A finding is clearly erroneous if, after reviewing the entire record, this Court is definitely and firmly convinced that the trial court made a mistake. *Id*.

MCL 712A.19b(3)(c)(*i*) provides in pertinent part that the trial court may terminate a parent's rights if there is clear and convincing evidence that "[t]he conditions that led to the adjudication continue to exist . . . ." MCL 712A.19b(3)(c)(*i*) supports termination "when the conditions that brought the children into foster care continue to exist and are not likely to be rectified despite time to make changes and the opportunity to take advantage of a variety of services." *White*, 303 Mich App at 710 (quotation marks and citation omitted).

Respondent argues that the condition that led to adjudication was his incarceration, which was rectified by the time of the termination hearing. Respondent-father bases his argument on a mistaken premise. The record reflects that at the time of adjudication, respondent-father also pleaded to having a substantial CPS history that included substance abuse and domestic violence, and that the court took jurisdiction over the children in part on that basis. The petition alleged that respondent-father was incarcerated *and* that he had a "substantial" CPS history for issues including

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73, 92; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); see also *TK*, 306 Mich App at 706. Our review of the record reveals no plain error affecting respondent-mother's substantial rights. *Id*.

domestic violence and substance abuse. Respondent-father is simply mistaken that his substance abuse was not a condition that led to adjudication.

Respondent-father presents no argument that the trial court erred by determining that he had failed to rectify his substance abuse issue, and the record indeed supports that determination. Respondent-father was unsuccessfully discharged from a substance abuse counseling program and continually tested positive for marijuana and cocaine. We conclude that the trial court did not clearly err when it terminated respondent-father's parental rights under MCL 712A.19b(3)(c)(*i*).

Affirmed in both Docket No. 350778 and Docket No. 350779.

/s/ Thomas C. Cameron
/s/ Mark T. Boonstra
/s/ Anica Letica